The European Citizens’ Initiative: 
*A laboratory for citizens’ participation in EU law-making*

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Declaration

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SUMMARY

The European Citizens’ Initiative (ECI), introduced as an instrument for citizens’ democratic participation in the EU, has been in existence for just over three years. It is a participatory mechanism by which a proposal supported by one million signatures may influence the Commission’s legislative initiatives. In addition to an express reference in Article 11(4) TEU, the ECI has a detailed legal framework by virtue of Regulation 211/2011.

This thesis explores the ECI both as an opportunity for EU citizens to access the EU-law making process, and as part of the wider EU institutional and constitutional order. This is done via an in-depth legal analysis of the ECI’s regulatory framework vis-à-vis an examination of the empirical reality of the ECI’s operation. In this way, the findings of the thesis combine a doctrinal perspective on the legal issues arising from the ECI Regulation, with an empirical element based on primary data collected through interviews with ECI organisers, and detailed observations of the experiences with the first three years of the ECI.

By focusing on specific aspects of the ECI that are connected with pertinent EU law debates, such as EU citizenship, the Commission’s competence to propose EU legislation, and the CJEU’s role in adjudicating elements of EU participatory democracy, the thesis lends a legal perspective to the academic understanding of the ECI and - more broadly - citizens’ participation in the EU. At the same time, it demonstrates what can be realistically expected from the ECI as a participatory mechanism. In this respect, it is argued that the ECI does not offer a strong potential to EU citizens to influence EU legislative output. Any future changes to the ECI’s regulatory framework should thus give EU citizens a stronger incentive to make the effort to organise and promote an ECI.
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The European Citizens’ Initiative:
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CHAPTER 1

INTRODUCTION

I. Research Background

Widespread concerns that the European Union is not democratically legitimate have grown alongside the evolution of the EU from a technocratic entity to a political system, leading many to believe that ‘it is self-evident that the EU is not democratically legitimate’.¹ This belief has led to a search for further sources of legitimacy for the EU or, put differently, ‘other tools for building a legitimate European order’.² The European Citizens’ Initiative (ECI) is one of these tools. Introduced by the Commission in 2009 as a mechanism to promote participatory democracy in the EU and add a new perspective to European democracy,³ the ECI enables EU citizens to bring forward an idea and oblige the Commission to consider it as a possible basis for a legislative proposal. A prerequisite for the examination of an ECI by the Commission is the collection of a million signatures from EU citizens in various Member States who support the corresponding proposal. This thesis explores the development of the ECI as the latest opportunity for citizens to participate in the EU, and focuses in particular on the ability of the ECI to influence the EU law-making process. As the title of the thesis suggests, the overall purpose is to illustrate the ways in which the ECI is a laboratory fostering citizens’ participation in EU law-making.⁴ In other words, the aim of the thesis is to analyse the type of citizens’ participation in EU law-making that is promoted via the ECI. This introduction elaborates the background of the

³ According to Maroš Šefčovič, the then Vice-President of the European Commission for Inter-Institutional Relations and Administration (the DG responsible for the ECI), ‘with the launch of the ECI on 1 April 2012, the EU took a big step in promoting participatory democracy.’ European Commission Guide to the European Citizens’ Initiative (2nd edn, European Union 2014) 1.
research and its methodological framework, and explains the objectives of the thesis in more depth.5

A. Democratising and legitimising attempts at the EU level

The Treaty of Lisbon contains several references to the notion of democracy. The legal basis of the ECI itself, Article 11(4) TEU, sits prominently within Title II of the TEU as one of the Union’s Provisions on Democratic Principles. As a whole, Title II (Articles 9 – 12 TEU) attempts to portray the democratic character of the EU. Article 10(1) TEU first and foremost states that ‘the functioning of the Union shall be founded on representative democracy’. It also establishes the dual democratic legitimacy of the EU: individual citizens are directly represented in the European Parliament (Article 10(2) TEU), whilst Member States’ citizenries are represented via their executive – accountable to their elected national parliaments (Article 12 TEU) – in the European Council and the Council (Article 10(2) TEU). Hence, the Treaty formally establishes citizens’ representation in the European Parliament as the central aspect of democratic legitimacy and as the cornerstone of European democracy. It follows that the direct election of Members of the European Parliament (MEPs) is the primary channel for citizens’ involvement in the EU political system and constitutes the essence of citizens’ participation in the EU.

Article 10 TEU is hardly an innovative provision; as will be subsequently discussed, the idea that democracy in the EU manifests itself by way of civic representation was already commonly accepted long before the enactment of the Treaty of Lisbon.6 By way of contrast, the Treaty of Lisbon introduced, in Article 11 TEU, new democratic elements in the form of civil society involvement, public consultations, the participation of representative associations in EU actions (Articles 11(1), (2) and (3) TEU), and the ECI. Given that the provisions of Articles 10 and 11 TEU make up a coherent whole within Title II of the TEU, and that the foundation of EU legitimacy is representative democracy (Article 10(1) TEU), it is apparent that mechanisms of participatory democracy (Article 11 TEU) were established as a complementary source of legitimacy for the EU.7

5 In the thesis, the law is stated as of 1 October 2015.
Beyond the specific provisions of Articles 10 and 11 TEU, Article 2 TEU also declares that democracy, along with fundamental rights and the rule of law, constitutes one of the foundational values of the EU. Despite being referenced in the Treaty, the meaning and essence of democracy and democratic legitimacy with regard to EU institutional and constitutional output remain highly contested. In the early days of the EEC, democratic considerations such as the establishment of a representative assembly had barely any weight in shaping the former Community’s institutional order. Furthermore, it is common knowledge that the original EEC pursued mainly economic objectives and focused on building a common market between its six founding Member States; enhancing the Community’s democratic profile was not an immediate concern.\(^8\) In fact, the term ‘democracy’ was not even included in the Treaty of Rome (1957).\(^9\) There was no institution designed to act as a representative of a European citizenry; the European Parliament’s predecessor, namely the Assembly, was mainly a consulting body composed of delegates from national parliaments who offered non-binding opinions to the Council of Ministers.\(^10\)

Without a democratic decision-making process, and an institutional structure that encouraged civic involvement, it became increasingly difficult to maintain that EU citizens had an adequate degree of participation in EU affairs and thus that the functioning of the EU was legitimate.\(^11\) The gradual increase of the EU’s competences and impact since its inception, coupled with the establishment of judge-made principles of direct effect and primacy of EU law, generated an increasing need for legitimacy in the EU.\(^12\) In other

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\(^9\) The Treaty preamble included the word ‘liberty’ which was rather interpreted as ‘a value to be defended’ by the six Member States. Giuseppe F Mancini and David Keeling, ‘Democracy and the European Court of Justice’ (1994) 57(2) MLR 175, 175.


\(^12\) Stijn Smismans, ‘Should participatory democracy become the normative model for EU governance?’ (Background text for speech at the ‘Civil Society Day 2012: Democracy in Europe: where do we stand?’ (8 May 2012, EESC) <www.re-public.gr/en/?p=481> accessed 12 January 2015.
words, the incremental evolution of the EU as an international organisation, as well as the political choices of its institutions, which became less dependent upon the will of the Member States, needed to reflect the will of the people.\(^ {13}\)

Attempts to enhance the legitimacy of the EU relied on the nation-state model of representative democracy, whereby citizens of a polity, through elections, authorise representatives to act on behalf of their interests.\(^ {14}\) The first direct elections of Members of the European Parliament (MEPs) in 1979 gave the European citizenry the first opportunity to become involved in the EU political system. Consequently, MEPs assumed the role of EU citizens’ representatives and the European Parliament was transformed into a full-time, directly elected body. Despite the introduction of direct elections, legitimacy concerns persisted, not least because of the ‘delegation and pooling of national sovereignty’\(^ {15}\) in respect of the EU decision-making process. Decision-making sovereignty was not only transferred from the domestic to the supranational level, it was also characterised by majoritarian decision-making powers that were detached from the scrutiny of national parliaments.\(^ {16}\)

What is more, Member States’ practices regarding governmental controls, parliamentary accountability, and administrative responsibility were not adequately transposed to the EU level.\(^ {17}\) The adoption of legislation was taking place behind closed doors, while the European Parliament had limited powers of democratic control over the Commission and the Council. Therefore the weakening of national democratic controls was not accompanied by a corresponding increase of the democratic powers of the European Parliament as the representative body of EU citizens.\(^ {18}\) The initial rejection of the Maastricht Treaty by the Danish referendum, and the narrow French ratification were

\(^ {13}\) Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) 6.


\(^ {16}\) Berthold Rittberger (n 15) 7; The ratification of the Lisbon Treaty elevated the role of national legislatures in the scrutiny of the Commission legislative proposals by giving to the national parliaments a role in subsidiarity monitoring (Article 12 TEU).


\(^ {18}\) Ben Crum (n 14) 453.
considered signs of public alienation from the EU, largely connected with the underperformance of the EU in terms of democratic legitimacy. As a result, the 1992-1993 Maastricht process ignited debate in the national courts about the constitutionality of the Maastricht Treaty itself, and particularly the need for public approval of the expansion of EU competence. The Maastricht process also signalled the beginning of an academic debate largely concentrated around the so-called democratic deficit of the EU and the growing legitimacy crisis.

The term ‘democratic deficit’ describes ‘a widespread citizen malaise with respect to formal institutions, and common views among citizens that political institutions underperform’. As such, the deficit signals a mismatch between the demands of citizens and the ability of political institutions to respond to such demands. From an institutional point of view, attempts to alleviate the deficit and to shape the democratic character of the EU have largely revolved around enhancing mechanisms for the exercise of popular power. In particular, since political representation is considered to be a prerequisite for the democratic legitimation of modern political systems, institutional changes in the EU focused on strengthening the role and the powers of the European Parliament.

The gradual increase of powers assigned to the European Parliament included the widening of the co-decision procedure (now ordinary legislative procedure) to single market legislation (Amsterdam Treaty) and more recently, to policy areas such as the Common Commercial Policy (Article 209 TFEU) and aspects of the Area of Freedom, Security and Justice (Article 75 TFEU) which involve sensitive topics such as immigration and criminal

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22 ibid
23 David Judge and David Earnshaw (n 9).
25 In terms of policy-making, the co-decision procedure brought expertise from the Council and the European Parliament together to the negotiations and facilitated compromise. It has overall been regarded a successful procedure. See Peadar O’ Broin and Piotr Maciej Kaczynski, The Treaty of Lisbon: A second look at the Institutional Innovations (CEPS 2010).
law. The budgetary functions of the European Parliament were also extended (Articles 310 and 312 TFEU), as well as its power of consent in areas such as the conclusion of international agreements under Article 218 (6) TFEU. Nonetheless, as the EU’s only directly elected body, the European Parliament still faces substantial limitations in comparison to traditional parliaments’ powers, such as its inability to initiate legislation or legislate in areas such as social security and social protection (Article 21(3) TFEU). In most cases, EU legislation is still the product of a triangular interaction between the Commission, the Council, and the Parliament.

In addition, the relationship between parliamentary representation and democracy in the EU is often disputed. For instance, political scientists point to the constantly declining voter turnout in European Parliament elections, which is generally seen as an indication of EU citizens’ apathy and disengagement with the electoral system. Briefly put, the argument is that where the European electorate abstain or do not vote in European Parliament elections, the actions and decisions of the elected representatives do not express the political preferences of the entirety of the EU population. When considered alongside the abovementioned limitations to the powers of the European Parliament, the extensive research on the declining turnout of EU elections shows that the representative role of the European Parliament is not unquestioned. Such criticisms are directly relevant to the

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legitimacy concerns with regard to the EU, in that they question the capacity of the European Parliament to facilitate political communication between the EU institutions and EU citizens.30 This distance between the European Parliament and EU citizens consequently impacts negatively on the EU’s input democratic legitimacy, a term used to characterise the direct or indirect opportunities available to citizens to participate actively in the political decision-making process.31

A fundamental question arising from the preceding discussion is whether it is at all suitable to conceptualise legitimacy and democracy in the EU on the basis of democratic models such as parliamentary democracy that were developed for and within nation states.32 Proponents of the no-demos thesis, for example, argue that legitimate democratic procedures are unachievable in the EU. Their point of departure is that the existence of a polity of members ‘by whom and for whom democratic discourse with its many variants takes place,’33 (a demos) is a precondition for legitimacy. A demos exists in parallel with strong bonds formed by a peoples’ common language, history, ethnicity, and culture; these bonds then allow the minority to accept the authority and legitimacy of the majority’s decisions.34 EU citizens by default lack such bonds and it is difficult to build them for various reasons such as language differences and the minimal transnational discourse that takes place in the EU. Given that the essential preconditions for the fostering of a demos among EU citizens are absent, the EU cannot become democratically legitimate. According to this line of thought, the structural democratic deficit in the EU cannot be alleviated by institutional reforms such as the constant increase of the European Parliament’s powers.35

By way of comparison to the no-demos thesis, it has been argued that, although a European demos does not currently exist, it can be fostered in a form that is detached from cultural or

33 Joseph HH Weiler (n 17) 503.
34 David Beetham and Christopher Lord, Legitimacy and the European Union (Longman 1998) 36.
historical connections and emotional attachments. Habermas, for instance, argues that a pre-existing collective identity is not a functional requirement for European democracy. What is essential, instead, is a ‘civil society encompassing interest associations, nongovernmental organisations, citizens’ movements and naturally a party system appropriate to a European arena’. These preconditions should facilitate the shaping of a common political culture that transcends national public spheres. Alternatively, a model of democracy for the EU could be based on the notion of multiple demoi, whereby individuals identify themselves primarily as nationals of their Member States but also as associated with citizens at a transnational level. As a result, they become able to acknowledge that some decisions should be made by the transnational demos and thus accept the legitimacy of those decisions.

In sharp contrast to the above attempts to identify the most appropriate democratic model for the EU, other academic commentators have argued that the EU is not suffering from a fundamental democratic deficit, especially when judged against existing democracies rather than an idealistic concept of parliamentary democracy. On the one hand, Moravcsik considers that the structure of the EU, inter alia the high thresholds for the decision-making processes as well as the political accountability exercised by the European Parliament and elected national officials, are consistent with national democratic practice. Given that the EU has limited competences in certain political areas, there is no need for direct democratic participation of EU citizens in the decision-making process-legitimacy should derive from the national level.

40 Andrew Moravcsik (n 1).
41 Andrew Moravcsik (n 1) 622.
42 Andrew Moravcsik (n 1) 614.
On the other hand, it has been suggested that democracy should not be a crucial consideration when assessing the actions of the EU. Majone describes the EU as a ‘glorified regulatory agency’ which should focus on producing efficient policies. His basis for that argument is that more extensive democratic accountability mechanisms would allow politicians to exert more influence over the EU policy-making process. This would remove the policy-making process from independent regulatory agents and therefore risk the effectiveness of EU policies. According to this line of thought, the key to legitimising the EU is to increase the credibility of the EU policy-making process by bringing in more technical expertise and enhancing the transparency of the process rather than by increasing the legislative powers of the European Parliament or the opportunities for citizens’ participation in EU politics. The focus here is on output legitimacy, according to which the legitimacy of the EU depends on the quality and effectiveness of its policies.

Finally, other scholars place emphasis on legitimacy by way of contestation and dialogue, arguing that appropriate institutions should be created to allow for such debates given that currently the voice of citizens is undermined by the role of technocrats and experts in the policy-making process. Similarly, deliberative democrats suggest that the legitimacy of political decision-making must come from public deliberation by citizens. At the same time, the possibility for such political contestation to take place at the EU level is disputed on the basis of the limited competences of the EU. In particular, the limited options available to the EU institutions to act in certain policy areas does not allow for a choice between different priorities and a corresponding political debate.

More than 20 years after Maastricht, and in spite of institutional attempts at the EU level to shape the democratic character of the EU, it remains difficult to conceptualise democracy and legitimacy in the EU. Yet, questions about the democratic legitimacy of the EU have

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45 Andreas Follesdal and Simon Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44(3) JCMS. 533, 562; Gareth Davies, ‘Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People’ in Dimitry Kochenov, Grainne de Búrca, Andrew Williams (eds) Europe’s Justice Deficit? (Hart 2015) 259-262.
47 Gareth Davies (n 45).
become more pertinent in light of the latest economic and migration crises in the EU and the measures taken by the EU institutions in response to these issues. The recent Greek bailout referendum, which was perceived by Greek people as a question of leaving or staying in the EU, the EU leaders’ response to the migration crisis, which was heavily criticised as inadequate, as well as current discussions on the renegotiation of the UK’s EU membership, have fostered negative perceptions over the EU’s ability to surmount current political challenges. Politically, these crises have also generated a more insular approach in the Member States; an example is the EU Act 2011 which reflects the idea that EU actions in sovereign sensitive areas need to be under constant democratic check via national referenda. As a result of negative perceptions of the EU, any possible future demos projection seems like a remote – if not farfetched - scenario. At the same time, the example of the Eurozone crisis and the impact of the austerity measures passed by EU leaders on citizens of Member States in need of financial assistance is clear evidence that the EU is no longer simply a regulatory organisation with minimal political significance in the day-to-day lives of citizens. The Maastricht Process may indeed have been the starting point of legitimacy concerns over EU actions, but the growing legitimacy crisis is even more topical nowadays.

The above tour d’horizon of the democratic deficit debate only illustrates some of the varying perceptions of the challenges in democratising the EU decision-making system. What appears to be the prevalent point of agreement among academics studying the democratic nature of the EU is that there is no agreement as to how to tackle the EU’s democratic deficit. Nevertheless, the divergence of positions regarding the democratic character of the EU should not come as a surprise. Conceptualising democracy - ‘in itself an idea of great abstraction if not ambiguity’ - entails intrinsic difficulties. At the EU level, such conceptualisation becomes even more complicated because it necessitates an
attempt to assess a supranational institutional and procedural set-up against a model of national democracy.\(^{51}\)

Setting conceptual difficulties aside, the augmentation of the European Parliament’s powers is no longer the Treaty’s only way to respond to legitimacy concerns in the EU at an institutional level. As indicated above, the Treaty of Lisbon goes some way towards defining the sources of democratic legitimacy of the EU in Articles 10-12 TEU, which also include participatory democratic mechanisms.\(^{52}\) Whilst the ECI can be considered an innovation of the Treaty, the rest of Article 11 TEU is ‘a further step in the decade-long process that aims to turn ad hoc mechanisms for interaction with interest groups into democratic innovations that aim to legitimise the EU’.\(^{53}\) In a nutshell, the three provisions (Article 11(1), (2), (3) TEU) refer to horizontal and vertical civil dialogue and participation via consultation procedures.\(^{54}\)

As such, the three provisions codify mechanisms that are strongly linked with European governance, a concept coined to describe ‘the constant interactions between multiple actors including institutions and bodies of the EU, national and sub-national institutions, and other non-institutional collective actors representing civil society’.\(^{55}\) This definition includes the participation of interest groups such as lobbyists, NGOs, and civil society organisations (CSOs) in EU decision-making,\(^{56}\) and particularly in consultative committees, where these groups are able to ‘fill the resource deficits of the Commission by supplying information for policy-making purposes’.\(^{57}\) As such, the contribution of these actors in the EU decision-making process was initially encouraged on the basis that it

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54 According to the EESC, horizontal civil dialogue is ‘dialogue between European CSOs on the EU’s development, future and policies’, whilst vertical civil dialogue is ‘structured, regular dialogue between CSOs and the EU’ The EESC also defines consultation as an aspect of civil dialogue and a ‘top-down process’ aiming to make different points of view known to the EU Institutions. EESC Compendium ‘Participatory Democracy: a retrospective overview of the story written by the EESC’ 10-12 <www.eesc.europa.eu/?i=portal.en.events-and-activities-participatory-democracy-prospects> accessed 15 September 2015.
could improve the quality of the process’ outcomes. Gradually, the rationale for encouraging the participation of such actors in EU decision-making processes began to change. The Commission in particular found value in the ability of CSOs to play a legitimation role as an agent between European decision-makers and citizens; the focus of the potential contribution of these organisations shifted to the input legitimacy of the EU. The terms ‘civil society’ and ‘participatory democracy’ found their way into the academic discourse on the EU’s democratic deficit as a form of EU legitimacy parallel to that of citizens’ representation by the European Parliament.

B. Citizens’ participation as a source of legitimacy for the EU

Three forms of participation in EU institutional practice have been identified. The first concerns formal interest representation. Interest and Advisory Committees, composed of representatives from corresponding sectors, as well as EU agencies, provide technical and specialised input to the Commission with regard to the regulatory priorities of each field and the desirable aims of the legal framework. The second relates to rights-based participation, defined in the context of EU administrative law as ‘the procedural rights of intervention in decisional procedures grounded in substantive rights or interests that are affected by these same procedures’. In other words, actors who hold rights and interests that are judicially protected by the CJEU should have the right to participate in the EU decision making process where their rights are affected.

The third form of participation is the closest to the form of participation fostered by the ECI, in that it concerns the opportunities for natural (individual citizens) and legal persons (such as CSOs) to participate in the EU law-making process. In this sense, the definition

61 The categorisation and its explanation is taken from Mendes’ elaborate analysis on participation in EU decision-making; Joana Mendes, Participation in EU rule-making (OUP 2011) Chapter 3.
62 Joana Mendes (n 61) 100-102.
63 Joana Mendes (n 61) 2.
64 Joana Mendes (n 61) 26.
65 ibid; Mendes excludes the ECI from the term EU ‘decision-making process’ given that its purpose is to initiate the decision-making process instead of being called into it like, for example, participation via
of citizens’ participation includes ‘all those activities by private citizens that are more or less directly aimed at influencing the selection of government personnel and/or the decisions they make’. As mentioned previously, the involvement of CSOs in the EU law-making process has been encouraged by the Commission in an attempt to promote citizens’ participation to complement the democratic representative role of the European Parliament. These EU-citizen interactions, which were originally limited to exchanges with economic interest groups and social partners, gradually extended to groups representing general interests.

The exchanges between civil society and the EU institutions developed in an informal way which afforded extensive discretion to the Commission as to the relevant processes and follow-up of such exchange. Even so, the relations between EU institutions and CSOs, as well as CSOs’ access to the political system, were not left entirely unregulated. The Commission’s 2001 White Paper on Governance was a milestone in defining the scope of CSOs’ participation. The White Paper was based on the premise that the participation of actors external to EU Institutions in the EU policy-making process is vital for the legitimacy of the EU. Improving participation would thus lead to more public confidence in both the EU institutions and EU policy and legislation. A primary role for promoting this aim was thus bestowed upon the European Civil Society, a term broadly defined in the White Paper as ‘trade unions and employers’ organisations (“social partners”); nongovernmental organisations (NGOs); professional associations; charities; grass-roots organisations; organisations that involve citizens in local and municipal life [including] churches and religious communities’.

consultation processes. Mendes (n 61) 111. This research adopts the wider term ‘EU law-making process’ to include the ECI in this third meaning of participation.


67 For an analysis on this so-called ‘participatory turn’ in the role of CSOs at the EU see Sabine Saurugger (n 59); Luis Bouza Garcia (n 53).


69 ibid


72 ibid; Kohler-Koch and Quittkat explain that there is also a more narrow definition of CSOs which includes only associations that advocate ‘the common good’ (for example public policy objectives) and excludes
It is clear that the ‘participatory turn’ in EU governance that was initiated by the 2001 White Paper provided for a limited scope for participation in terms of influencing EU law-making. References to civil society participation concerned the consultative, pre-decision stage rather than the actual law-making process. Moreover, neither the White Paper nor additional Communications allowed for any legally binding participation rights that could be enforced by the CJEU. On the one hand, the Commission maintained that consultation was ‘intended to provide opportunities for input from representatives of regional and local authorities, civil society organisations, undertakings and associations of undertakings [and] the individual citizens concerned’. On the other hand, it clearly stipulated that:

A situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation with interested parties. Such an overly legalistic approach would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substance rather than concentrating on procedures.

The emphasis of the White Paper on the need ‘to deliver on substance’ exemplifies that, in spite of the rhetoric of inclusion, greater participation in the EU was still conceived as a way to improve the outcome of public policy. In addition, the White Paper merged the concepts of ‘participatory democracy’ with ‘functional representation’, thus implying that direct citizens’ participation would result from establishing institutional arrangements for citizens’ representation via associations and interest groups. Such an approach to citizens’ associations that defend their members’ interests (for example trade unions). Similarly to their approach, this thesis also uses a broad definition of CSOs that includes all types of organisations and associations. Beatte Kohler-Koch and Christine Quittkat (n 49) 8,9.

73 Sabine Saurugger, (n 59) 471; Luis Bouza Garcia (n 53).
participation differs from that of democratic participation theorists, who consider
democratic participation from the perspective of the individual citizen.\textsuperscript{79} At the core of
participatory democracy theories is the claim that giving more opportunities to citizens to
participate in making the decisions which govern their lives has positive effects on the
citizens.\textsuperscript{80} In this sense, participation in decision-making contributes to educating citizens,
making them feel like they are part of a community, and enabling them to accept collective
decisions even though they may not agree with the final outcome.\textsuperscript{81}

With regard to its ability to stimulate civic engagement, the White Paper was heavily
criticised for merely formalising existing avenues of participation for the benefit of already
established interest groups instead of promoting direct citizens’ participation.\textsuperscript{82} What is
more, academic commentators expressed doubts as to the ability of organised civil society
to bridge the gap between the EU and its citizens.\textsuperscript{83} Although CSOs have for a long time
demanded legal recognition for civil dialogue as part of the EU’s participatory model, the
extent to which these organisations enhance individual citizens’ participation in the EU
policy-making process is disputed. According to Kohler-Koch, ‘the expectation that above
all, NGOs would act as transmission belts between citizens and decision makers and that
they would increase public awareness about EU politics is only reflected to a very limited
extent in the political reality’.\textsuperscript{84}

Inter alia, the doubts expressed about the role of CSOs in encouraging citizens’
participation are attributable to those organisations’ questionable representative character.
CSOs’ involvement in policy-making does not automatically result in direct citizens’
participation unless the citizens that are members of such organisations are actively

\textsuperscript{79} Elizabeth Monaghan (n 77) 292.
\textsuperscript{80} Mark Warren, ‘Democratic Theory and Self-Transformation’ (1992) 86 American Political Science
Review 8.
\textsuperscript{81} Carole Pateman, \textit{Participation and Democratic Theory} (Cambridge University Press 1970) 27-33; John
Stuart Mill, ‘Representative Government’ in John Stuart Mill, \textit{Three Essays} (Oxford University Press 1975);
Ank MB Michels ‘Citizen participation and democracy in the Netherlands’ (2006) 13(2) Democratization
323, 326.
\textsuperscript{82} Paul Magnette (n 74) 155; Theodora Kostakopoulou (n 51) 424; Stijn Smismans, ‘New Governance – The
solution for active European citizenship, or the end of citizenship?’ (2006) 13 ColumEurL 595, 603.
\textsuperscript{83} Sandra Kröger, ‘Nothing but Consultation: The Place of Organised Civil Society in EU Policy-making
across Policies’, European Governance Papers (EUROGOV) C-08-03; Beatte Kohler-Koch and Christine
Quittkat (n 49) 184.
\textsuperscript{84} Beatte Kohler-Koch and Christine Quittkat (n 49) 184.
involved in the policy-making process. Empirical research indicates, however, that CSOs tend to prioritise their chances of influencing policy over the involvement of their members or the public.

Additional participatory experiments at the EU level, which placed more emphasis on introducing channels for direct citizens’ participation, were rather short-lived and largely symbolic. Actions under the Commission’s Plan D for Democracy, Dialogue and Debate, which included online deliberation forums, citizens’ conferences and opinion polls, are relevant examples. Although Plan D signalled the extension of participatory instruments from organised civil society to ordinary citizens, its achievements in terms of enhancing civic participation were limited. The participatory actions established by Plan D included a number of transnational deliberative citizen forums, such as the European Citizens’ online consultations and the online ‘Virtual European Parliament’ where a group of citizens were brought together to deliberate and come up with a set of recommendations for the future of Europe. On a positive note, Plan D resulted in changes to the consultation regime by lowering the thresholds for participation and allowing direct access for individual citizens. Even though the recommendations were then transferred to EU policy makers, there were no signs of influencing the policy-making process. This outcome was said to negate any short-term positive effects that participants gained from the process.

The limited impact of the abovementioned participatory instruments on the EU decision-making process was not the only aspect of the participatory regime under criticism. A lack of media attention, which meant that there was not much dissemination of these processes

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85 Luis Bouza Garcia, ‘How could the new Article 11 TEU contribute to reduce the EU’s democratic malaise?’ in Michael Dougan, Niamh Nic Schuibhne, Eleanor Spaventa Empowerment and Disempowerment of the European Citizen (Hart 2012) 261.
86 Luis Bouza Garcia (n 53) 9, 134; Imogen Sudbery, ‘Bridging the Legitimacy Gap in the EU: Can Civil Society help to bring the Union closer to its citizens?’ (2003) 26 Collegium 75, 89-90.
91 Thorsten Hüller (n 89) 100.
92 ibid
to the wider public, alongside the questionable representativeness of the sample of citizens, were also considered to be problematic.\textsuperscript{93} It was even commented that ‘without any doubt, it would certainly be utopian to believe that the transnational deliberation forums will ever be very closely linked to the decision-making processes’.\textsuperscript{94}

Case studies conducted on the Commission’s Online Consultations have also shown that the Consultations foster a model of active participation that is too demanding for individual citizens.\textsuperscript{95} Although the Online Consultations aimed at enhancing input legitimacy by giving a voice to CSOs, associations, regional authorities, and affected individual citizens, research suggests that they are ‘an elitist practice, limited to those citizens and groups who benefit from their organisational and financial resources’.\textsuperscript{96} Moreover, the questionable representativeness of the participants and the lack of detailed feedback from the Commission regarding the arguments presented during the consultations indicated the limited success of the tool in encouraging citizens’ participation in policy-making.\textsuperscript{97} In a study of EU participatory mechanisms, which included the ECI, Boussaguet argues that ‘it is therefore difficult to conclude that there has been an effective participatory turn in the EU: “democracy in a laboratory” would seem to be a better description’.\textsuperscript{98} In spite of these rather pessimistic empirical observations, this participatory turn was codified in the Constitutional Treaty and later in the Treaty of Lisbon and it now constitutes part of Article 11 TEU.

\textbf{C. The codification of citizens’ participation in the Treaty of Lisbon}

According to Article 11 TEU:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

\textsuperscript{93} Dawid Friedrich (n 88) 175.
\textsuperscript{94} Dawid Friedrich (n 88) 176.
\textsuperscript{95} Thorsten Hüller (n 89) 100.
\textsuperscript{97} Beatte Kohler Koch and Christine Quittkat (n 49) 100.
\textsuperscript{98} Laurie Boussaguet (n 4) 10.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The overall lack of novelty in these provisions is apparent; by and large, Article 11 TEU recognises already established institutional practices that were described in the preceding discussion.99 Article 11 TEU is a combination of pre-existing inclusive practices which ‘remain politically institutionalised patterns of interaction immune to legal recognition’.100 Articles 11(1), (2) and (3) TEU rather embody the Treaty’s manifestation of the participatory rhetoric adopted by the EU institutions according to which participatory democracy denotes the involvement of a broad range of actors in the decision-making process.101 Nonetheless, a new dimension is added to the concept of participatory democracy in the EU by virtue of Article 11(4) TEU. Given its bottom-up character, which allows citizens to approach the EU institutions, the ECI is different both from the rest of Article 11 TEU, and from other participatory experiments through which the institutions reach out to citizens.102

Seeing Article 11 TEU as a whole, the very fact that it codifies previous ad hoc participatory channels prompts a query as to any legal or political changes it could bring about to the conceptualisation and practice of citizens’ participation in EU law-making.103 It has been suggested, for example, that procedural changes are necessary for Article 11 TEU to be considered a channel for empowering the individual citizen vis-à-vis the EU institutions.104 Such procedural changes would put flesh on the bones of Article 11(1), (2) and (3) TEU. The changes would implement Article 11(1) – (3) TEU in the sense that they would define the conditions under which the participation stipulated in the Article can take

100 Joana Mendes (n 61) 113.
101 Beatte Kochler-Koch and Christine Quittkat (n 49).
102 Laurie Boussaguet (n 4) 3.
103 Paul Craig (n 72) 67.
104 Joana Mendes (n 99) 1861.
place. For instance, they would define the meaning of ‘representative associations’ and of ‘appropriate means’ by which EU institutions shall provide opportunities for the exchange of views. Moreover, the implementation of Article 11(1) – 3 TEU would establish structures for dialogue between EU Institutions and CSOs, set clear criteria for access to these structures, and determine the obligation of EU institutions to respond to such CSOs’ participation. These changes, which are considered necessary to achieve the aims of Article 11 TEU, could result either from the adoption of secondary law or soft law, or from future litigation before the CJEU.

With regard to implementing the first three provisions of Article 11 TEU by way of adopting secondary legislation, there have been no substantial steps by the EU institutions towards setting the structures mentioned above, despite the European Economic and Social Committee’s (EESC) acknowledgment that Article 11 TEU ‘create[s] a framework [that] needs to be defined, fleshed out and put into practice with appropriate legal arrangements’. In a 2012 Own-Initiative Opinion, the EESC submitted suggestions for further steps regarding the implementation of Article 11(1) and (2) TEU. It stressed that a new construct of civil dialogue should not be duplicating the existing consultation structures and suggested that the Commission carries out a detailed study to assess the impact of civil dialogue on the legislative process, the shortcomings of civil dialogue, and any future steps necessary to ensure wider participation. According to the EESC Opinion, the Commission should draft a Green Paper on Civil Dialogue for the practical implementation of Articles 11(1) and (2) TEU, but there are no signs of such Green Paper being issued in the near future.

In addition, there are currently no pending cases before the CJEU regarding the implementation of Article 11(1), (2) or (3) TEU. Cases could arise in the future if CSOs decide to challenge the extent to which their contribution to consultation processes was

105 Joana Mendes (n 99) 1860,1862, 1866; Dawid Friedrich, Democratic Participation and Civil Society in the European Union (Manchester University Press 2011) 196-199.
106 Ibid.
107 EESC ‘The Implementation of the Lisbon Treaty: Participatory Democracy and the Citizens’ Initiative (Article 11)’ (Opinion) [2010] OJ C 354/59, point 3.4; In 2009, there was a relevant European Parliament Resolution which, however, was not followed-up by the Commission: European Parliament Resolution of 13 January 2009 on the perspectives for developing civil dialogue under the Treaty of Lisbon (2008/2067(INI))
109 The EESC has been requesting a Green Paper on Civil Dialogue since 2009, without any positive response from the Commission. OJ C 11/08, 2.5.
taken into consideration by the EU Institutions during the decision-making process.\textsuperscript{110} Depending on the approach of the CJEU in future litigation concerning these three provisions, the practices stipulated in Article 11 TEU, such as consultation practices, may remain detached from any type of legally binding participatory rights.\textsuperscript{111} Similarly, existing opportunities to foster dialogue among citizens, such as those in Plan D, would satisfy Article 11(1) TEU without the need for any improvements to current practice. Craig warns about a potentially narrow interpretation of Article 11 TEU, which would send a negative message about the inclusiveness of participatory opportunities that are currently provided in the TEU.\textsuperscript{112}

Despite his criticisms of a narrow view of Article 11 TEU, Craig does not articulate a possible alternative interpretation by the CJEU. Would a broader interpretation mean that Article 11 TEU creates binding obligations for the Commission to initiate consultation proceedings ‘in order to ensure that Union actions are coherent and transparent’ (Article 11(3) TEU)? If so, in what instances, and for which EU institutions, would these obligations be binding? What is the meaning of ‘coherent Union actions’? These questions remain in the realm of the abstract although it has been suggested that, based on Article 11 TEU, the CJEU could enforce individuals’ legal claims of participation.\textsuperscript{113} As for the EU’s broader institutional order, Article 11 TEU could be interpreted to mean that the Commission and other institutions are obliged to set more precise and less discretionary rules for its consultation practices.\textsuperscript{114}

Contrary to the currently non-existent implementation framework for Articles 11(1), (2) and (3) TEU, Article 11(4) TEU finds concrete expression in secondary legislation and specifically in Regulation 211/2011 (the ECI Regulation). The above depiction of the meaning of citizens’ participation in the EU and its codification in the Treaty illustrates that the ECI is the only novel Treaty-based opportunity for citizens’ participation. The ECI is also the only opportunity in Article 11 TEU aimed at the mobilisation of individual citizens and addressed to grassroots organisations rather than CSOs. It can thus be seen as a source of input legitimacy complementary both to the rest of Article 11 TEU and to

\textsuperscript{110} See Joana Mendes (n 99) 1853, 1873-1875.
\textsuperscript{111} Paul Craig (n 76) 70.
\textsuperscript{112} ibid
\textsuperscript{113} Joana Mendes (n 99) 1873-1875.
\textsuperscript{114} Alberto Alemanno, ‘Unpacking the principle of openness in EU law: transparency, participation and democracy’ (2014) 39(1) ELRev 72, 80.
The current study offers an analysis of the ECI’s role in providing an additional opportunity for citizens to access and influence the EU law-making process, and examines the ways in which the ECI contributes to shaping the notion of citizens’ participation in the EU beyond its pre-Lisbon meaning (now embodied in Article 11(1) – (3) TEU).

II. Research Design: The choice of a legal approach

The preceding discussion provided an outline of the debate about the democratic legitimacy of the EU and explained the introduction of the notion of citizens’ participation in the Treaty of Lisbon. The current study explores the ECI as a means of citizens’ participation but it does not seek per se to provide a new dimension to the debate on European democracy. Although the significance of the questions regarding the democratisation of the EU is acknowledged, for the purposes of this study, one concept is particularly relevant whereby democracy is understood as ‘giving the individual a sufficiently effective opportunity to influence the basic decisions of European public policy through national and Union procedures’. Hence, overall, the objective is neither to measure if or how the democratic character of the EU has been enhanced as a result of the ECI, nor to assess the ECI’s contribution to legitimising the EU on the basis of participatory democratic criteria.

Instead, the two main objectives of the study are more specific. The first objective is to analyse the ECI’s contribution to shaping the notion of citizens’ participation at the EU level. As such, the ECI is analysed from the perspective of the individual EU citizen, in an attempt to identify the extent to which the ECI functions as an additional opportunity for citizens to access the EU-law making process. The term ‘opportunity for citizens’ participation’, which is used throughout, indicates channels of access to the EU law-

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115 Luis Bouza Garcia (n 85).
117 Von Bogdandy (n 116) mentions in this regard that ‘there are no criteria as to how a deficit in electoral legitimacy could be legally offset’.
The making process that are available to citizens. The second objective goes beyond the examination of the ECI’s effects on the participation of citizens, in that it explores the implications of the ECI’s constitutionalisation for the wider EU institutional and legal order. To this effect, it touches upon matters of EU law that are affected by the inclusion of the ECI in the Treaties: the Commission’s monopoly of legislative initiative; EU citizenship; and, the CJEU’s role in interpreting citizens’ participation in the EU.

In light of its objectives, the thesis is grounded in a juxtaposition of in-depth legal analysis of the ECI’s regulatory framework (Article 11(4) TEU and the ECI Regulation) and an empirical investigation of the ECI Regulation’s implementation and application in practice. This approach to studying the ECI was chosen due to the salient role of the ECI’s legal framework, and particularly the ECI Regulation, in dictating the functioning of the ECI. The Regulation puts in place detailed provisions for the entire life cycle of an ECI: from the beginning to the end of the signature collection process; from the role of the Commission in accepting Initiative proposals, to its role in deciding how to proceed with successful ECIs; from the conditions for signature collection, to the way in which signatures are to be submitted to the Commission. What citizens can or cannot achieve by organising an ECI depends to a great extent on the provisions of the ECI Regulation. Accordingly, the ECI’s legal framework is taken as the main point of reference. At the same time, it was considered essential to incorporate an empirical element to the research to gain an insight into the first few ECI campaigns and to formulate a clear picture of the first three years of the ECI’s operation.

The study draws inspiration from academic endeavours to understand ‘democracy’ in the EU as a Treaty embedded term of positive law. Accordingly, it shifts the topic of citizens’ participation from the theoretical level to the legal and institutional level. In 2012, when this project started, it was commented in the literature that it was difficult to evaluate the possible importance of the ECI as a way of giving life to the principle of democracy in the EU. This research aims to contribute to these evaluations by providing an assessment of the ECI legal framework’s implications for individual citizens’ participation and for the

119 ibid
120 In his article on the ECI in 2012, Dougan comments in this respect that ‘the new citizens’ initiative engages in novel and potentially fruitful ways with wider broader debates current in EU legal scholarship.’ ‘What are we to make of the citizens’ initiative?’ (2011) 48 CMLRev 1807, 1848
122 Armin Von Bogdandy (n 121) 51.
EU’s legal and institutional dynamics. The timing of the research project lends itself to this purpose; a number of ECI campaigns were completed, the judgment of the first ECI case has been delivered, there are more ECI cases pending before the GC, and the ECI Regulation is, at the moment, being reviewed by the EU institutions. As subsequently described, this thesis constitutes a meaningful addition to the current literature on the ECI and a backbone for further research on this topic.

A. Contribution to the literature

As the EU’s first citizens’ initiative mechanism, the ECI has attracted considerable attention and criticism, often being compared to similar initiatives at national level. From a broader point of view, the ECI was discussed in the aftermath of the Treaty of Lisbon as one of the Treaty’s provisions to enhance the EU’s democratic character. Other areas that have been singled out include the ECI’s legal framework; its potential to close the ‘legitimacy gap’ created in the EU because of the gradual schism between legitimating norms and public support for those norms; and the way in which it could lead to effective policy and legislative outputs.

Scholars have also discussed the negotiations that preceded the ECI’s introduction to the Treaty of Lisbon, the Initiatives that were brought before the adoption of the ECI Regulation, the potential links between the ECI and organised CSOs and NGOs, as

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124 Piotr Maciej Kaczyński and Peadar ó Broin (n 25).
126 Julia De Clerck-Sachsse (n 7).
127 Justin Greenwood, ‘The European Citizens’ Initiative and EU Civil Society Organisations’ (2012) 13(3) Perspectives in European Politics and Society 325 provides a thorough analysis of the 21 Initiatives launched before the adoption of the ECI Regulation.
well as more theoretical and normative aspects of the ECI which measured the ECI Regulation against participatory and deliberative democracy yardsticks. Despite the varied academic commentary on the ECI before and at the time of the ECI Regulation, the majority was published prior to the starting date of operation of the ECI (April 2012) and thus is missing an empirical view of the relevant campaigns and challenges to organising an ECI. What is more, the few academic empirical examinations of the ECI that have been published so far deal either with very specific aspects or view the ECI in light of its contribution to EU politics.

Taking stock of previous accounts of the ECI, this study provides a thorough and up-to-date analysis of the ECI’s legal framework vis-à-vis its operation in practice. Premised on an analysis of Article 11(4) TEU and the ECI Regulation in light of the ECI’s functioning in practice, it illustrates, in a pragmatic way, the expectations that citizens and the EU institutions should have of the ECI as a participatory mechanism. Since the focus is placed on the ECI’s legal fabric, the political connotations of the topic, which have partly been explored in previous academic research on the ECI, are not elaborated. Notwithstanding this, the study is set against the broader institutional and political framework in which the ECI operates. In particular, the attitudes of the Commission, the European Parliament, and the Council towards ECI organisers, stakeholders, and the ECI generally were closely observed, and these observations form part of the ensuing analysis. Even though the findings do not concern the ECI vis-à-vis wider democratic theories or with regard to the political role of civil society in EU affairs, they provide a starting point for further

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131 For a recently published empirical analysis on the ECI from a political science perspective see Luis Bouza Garcia and Justin Greenwood ‘The European Citizens’ Initiative: A new sphere of EU politics?’ (2014) Interest Groups & Advocacy 1; Luis Bouza Garcia (n 53); Michael Saward ‘Enacting citizenship and democracy in Europe’ in Engin F Isin and Michael Saward, Enacting European Citizenship (CUP 2013).

132 See, for example, Elizabeth Monaghan (n 77).
exploration of the democratic virtues of the ECI and constitute a solid basis for future discussions on the legal reform of the ECI.

B. Methodology

The adoption of the ECI Regulation and its legal and procedural requirements faced a number of criticisms in the above-mentioned literature on the ECI that are consequently explored in the chapters of this study. To summarise these briefly, the ECI procedures were said to be too onerous for the ECI organisers considering the non-binding character of the ECI as an agenda-setting mechanism. As a result of the establishment of these procedures, concerns were voiced that the use of the ECI would be monopolised by lobbyists and that the result would be that citizens were disappointed with the system rather than interested in the EU political process. Moreover, the reaction of the EU Institutions towards the first submitted ECIs was considered a substantial factor in the subsequent development of the ECI in light of the extensive discretion of the Commission in an ECI’s lifecycle.

In light of the literature on the ECI, it is contended that the ECI’s institutional design and the reaction of the EU institutions towards the first submitted ECIs are of principal importance for the functioning of the ECI as a new opportunity for citizens’ participation in the EU. A combination of doctrinal legal research and empirical examination of the ECI regulatory framework was employed in order to examine both the ECI’s institutional design and the reaction of the EU institutions to the first ECIs. The findings from this research are intertwined in the chapters to inform the conclusions of the thesis.

Analysing the ECI from a doctrinal perspective allowed insights into legal issues arising from the ECI Regulation, such as the interpretation of the Commission’s competences for the purposes of registering an ECI, the potential role of the CJEU in delineating the Commission’s discretion in the process of the ECI, and the implications of Article 11(4) TEU as a corollary to EU citizenship rights. In addition, exploring the operation of the ECI in practice in its first three years of life (2012-2015) provides a deep understanding of the implications of the ECI’s procedural aspects for citizens who attempt to use it to influence EU law-making. The exploration revolved around the experiences of the organisers of the first few ECIs. Issues that were examined in this respect were the extent to which grassroots movements used the ECI; the obstacles faced by ECI organisers; the accessibility of the ECI to EU citizens; and, most notably, the outcome of successful and unsuccessful ECI campaigns.
Beyond the doctrinal analysis of the ECI, a qualitative empirical approach, specifically in-depth interviews with ECI stakeholders, was further adopted to explore empirically the abovementioned topics of interest. In following a qualitative approach, the topic of the ECI was studied by examining and interpreting the experiences of participants. In particular, the interviews allowed for a detailed grasp of the ECI and the issues surrounding it. At the time of designing the empirical research (October 2013), the first ECIs were still on-going, and the ECI campaigns were to a great extent unexplored. For this reason, it was considered most appropriate to select a methodological tool which could shed light on various aspects of the ECI and that allowed asking ‘open-ended questions that elicit depth of information’. As a result, in-depth interviews were selected as a method for collecting primary data on ECI organisers’ views and perception of the ECI in practice. The researcher was therefore able to discuss aspects of the ECI with the participants which, until the point of the interviews, remained theoretical or speculative.

Selecting the sample for the interviews entailed choosing the individual participants and choosing the ECI campaigns from which these participants would be selected. The pool of potential participants was limited to the organisers of registered ECIs. In this respect, ECI organisers were perceived as the persons primarily involved in the creation and promotion of an ECI and those who were responsible for ensuring that their campaign fulfils the necessary legal and procedural requirements. Since the research focused on the impact of the ECI regulatory framework on the use of the ECI as a channel for citizens’ participation, the ECI organisers could provide valuable insight on the topic. As for the ECIs from which participants were selected, the initial sample included the first 20 ECIs, which were registered between April 2012 and November 2013. This included ECIs from the very first round of campaigns, which were registered in 2012 and were completed by the time the interview took place (for example, ‘Right 2 Water’, ‘End Ecocide’), as well as campaigns that were on-going at the time of the interview (for example ‘Education is an investment’, ‘Teach for Youth’). Hence, the sample allowed for the apprehension of both the views of organisers that were still pursuing their ECIs, and those who had completed their efforts.

According to the ECI Regulation, every ECI has two contact persons (one representative and one substitute) who speak and act on behalf of the campaign. An attempt was made to

134 Lisa Guion, David Diehl, Debra McDonald ‘Conducting an In-depth Interview’ University of Florida <http://edis.ifas.ufl.edu/fy393> accessed 1 July 2015.
interview one person\textsuperscript{135} from each of the first 20 ECIs that were registered and collected signatures. Recruitment emails (including follow-up emails) were sent to all 20 potential participants explaining the purpose and the scope of the interviews. Nine out of the 20 responded positively to the request for an interview.\textsuperscript{136} The following table shows the ECIs whose organisers were approached for an interview (see ‘contacted’) and the number of ECIs whose organisers agreed to be interviewed:

\textit{Table 1.1}

### INTERVIEWS WITH ORGANISERS OF REGISTERED ECIs

<table>
<thead>
<tr>
<th>Name</th>
<th>Registration date</th>
<th>Closing date</th>
<th>Contacted/ interviewed?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Fraternité 2020 - Mobility. Progress. Europe.</td>
<td>09/05/2012</td>
<td>1/11/2013</td>
<td>Interviewed</td>
</tr>
<tr>
<td>2. Water and sanitation are a human right! Water is a public good, not a commodity! (Right 2 Water)</td>
<td>10/05/2012</td>
<td>1/11/2013</td>
<td>Interviewed</td>
</tr>
<tr>
<td>3. One of us</td>
<td>11/05/2012</td>
<td>1/11/2013</td>
<td>Interviewed</td>
</tr>
<tr>
<td>4. Stop vivisection</td>
<td>22/06/2012</td>
<td>1/11/2013</td>
<td>Contacted</td>
</tr>
<tr>
<td>5. High Quality European Education for All</td>
<td>16/07/2012</td>
<td>1/11/2013</td>
<td>Contacted</td>
</tr>
<tr>
<td>6. Pour une gestion responsable des déchets, contre les incinérateurs (Responsible management and treatment of waste by all Member States of the EU)</td>
<td>16/07/2012</td>
<td>1/11/2013</td>
<td>Interviewed</td>
</tr>
<tr>
<td>7. Suspension of the EU Climate and Energy Package</td>
<td>08/08/2012</td>
<td>1/11/2013</td>
<td>Contacted</td>
</tr>
<tr>
<td>8. Central public online collection platform for the European Citizen Initiative</td>
<td>27/08/2012</td>
<td>1/11/2013</td>
<td>Contacted</td>
</tr>
<tr>
<td>9. “30 km/h - making the streets liveable!”</td>
<td>13/11/2012</td>
<td>13/11/2013</td>
<td>Contacted</td>
</tr>
<tr>
<td>10. Kündigung Personenfreizügigkeit</td>
<td>19/11/2012</td>
<td>19/11/2013</td>
<td>Withdrawn Contacted</td>
</tr>
</tbody>
</table>

\textsuperscript{135} The representative, the substitute, another member of the Citizens’ Committee or a designated press person.

\textsuperscript{136} The remaining 13 organisers either replied negatively or replied positively but did not reply to subsequent emails.
11. Single Communication Tariff Act 03/12/2012 3/12/2013 Contacted
12. Unconditional Basic Income (UBI) - Exploring a pathway towards emancipatory welfare conditions in the EU 14/01/2013 14/01/2014 Interviewed
13. End Ecocide in Europe: A Citizens’ Initiative to give the Earth Rights 21/01/2013 21/01/2014 Interviewed
14. Let me vote 28/01/2013 28/01/2014 Contacted
15. ACT 4 Growth 10/6/2013 10/6/2014 Contacted
16. Teach for Youth -- Upgrade to Erasmus 2.0 17/06/2013 17/06/2014 Interviewed
17. Do not count education spending as part of the deficit! Education is an investment! (Education is an investment) 6/08/2013 6/08/2014 Interviewed
18. European Initiative for Media Pluralism 19/08/2013 19/08/2013 Contacted
19. Weed Like to Talk 20/11/2013 20/11/2014 Withdrawn Contacted

The interviews were conducted during an overall period of 6 months, and were transcribed by the researcher. All the interviews conducted were semi-structured in nature; therefore there was no strict adherence to a predefined set of questions. Instead, predetermined questions were designed whose order and wording could be altered during the course of the interview. Those questions were accompanied by prompts and probes, which are defined as simple words or phrases (reminders) to ensure that every sub-area of interest has been adequately covered. The interview schedules, which are attached in Annex VIII, were designed based on a reflective approach to the knowledge sought and with regard to obtaining the intended information. As such, the interviews covered seven main topics. The participants were first asked about their co-organisers and the reasons for starting a

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campaign, the motivation to use an ECI rather than an EU petition or another channel of participation, and their expectations of their campaigns. In turn, they were asked to discuss the procedural aspects of their campaigns, such as the process of organising an ECI, registering it with the Commission, and collecting statements of support. In an attempt to detect the role of the ECI as a means of debate, the next topic concerned the opportunities provided by the organisers for public dialogue around the subject-matter of their ECI. Finally, the participants were asked to talk about the attitude of the EU Institutions towards their ECIs, and to give their opinion on the future of the ECI.

By contrast to the registered ECIs, some proposed Initiatives were refused registration by the Commission and thus did not proceed to the campaigning stage. Regarding these rejected Initiatives, the research focused on the legal criteria set in the ECI Regulation for an Initiative to start collecting signatures (the so-called legal admissibility test) and the way in which these criteria were interpreted and applied by the Commission so far. The primary sources used for this legal analysis were the Commission’s official replies to the organisers of proposed Initiatives, which are available on the ECI website. During the course of the research, six of these Initiatives’ organisers launched proceedings before the CJEU asking for the annulment of the Commission’s decisions to reject their proposals. A conversation took place with the applicant of the first ECI case, with the purpose of gaining information about his course of action after the initiative’s rejection and his perception of the Commission’s approach towards the proposed initiative.

For a balanced approach to data collected from interviews with ECI organisers, and in order to ensure a detailed understanding of the Commission’s view of the ECI, a European Commission official from the Directorate General (DG) responsible for the implementation of the ECI was also interviewed. The ECI Regulation’s preparatory acts, Commission Press Releases, and Commission Communications about rejected Initiatives and successfully submitted ECI, as well as information from the official ECI website of the Commission,140 were used as additional means of mapping the position of this EU Institution to the development of the ECI.

The topic of the ECI was explored qualitatively by listening to the participants and building an understanding of the ECI process based on their experiences. Although the interview data fed into the legal analysis by providing the study with an ‘insider
of the ECI, the views of the participants were not taken at face value. Instead, the meaning of the data was interpreted by the researcher in light of the legal underpinnings of the subject. As a result, the thesis was built both around quotes taken from the original data collected, as well as the researcher’s interpretative commentary and analysis.

In addition, the interview data was complemented by information collected from the individual websites of the ECI campaigns, the media, and from the positions of the organisations supporting the ECI mechanism, such as the ECI Campaign, ECAS, and the ECI Support Centre. The report produced by the ECI Campaign in the first two years of implementation of the ECI, which included interviews with ECI Organisers and other stakeholders (for example officials from national authorities responsible for the implementation of the ECI Regulation), was also consulted, as it confirmed and added to the findings of the interviews undertaken by the researcher. Moreover, the documents submitted by ECI stakeholders for the purpose of the EU Ombudsman’s Own-Initiative Inquiry and the Ombudsman’s Report contributed to the exploration of procedural matters concerning the use of the ECI.

A number of ECI workshops, conferences and events, which took place during the three years of this study, were used as supplementary sources of information. These include the three annual ‘ECI Days’ in Brussels, four smaller workshops in 2013, 2014, and 2015 and the three Public Hearings that took place in the European Parliament for the successfully submitted ECIs. Finally, the documents from the current review of the ECI

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142 A non-for-profit organisation supporting the introduction and implementation of the ECI <www.citizens-initiative.eu/about/the-eci-campaign/>
143 A Brussels-based non-profit organisation which has been involved with promoting the ECI.
144 The ECI support centre is a joint initiative of the European Citizen Action Service (ECAS), Democracy International and Initiative and Referendum Institute Europe. <www.citizenhouse.eu/index.php?option=com_content&view=article&id=42&Itemid=123&lang=en>
Regulation by the EU Institutions, as well as the two reports prepared by independent consultants for the purposes of the review provided data on the experiences with the first few ECIs and the possibilities for legislative changes in the ECI Regulation. Ultimately, the strategy of triangulation, meaning the combination of information from the above-mentioned resources with the data collected from in-depth interviews, provided manifold ways to reflect upon the ECI and to formulate the arguments of this thesis.

C. Structure of the thesis

The structure of the thesis can be summarised as follows: the study commences with a conceptualisation of the ECI as an agenda-setting mechanism, an overview of its legal infrastructure, and an exploration of the first few experiences with the ECI in practice (Chapter 2). Subsequently, it focuses on specific aspects of the ECI which are connected with pertinent EU law debates, such as EU citizenship (Chapter 3), the Commission’s monopoly of legislative initiative in the EU (Chapter 4), and the CJEU’s case law on the Union’s democratic participatory features (Chapter 5). The choice to focus into specific areas illustrates that the ECI is perceived in this thesis not only as an opportunity for citizens’ participation in EU-law making, but also as a new element of the EU institutional and constitutional order which merits consideration. Ultimately, Chapter 6 shifts the perspective back to the question of whether and how EU citizens can affect EU law-making by bringing an ECI. Finally, the topic of the review of the ECI Regulation runs throughout the whole thesis. Instead of examining the suggestions for review that have been voiced by EU Institutions and ECI stakeholders separately, each of the chapters provides a critical overview of the suggested reforms with respect to the issues examined in that chapter.

The study commences with Chapter 2, which conceptualises the ECI in three ways. Firstly, it looks at the ECI in context. For this purpose, it compares the ECI with other forms of direct-democratic instruments that exist at the national, federal, and regional level, such as

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150 Michael Q Patton, Qualitative Research and Evaluation Methods (3rd edn, Sage 2002) 556.
referenda, full-scale initiatives, and agenda-setting initiatives. In turn, it looks at the ECI vis-à-vis petitions to the European Parliament and explains the main differences in the legal frameworks of the two. The comparison of the ECI with direct-democratic instruments on the one hand, and petitions to the European Parliament on the other hand, shows that the ECI has a distinct nature as the first participatory agenda-setting mechanism in the EU. In addition to this comparison, the chapter examines the ECI in light of the Commission’s monopoly of legislative initiative in the EU. Secondly, the chapter conceptualises the ECI by providing an account of the ECI’s legal infrastructure, including the drafting of the ECI Regulation and the process set by the ECI Regulation for the collection of one million signatures. In these two ways, the conclusion is reached that the discretion of the EU Institutions in the follow-up of the ECI, and the ECI’s institutional design, are substantial factors for the development of the ECI as a participatory mechanism. Thirdly, the chapter conceptualises the ECI from a more practical perspective. This conceptualisation also provides the background for the empirical research discussed in the subsequent chapters. It considers the first three years of the ECI’s operation and looks at the actors behind the post-2012 ECI campaigns, and their experiences. It argues that organising a successful ECI entails practical, institutional, and legal challenges, and identifies a form of two-speed participation in the context of the ECI: although the mechanism has attracted interest from both grassroots movements and larger, well-organised groups of actors, it is the latter that managed to collect the required one million signatures.

Chapter 3 shifts the attention from the experiences of the ECI organisers to the way in which the ECI adds to the concept of EU citizenship, and particularly the way in which it allows for the development of EU citizenship into a notion that entails citizens’ political participation rights. The chapter explores some technical issues concerning the ECI signature collection system and their effects on the ECI’s accessibility to EU citizens, both with regard to potential organisers and potential signatories of an Initiative. In particular, it illustrates the way in which the ECI Regulation excludes two groups of citizens from signing or organising an ECI: some EU citizens residing in a Member State other of that of their nationality, and third-country nationals who are long-term residents of the EU. Lastly, it turns to discussing these exclusions in the context of the wider debate on the inclusivity of EU citizenship, and to consider some of the current calls from EU Institutions and ECI stakeholders to address the technical issues which result from the ECI Regulation. The
argument advanced in this chapter is twofold. On the one hand, the attempt of the ECI to promote a dimension of active EU citizenship among EU citizens depends to a large extent on the ECI Regulation. On the other hand, the current calls for reform should be seen in light of the Member States’ key role in this task, which is similar to the Member States’ key role in the acquisition and loss of EU citizenship.

Another specific aspect of the ECI, namely the legal admissibility test, is examined in Chapter 4. This chapter analyses the Commission’s interpretation and application of a particular aspect of the test, namely Article 4(2)(b) of the ECI Regulation, which has been the only reason for refusal of proposed Initiatives so far. According to Article 4(2)(b), a proposed Initiative will not be registered if it ‘manifestly falls outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties’. By exploring the legal issues around the practical application of the ECI legal admissibility test to date, this chapter adds to the debate on the functionality of the ECI as a new tool available to EU citizens to influence the EU agenda. Therefore, a detailed account is provided regarding the legal confines imposed on the ECI and thus the extent to which EU citizens can propose legislation at the EU level by organising an ECI.

Chapter 5 builds on the discussion in Chapter 4 by examining the first judgment on an ECI case and the remaining six cases that are currently pending before the General Court (GC). The pending cases are grouped into two categories: five cases ask for the annulment of the Commission’s decisions to reject proposed Initiatives, whilst one case challenges the response of the Commission to a successfully submitted ECI. This chapter suggests that the admissibility of these cases before the Court depends on two factors. Firstly, on whether the Commission can be perceived as an administrator of the ECI at each stage of the ECI process. The second factor is the extent of the rights bestowed on EU citizens by the ECI legal framework (Article 11(4) TEU and the ECI Regulation). This chapter suggests that, whilst the admissibility of the first category of cases is evident, the admissibility of the seventh case is doubtful to say the least. Nevertheless, the case raises questions with respect to the obligations of the EU Institutions at the final, follow-up stage of an ECI, and the added value of the ECI as an agenda-setting mechanism. Furthermore, it is argued that, in the grand scheme of things, the ECI opens up the potential to the CJEU to add a new dimension to its existing case law on citizens’ participation in the EU.
Whilst Chapters 2-5 are mainly concerned with the signature collection stage of an ECI as the first step to participate in EU law-making, Chapter 6 looks at the ECIs after their 12-month campaign deadlines. In particular, the chapter focuses on the possibilities of affecting EU law-making through an ECI. The differences in the responses of the Commission to the three successfully submitted ECIs are examined in an attempt to depict the variety of factors that the Commission has to balance in order to decide its follow-up actions. Unsuccessful ECIs are also discussed to identify whether there have been any signs of continuity in the campaigns. Notably, the chapter depicts the role of the European Parliament in the follow-up of both successful and unsuccessful ECIs. In this way, it returns to some of the hypotheses made in Chapter 2 concerning the discretion of the EU Institutions in the follow-up of the ECI. While there is evidence that the European Parliament is willing to push the Commission for further action on an ECI, there are also indications that where the views of the European Parliament and the Council oppose those of an ECI, the Commission will lean towards those of the EU’s co-legislators. By exposing the interplays between the EU Institutions and ECI campaigns, the chapter sheds light on the different ways in which the link between Article 10 TEU (EU citizens’ representation) and Article 11(4) TEU (EU citizens’ participation) plays out. Finally, the discussion turns to the negative reactions of ECI organisers with respect to the outcome of their campaigns. It identifies a mismatch between the organisers’ expectations and the actual potential of the ECI as an agenda-setting instrument, and puts forward some procedural suggestions to improve the ECI process with the aim of alleviating citizens’ frustration with the ECI mechanism in the future.

Finally, the conclusion brings the findings of the six chapters together and explains the reasons why the ECI has so far been a weak mechanism for affecting EU law-making.
CHAPTER 2

CONCEPTUALISING THE ECI

Introduction

The main purpose of this chapter is to unpack the concept of the ECI and to define the ECI as a non-binding, agenda-setting participatory mechanism, whose development largely relies upon the EU Institutions (mainly the European Commission) as well as its institutional design and procedural characteristics. To this effect, the chapter commences by contextualising the ECI. It reviews the ECI’s purpose and potential, its differences to other similar citizens’ participatory mechanism, as well as its place within the EU institutional framework and particularly vis-à-vis the Commission’s right of legislative initiative. The chapter then considers the background to the insertion of Article 11(4) TEU in the Treaty, and the inter-institutional negotiations that preceded the drafting of the ECI Regulation. Based on the particulars of the ECI Regulation, the discussion elucidates the process of bringing an ECI in an attempt to build a reference point for the rest of this thesis’ chapters, which examine particular aspects of the ECI’s regulatory framework. This discussion is followed by a depiction of the first three years of the ECI’s operation. Some facts about the ECI are provided, to allow the reader to put the remaining chapters in context. These facts include the number of registered and rejected ECIs to date, the topics that were promoted by these ECIs, and the actors behind the ECI campaigns. Based on this examination, the chapter then reflects on the first set of ECI campaigns and identifies the factors that distinguished the successful ECI campaigns from unsuccessful attempts to collect the necessary signatures.

I. The ECI in context

The ECI is a Treaty of Lisbon innovation and an attempt to strengthen the participatory aspects of democratic life in the EU. It is a participatory mechanism which enables EU citizens to bring forward an idea and, upon collecting one million signatures supporting

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1 Michael Dougan ‘What are we to make of the citizens’ initiative?’ (2011) 48 CMLRev 1807, 1844; Luis Bouza Garcia ‘How could the new Article 11 TEU contribute to reduce the EU’s democratic malaise?’ in Michael Dougan, Niamh Nic Schuibhne, Eleanor Spaventa Empowerment and Disempowerment of the European Citizen (Hart 2012) 269, 273.
that idea, compel the Commission to consider it as a possible basis for a legislative proposal. Article 11(4) TEU provides the legal basis for the ECI:

*Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.*

Article 24(1) TFEU complements Article 11(4) TEU by stating that secondary legislation should be adopted according to the ordinary legislative procedure. Accordingly, on 15 December 2010, the Council and the European Parliament adopted Regulation 211/20111 (hereinafter the ECI Regulation), which sets out the provisions of the ECI’s legal framework. The starting date for the registration of initiatives was the 1st of April 2012 and the first ECI was registered on 11 May 2012.2

The ECI is a non-binding participatory mechanism. As Article 11(4) TEU proclaims, one million citizens can only *invite* the Commission to submit a legislative proposal based on their ECI. Since the language of the Treaty is permissive as opposed to mandatory, it is not guaranteed that, upon collecting one million signatures, the ECI’s proposals for legislation will be adopted by the Commission. Not only is the Commission not obliged to act, it also has absolute discretion over its response to a successfully submitted ECI.3 In this respect, the ECI resembles the Early Warning System, also introduced by the Treaty of Lisbon, regarding the contribution of national parliaments to EU legislation. In short, under the Early Warning System, national parliaments can issue reasoned opinions objecting to a Commission’s draft legislative proposal on the grounds that the proposal does not comply with the principle of subsidiarity. Similarly to an ECI, these opinions are non-binding, and the Commission is allowed to maintain the proposal in question as long as it justifies its

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2 The online register is publicly available at the EU official website of the ECIs. Every ECI proposed, registered or rejected, successful or withdrawn, is published in the website: <http://ec.europa.eu/citizens-initiative/public/welcome> accessed 22 September 2015. The reader can refer to the website for information regarding the ECIs and the Commission’s letters of refusal mentioned throughout the thesis.

3 The term 'successfully submitted ECI' is used in the thesis to connote an ECI which has submitted a minimum one million validated signatures to the Commission. Under the ECI Regulation, the only obligations of the Commission are those stipulated in Article 10: to publish the ECI in the register; to organise a public hearing for the organisers to present and explain their ECI; and, to publish a communication with its legal and political conclusions on the ECI and any action it intends to take, including the reasons for taking or not taking action.
decision. On paper, therefore, the Commission’s monopoly over legislative proposals has not been undermined by the introduction of the ECI and the Early Warning System.

Despite the lack of a binding effect, the ECI has been portrayed in a positive light as a directly-democratic tool at the transnational level, the first step towards the establishment of directly-democratic institutions at the EU level, and as a prime expression of direct democratic participation in the EU. The Commission has adopted a rather more specific definition of the ECI as an innovation included in the Treaty of Lisbon, which allows citizens to request that the Commission formulates new legislative initiatives. At the other end of the spectrum, the ECI has been criticised by academics for having no added value to the existing right of citizens to petition the European Parliament (Article 227 TFEU).

The diversity of views regarding the ECI makes it necessary to attribute a definition to this new participatory mechanism. Given that the ECI is a novel concept at the EU level and has only recently become operational, it is worth trying to define it in relation to similar instruments that exist in current national practice and traditions. An essential step in this process is to identify the categories of existing national citizens’ initiatives and similar participatory mechanisms that do not correspond to the definition of the ECI. In this regard, it should be kept in mind that the ECI’s design did not imitate a pre-existing form of citizens’ initiative; the EU institutions did not reproduce a citizens’ initiative mechanism that exists on the national level in a particular Member State. As a result, the ECI has ended up being a supranational participatory mechanism which does not fit squarely within

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4 Protocol (No 2) on the application of the principles of subsidiarity and proportionality attached to the Treaty of Lisbon, Articles 6 and 7.
existing concepts of those participatory mechanisms that broadly fall within the category of citizens’ initiatives.

A. ECI and citizens’ initiatives at national, federal and regional level

To begin with, the name of the ECI – a European citizens’ initiative – suggests that the ECI is an instrument of direct democracy similar to those instruments found on the national, federal, and regional levels of some countries (including some EU Member States). Generally speaking, the purpose of such instruments is to allow the citizens of a polity to participate in the decisions of the legislature and formally shape public policy. Direct democracy aims to maximise the input of citizens into the political system, and to turn that input into political decisions. Specifically, the notion of direct democracy refers to those institutional mechanisms that place final decision-making powers in the hands of citizens.

Recent years have seen a surge of such institutional mechanisms. More countries now provide for some sort of directly-democratic instrument and thus more citizens have the opportunity to become directly involved in decision-making. To be more precise, the concept of direct democracy entails a number of different political processes with the common characteristic of allowing ordinary citizens to vote and decide directly on legislation. As such, direct democratic mechanisms can be contrasted to electoral voting, whereby citizens vote for candidates instead of voting directly on legislation. The rationale behind the introduction of such mechanisms is that they let the people take final decisions, and that, in the absence of unanimity on the topic, ‘the majority must be understood as speaking for the people as a whole’. Therefore, directly-democratic mechanisms are considered more responsive to citizens than institutional arrangements

which only accord individuals the power to decide by means of electing representatives via elections.\textsuperscript{15}

In modern political systems, there is no absolute distinction between representative democratic processes (whereby citizens vote their representatives) and direct democratic processes (whereby citizens vote directly on legislation). Instead, models of representative democracy are combined with elements of direct democracy.\textsuperscript{16} In this way, citizens are given opportunities to participate in law-making in addition to their right to vote in elections. The two most widely used instruments of direct democracy are initiatives and referenda, although there are numerous forms in which these two instruments manifest themselves.\textsuperscript{17} In practice, their different manifestations depend on what sort of powers they bestow on citizens, at what level of the political system they are established, and who initiates the procedure.\textsuperscript{18} For instance, an \textit{obligatory referendum} at national level is a procedure triggered by law that allows citizens to vote on certain types of constitutional amendments or on a legislative bill.\textsuperscript{19} A referendum can also be initiated ad-hoc by the government, where a directly elected president calls for a popular vote on a specific political decision.\textsuperscript{20} There are also forms of referenda that take place on the municipalities, state or local level. Such instruments of direct democracy can be found, for example, in Germany and in the US.\textsuperscript{21}

The typologies that are used in the literature to describe direct democratic instruments are rather inconsistent, because academic commentators put forward their own definitions.\textsuperscript{22} Generally speaking, direct-democratic instruments are classified into categories according

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\textsuperscript{15} ibid
\textsuperscript{18} Theo Schiller, ‘Modern Direct Democracy in Europe. Dynamic Developments on All Levels’ in Jung-Ok Lee, Bruno Kaufmann (eds) \textit{How Modern Direct Democracy can make our Representative Democracies truly representative} (Korea Democracy Foundation 2009) 133.
\textsuperscript{20} Theo Schiller (n 16) 134-135; An example is France, where amendments to the constitution are subject to a referendum that can only be initiated by the French president or to a less extent by the French parliament.
to their design, and those categories are then given different names. 23 Although a detailed description of every variation of referenda and initiatives that exist at national, federal, and regional level falls outside the scope of this thesis, 24 a line should be drawn distinguishing referenda from citizens’ initiatives in order to explain the essence of the latter. The underlying idea of referenda is that they constitute a way for citizens to express their approval or disapproval of decisions made by parliaments or government. 25 On the other hand, citizens’ initiatives enable citizens to propose new legislative measures or instigate popular voting procedures in order to affect existing legislation. 26

The distinction between referenda and initiatives is further illustrated with a comparison of the popular referendum 27 and the full-scale initiative (or direct initiative). 28 The first procedural stage of both instruments is the same, and consists of a petition that must be supported by a specified number of signatures. 29 Nonetheless, while the aim of a popular referendum is to trigger a public vote on a policy measure that was recently drafted or implemented by the legislature, the purpose of the full-scale initiative is to propose a new legislative measure or a constitutional amendment, which can be adopted or rejected by voters at the polls. 30 Thus, even though both instruments require a popular vote, they differ in the nature of the proposals that are put on the table. 31

Contrary to a referendum, where citizens are given the right to veto existing legislative or constitutional proposals, a full-scale citizens’ initiative enables citizens to introduce such legislative or constitutional proposals. As an example of these mechanisms, the Swiss full-scale initiative allows citizens to submit an initiative proposing a constitutional amendment

23 Miguel Sussa Ferro (n 9) 358.
24 For a detailed analysis see Michael Gallagher and Pier Vincenzo Uleri (n 22) 1-19.
27 Rolf Büchi (n 19); Graham Smith (n 11) 83.
28 The term is borrowed from Theo Schiller and Maya Setala, (eds) Citizens’ Initiatives in Europe (Palgrave Macmillan 2012) 1; See Graham Smith (n 11) who uses the term ‘direct initiative.’
30 Rolf Büchi (n 19); David Magleby (n 29).
to a popular vote where the proposal is supported by at least 100,000 signatures.\(^\text{32}\) The type of proposals that can be submitted to the ballot for voting depends on the rules governing the citizens’ initiatives. In Switzerland, the proposal can be generally formulated or precisely worded.\(^\text{33}\) Provided that it gathers the necessary 100,000 signatures, a generally formulated proposal needs to be turned into legislation by a parliamentary commission; a precisely worded proposal cannot be amended by parliament.\(^\text{34}\) If the proposal gains support in the subsequent ballot voting, it is then included in the Swiss constitution.\(^\text{35}\) The ECI is also different from the Californian citizens’ initiative, through which a proposal is submitted for voting shortly after the formal signature threshold is reached.\(^\text{36}\) A successful Californian full-scale citizens’ initiative does not require enactment by parliament. Therefore, the proposals put to the ballot do not aim merely to inform the legislature so that it can put forward a proposal that takes stock of the citizens’ initiative in question. Instead, an initiative that collects more supporting votes than opposing votes automatically becomes law.\(^\text{37}\)

Although they share a similar name, the ECI cannot be considered to be a full-scale citizens’ initiative. Indeed, both the ECI and a full-scale initiative grant citizens the opportunity to provide their input in the early stage of a legislative decision-making process, but there is a significant difference when it comes to their end result. As previously mentioned, Article 11(4) TEU explicitly states that the purpose of the ECI is ‘to invite the Commission to submit a legislative proposal’; there is no provision for a binding vote by the EU citizenry anywhere in the article or in subsequent secondary legislation.\(^\text{38}\) Drawing analogies with the lack of a centralised, EU-level process for voting in European Parliament elections, it can be said with certainty that such a binding vote on submitted ECIs will not be added in the near future. The ECI is thus distinct from direct democratic

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\(^{32}\) Article 138, Federal Constitution of the Swiss Confederation, 1999, status as of 3 March 2013. <www.admin.ch/ch/e/rs/1/101.en.pdf> accessed 12 June 2013; Additionally, according to Article 139 of the Federal Constitution of the Swiss Confederation, Swiss citizens have a right of direct initiative at cantonal level to submit legislative drafts to a popular vote.

\(^{33}\) Jos Verhulst and Arjen Nijeboer (n 21) 47.

\(^{34}\) Jos Verhulst and Arjen Nijeboer (n 21) 47.

\(^{35}\) ibid

\(^{36}\) Jos Verhulst and Arjen Nijeboer (n 21) 53.


\(^{38}\) Recital 1 ECI Regulation.
mechanisms that allow citizens to vote on a proposed legislative measure submitted by their peers.  

If directly-democratic instruments are defined by their capacity to allow for a vote by citizens, then the ECI should be excluded from this category of participatory instruments.  

The legal nature of the ECI, meaning its non-binding character and the lack of popular voting, also evades issues that are usually linked with direct-democratic instruments, such as the voters’ cognitive ability to decide on the initiative in question. Contrary to full-scale initiatives, there are no voters in the case of an ECI. The signatories are EU citizens who are expected to assess whether an ECI is the expression of a pan-European issue that they would like to see on the EU agenda. Nonetheless, the ECI encompasses some aspects of the full-scale initiative. The latter consists of three stages, namely petitioning, campaigning, and popular vote; the first two are part of the ECI process. In this respect, the ECI could be interpreted as an agenda-setting initiative, or, in other words, a popular legislative initiative, a type of citizens’ initiative found at Member State level. Whilst agenda-setting initiatives enable a number of citizens to gather support for a legislative proposal, they do not include a popular vote. Instead, the proposal must be considered by a representative political authority. At the national level, such agenda-setting initiatives could signal the beginning of the law-making process, although the ultimate decision depends on the political will of the national legislature.

There are currently ten EU Member States with legislation that provides for an agenda-setting initiative. Variations of this type of initiative exist in countries where the citizens’

42 Graham Smith, Democratic Innovations: Designing institutions for citizen participation (Cambridge University Press 2009) 133.
44 Theo Schiller and Maya Setala (n 28) 1; Alternatively, this instrument is named ‘Popular Legislative Initiative’ see Miguel Sussa Ferro (n 9).
45 Citizens’ Initiatives are set by the following provisions of each Member State’s Constitution: Italy (Article 71), Netherlands (House of Representatives of Netherlands Rules of Procedures 1994, Rule 132a) Poland (Konstytucja Rzeczypospolitej Polskiej, Article 118), Slovenia (Ustava Republike Slovenije, Article 88),
proposal is submitted to a popular vote if it is rejected by the national legislature or where the representative authorities have the right to put a citizens’ proposal to a popular vote. The analogy between the ECI and this type of agenda-setting initiative is evident from the statement of the former Commission vice-president, Maros Šefcovic, at the beginning of the ECI’s operation. He stated that the ECI is ‘a powerful agenda-setting tool in the hands of citizens’. In line with Šefcovic’s statement, the ECI can be described as a mechanism that gives EU citizens the opportunity to affect the EU political agenda by introducing collective claims to the EU decision-making process.

Despite their similarities, there is a substantial difference between the traditional Member States’ agenda-setting initiatives and the ECI. Unlike the former, the latter is not a vehicle for presenting a legislative proposal to the elected legislative bodies which are, at EU level, the European Parliament and the Council. Instead, according to Article 2 of the ECI Regulation, an ECI is addressed to the Commission, which is the body responsible for proposing legislation at the EU level. The ECI is, therefore, an ‘initiative of an initiative’.

An alternative view has classified the ECI as a petition right due to its lack of a binding effect. It has been argued, for instance, that the ECI is wrongly promoted as a form of

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46 Slovakia (Article 88), Latvia (Article 65), Hungary (Act 1949/CC, section 28 C).
49 Victor Cuesta Lopez (n 7) 2; The term ‘EU agenda’ is used hereinafter to connote those sets of issues that are considered by the decision-makers in a polity. Sebastiaan Princen, ‘Agenda-setting in the European Union: a theoretical exploration and agenda for research’ (2007) 14(1) JEPP 21, 29.
citizens’ initiative given the lack of a ballot process to vote on an ECI proposal and thus its inability to bestow any final decision-making powers on EU citizens. It was thus said that only the petition element of what is traditionally a citizens’ initiative has been institutionalised.\(^\text{51}\) This view retains some traction insofar as national agenda-setting initiatives are also categorised as collective petition rights which do not fall into the category of directly democratic instruments.\(^\text{52}\) In the context of the EU, however, the notion of a petition has a specific meaning: that of petitioning the European Parliament. The subsequent comparison between the ECI and the parallel right to petition the European Parliament will highlight the differences between these two instruments.

B. ECI and Petitions to the European Parliament

Whilst a citizens’ initiative has a direct outcome either because it was given a vote of support or because it was implemented by a representative authority, a petition cannot formally oblige either a national parliament or a government to take any action in response.\(^\text{53}\) Accordingly, the distinction between an initiative and a petition is based on the different effects they have on the respective political systems after the required number of signatures is collected. In consonance with this explanation, it follows that the ECI should have been labelled a petition as it is not legally binding.\(^\text{54}\)

Despite the formally non-binding nature of both an EU petition and an ECI, in the context of EU law the purpose and the legal framework of the right to petition the European Parliament are different from those of the ECI. Under Articles 24(2) TFEU, 227 TFEU, and Article 44 of the Charter of Fundamental Rights of the EU, every EU citizen, every natural person resident in the EU, and every legal person with a registered office in the EU has the right to address a petition to the European Parliament. This right is mainly an opportunity for citizens to inform the European Parliament in case EU powers are exercised in a way which directly or indirectly affects them, and ask for the situation to be remedied.\(^\text{55}\) The petition must deal with an issue from the field of activity of the EU and


\(^{52}\) Victor Cuesta Lopez (n 7) 2.

\(^{53}\) Bruno De Witte, Alexander Treschel et al (n 9) 18; Richard Hough, ‘Do Legislative Petitions Systems Enhance the Relationship between Parliament and Citizen?’ (2012) 18(3) JLS 479, 482.

\(^{54}\) Zuzana Gabrizova (n 50); Bruno De Witte, Alexander Treschel et al (n 9) 19.

\(^{55}\) European Parliament Report requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the citizens’
could potentially lead to a request for action by the European Parliament to the Commission.56

In contrast to EU petitions, the ECI’s primary aim is not to redress citizens’ complaints; it is rather to provide an opportunity for citizens to put forward a legislative request to the Commission. Procedurally, both rights include a period of institutional mediation between the initial submission of a citizens’ proposal and the final decision-making process. Substantially, the ECI goes beyond the scope of the right to petition the European Parliament, by establishing a formal institutional channel between EU citizens and the Commission.57 This channel is not limited to informing the Commission of a situation; after all, citizens have the right to do that by writing to the Commission and receiving an answer in their language (Article 24 TFEU).

Instead, the ECI includes deliberative elements that are not seen in the framework of the EU petitions. In this respect, the ECI Regulation provides for a stronger element of deliberation than the framework for EU petitions. The organisers of a successfully submitted ECI have the chance to present their initiative to Commission officials in a face-to-face meeting (Article 10 of the ECI Regulation). In addition, a public hearing for the ECI organisers at the premises of the European Parliament is part of the institutional follow-up of an ECI (Article 11 of the ECI Regulation). In this way, ECI organisers are able to present their initiative before MEPs, representatives of the Commission, and ‘other institutions and bodies of the Union as may wish to participate.’58 Rule 216(1) of the European Parliament Rules of Procedure (RoP) stipulates a much weaker form of deliberation with the EU institutions for an EU petitioner: the petitioner may be invited to participate in the relevant meeting of the PETI Committee if her petition becomes the

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56 Stijn Smismans, ‘The constitutional labelling of “The democratic life of the EU”: representative and participatory democracy’ in Andreas Follesdal and Lynda Dobson, Political Theory and the European Constitution (ECPR Studies in European Political Science, Routledge 2004) 137; For an example of a successful petition see the European Parliament’s response to the petitions against ACTA, which is discussed in Chapter 6.


58 Article 10 ECI Regulation.
subject of discussion. The right to speak is only granted to the petitioner at the discretion of
the PETI Committee Chair.59

Unlike petitions to the European Parliament, the legal framework of the ECI provides an
opportunity for the Citizens’ Committee to participate in a preliminary round of
discussions regarding their initiative, and to support their ideas before the EU institutions.60
The distinct rationale and legal framework of the ECI indicates that the ECI should not be
considered a replication of the petition mechanism at EU level, although both mechanisms
are equally formally toothless in the sense that they do not have any binding legal effects.61
Together with the findings of the preceding discussion, it can be argued that the ECI does
not fit squarely into any of the existing categories of citizens’ initiatives; it is a hybrid
mechanism of supranational participatory democracy.62

The distinct nature of the ECI can be understood better when it is contextualised in light of
the wider EU institutional structure, which includes the Commission, the European
Parliament, and the Council.63 Such contextualisation not only reinforces the distinction
between the ECI and other similar participatory mechanisms but also sheds light on the
intrinsic limitations and potential of the ECI as an agenda-setting tool. In an attempt to
depict the institutional framework within which the ECI operates, it is pertinent to look at
the Commission’s monopoly over legislative initiative in the EU.

C. The ECI and the Commission’s monopoly of legislative initiative

In Member States, the right to submit draft legislation lies either with the government,
the president, or the national parliament.64 In contrast, a proposal from the Commission is a
sine qua non of the EU law-making process (Article 17(2) TEU). The Commission’s right
of initiative is undivided, except in the areas of Common Foreign and Security Policy

(Hereinafter European Parliament RoP).
60 Victor Cuesta Lopez (n 43) 266.
61 Michael Dougan (n 1) 1844.
62 On a similar note, Ponzano refers to ECI as ‘a suis generis right of initiative’. Paolo Ponzano, ‘A million
citizens can request European Legislation: a suis generis right of initiative’ (EUI 2011) 1.
63 Paolo Ponzano (n 62) 1.
64 Angelika Nussberger, Venice Commission Report ‘Constitutional Holders of Legislative Initiative: A
General Overview’ Strasbourg, 1 July 2010 T-06-2010.
(CFSP)\textsuperscript{65} and Justice and Home Affairs (JHA).\textsuperscript{66} Even in areas where it is not required by the Treaties to submit a legislative proposal \textit{per se}, the Commission has at its disposal an indirect way to submit proposals.\textsuperscript{67} This exclusive right of the Commission to initiate legislation in the majority of legislative areas covered by EU competences is firmly embedded in the institutional logic of the EU, according to which each institution must act within the limits of the powers conferred to it by the Treaty.\textsuperscript{68}

The basics of the concept of EU institutional balance can be summarised as follows: while the Commission represents the general European interest, the Council represents the governments of the Member States, and the European Parliament represents the EU citizens. All three institutions participate in the EU law-making process and they are independent in exercising their powers. Such powers are exercised according to the so-called ‘Community method’, whereby the Commission drafts legislative proposals which are then deliberated and adopted by the Council and the European Parliament. In this framework, the European Council is considered to be the overall policy-setter by defining the EU’s priorities and general political direction (Article 15(1) TEU). As such, the ‘Community method’ contrasts with other forms of EU decision-making that are closer to ‘self-government by the Member States’,\textsuperscript{69} such as intergovernmentalism and the Open Method of Coordination (OMC). The area of Common Foreign and Security Policy (CFSP) is a primary example of intergovernmentalism, whereby decisions can only be adopted unanimously by the European Council and the Council (Article 31 TFEU). By way of comparison, OMC is a method of governance mainly in the field of social

\textsuperscript{65} Prior to the Treaty of Lisbon, under Article 22(1) TEU, the Commission had a formal right to submit proposals to the Council in the CFSP domain. Post-Lisbon, the High Representative can also make such legislative proposals either on his own or ‘with the Commission’s support’ under Article 30(1) TEU.

\textsuperscript{66} In the area of Justice and Home Affairs, according to Article 76 TFEU, the Commission shares the right to propose new legislative acts with a quarter of Member States.

\textsuperscript{67} See, for example, areas where the Council must act on the basis of a recommendation from the Commission: Article 121 TFEU, Article 126 TFEU; Emile Noel, ‘The Commission’s right of legislative initiative’ (1973) CMLRev 123.


\textsuperscript{69} Michael Dougan, “‘And some fell on stony ground’” - a review of Giandomenico Majone's Dilemmas of European Integration’ (2006) 31(6) ELRev 865, 870.
protection which is based on the cooperation of Member States and the exchange of best practices for the attainment of policy goals set by the Council.\textsuperscript{70}

Despite the rather dated connotations of the term, the ‘Community method’ is still the predominant method of governance in the EU.\textsuperscript{71} The independence of the Commission in proposing legislation is a central element of this method and thus of the EU institutional balance.\textsuperscript{72} Giving a formally binding effect to the ECI would alter the well-preserved Community method. Therefore, the non-binding character of the ECI is in line with the Commission’s prerogative of legislative initiative, and the fundamental principle that the Commission should not take instructions from other entities.\textsuperscript{73} In addition, conferring the ECI a binding power would mean that the legal importance of the ECI would have exceeded the parallel powers of the European Parliament and the Council to promote legislation.\textsuperscript{74} Although the two co-legislators can request the Commission to submit a legislative proposal by virtue of Articles 225 TFEU and 241 TFEU respectively, these proposals do not create any obligations for the Commission. Accordingly - and rather predictably - the ECI only goes as far as to give citizens soft and indirect powers to influence the EU’s political agenda.\textsuperscript{75}

Beyond the formally non-binding nature of the ECI, the two EU co-legislators’ right to propose legislation to the Commission is relevant to the ECIs’ potential to influence EU law-making for two reasons. Firstly, the indirect legislative proposals of the European Parliament and the Council are increasingly being followed-up by the Commission.\textsuperscript{76} Academic commentators have thus pointed out that, in the same way that the Commission is hesitant to ignore the non-binding proposals of the co-legislators, it would also be hesitant to turn down a successfully submitted ECI which expresses the views of a representative part of the EU citizenry.\textsuperscript{77} After all, the Recital to the ECI Regulation

\begin{itemize}
  \item \textsuperscript{70} See Claudio M Radaelli, \textit{The Open Method of Coordination: A new governance architecture for the European Union?} (SIEPS 2003).
  \item \textsuperscript{71} Renault Dehousse, ‘The Community Method. The EU’s “default” operating system’ (NOTRE Europe, 11 February 2013).
  \item \textsuperscript{73} Article 17(3) TEU; Editorial Comments ‘Direct democracy and the European Union...is this a threat or a promise?’ (2008) 45 CMLRev 929,937; Michael Dougan (n 1) 1842.
  \item \textsuperscript{74} Editorial Comments (n 73) 937; Paolo Ponzano (n 62) 2; Michael Dougan (n 1) 1842.
  \item \textsuperscript{75} Theo Schiller and Maya Setala (n 28) 11.
  \item \textsuperscript{76} Paolo Ponzano, Constanza Hermanin, Daniela Corona ‘The Power of Initiative of the European Commission: A Progressive Erosion?’ (NOTRE Europe Study & Research 89) 2.
  \item \textsuperscript{77} Luis Bouza Garcia, \textit{Participatory Democracy and Civil Society in the EU} (Palgrave Macmillan 2015) 137.
\end{itemize}
confirms that the indirect right of legislative initiative of one million people has a similar status to the right held by the European Parliament and the Council.

Secondly, the two EU Institutions may also seek to impact the Commission’s decisions on the follow-up of the ECI either by way of their Treaty rights or less formal mechanisms.78 For instance, the day-to-day informal interaction between EU Institutions and MEPs is a common way to inform the Commission of any demands for legislation.79 The Directives on the ban on tobacco advertising80 and on trans-frontier television broadcasts81 are examples of legislation that originated from calls of action by the European Parliament.82 At the beginning of the ECI’s operation, an expectation was expressed that, if the European Parliament and the Council support a successfully submitted ECI, the proposal put forward could have more chances of being followed-up by the Commission as a legislative proposal.83 On this view, the two co-legislators could promote an ECI by putting pressure on the Commission to respond positively to the Initiative’s proposals. This would be all the more likely considering that, at the end of a successful campaign, ECI organisers are invited to a public hearing with attendants from the EU Institutions (Article 11 of the ECI Regulation).

Beyond the normative comparison between the ECI and the rights of the European Parliament and the Council to propose legislation, any attempt to conceptualise the ECI and study its operation in practice must take place against the EU institutional reality. An anchoring point in this attempt is that the Commission’s monopoly of legislative initiative is not one-dimensional.84 Indeed, the choice of proposing legislation, as well as the manner in which it does so, belongs solely to the Commission. In the process of exercising its right of legislative initiative, however, the Commission takes into account the positions, views,

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82 Richard Corbett in House of Lords Report (n 79).
84 Sebastiaan Princen (n 49) 23.
and opinions of a multiplicity of actors such as interest groups, representatives of
governments and industry, experts and trade unions. The participation of interest groups in consultation procedures and other lobbying activities ensures that an array of viewpoints and positions are brought before the Commission. Consultation procedures are in fact promoted by the Commission precisely because they bring to its attention the positions of relevant stakeholders on a particular policy or legislation. Furthermore, lobbying - defined here as the attempts of various interest groups to promote public and private interests before EU Institutions and influence EU policy - takes place at various stages of the EU policy and law-making process. Interest groups influence "agenda-setting in the Commission, policy reformation in the European Parliament, ratification of regulations and directives in the Council".

85 An example of such influence can be seen in the revision of the 2014 EU Tobacco Products Directive (Directive 2014/40/EU repealing Directive 2001/37/EC, [2014] OJL 127/1). A recent study found that the tobacco industry launched a "massive lobbying campaign" against the Directive. The campaign included meetings with MEPs, the Commission Secretariat-General, and the Commission Legal Service, and resulted to delays or amendments to the proposal based on the lobbyists’ interests. Sylvie Peeters, Helia Costa et al, "The revision of the 2014 European tobacco products directive: an analysis of the tobacco industry’s attempts to "break the health silo"” (2015) Tob Control 1, 6.

86 Nikos Vogiatzis, ‘Is the European Citizens’ Initiative a serious threat for the Community method?’ (2013) 6(1) EJLS 91; This section does not aim to discuss in detail the role of interest groups in EU decision-making. Its purpose is rather to give a general idea of the place of such interest groups in the EU decision-making apparatus. In the Commission’s White Paper on Governance, civil society is defined as including: ‘trade unions and employers’ organisations (“social partners”); nongovernmental organisations; professional associations; charities; grass-roots organisations; organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities.’ Commission, White Paper on European Governance (COM(2001) 428 final. Accordingly, the terms ‘interest groups’, ‘organised civil society’ and ‘lobbyists’ will be used here interchangeably to connote groups promoting both economic, and general interests, as well as public interest groups such as NGOs. Sabine Saurugger ‘Interest Groups and Democracy in the European Union’ (2008) 31(6) WEurPol 1274, 1287; Koen Lenaerts ‘Institutional Balance in the EU’ in Christian Joerges and Renaud Dehousse, Good Governance in Europe’s Integrated Market (OUP 2002) 70; Generally on interest groups in the EU, see Justin Greenwood, Interest Representation in the European Union (Palgrave 2nd edn 2007).


88 Hauser explains that ‘[i]n the EU, businesses demand access to the Commission, the Parliament and the Council with the ultimate objective of securing favourable legislation and blocking adversative regulations. Citizens’ organisations, on the other hand, demand access with ultimate collective goals such as the protection of public health and the environment.’ Henry Hauser, ‘European Union Lobbying Post-Lisbon: An Economic Analysis’ (2011) 29(2) Berkeley J Int'l Law 680, 684, 692.

89 Henry Hauser (n 88) 692.
There is a long history of cooperation between the Commission and interest groups.\textsuperscript{90} In a 2000 Discussion Paper, the Commission explains the rationale behind this cooperation: NGOs represent the views of specific groups of citizens to the EU institutions and contribute to policy making.\textsuperscript{91} Given that the Commission benefits from the specialised expertise of NGOs during policy-making, it seeks to create long-lasting relations with interest groups which supply information.\textsuperscript{92} This state of affairs can be perceived as an exchange: the Commission obtains technical information and an insight into citizens’ views in exchange for giving lobbyists access to the EU decision-making process.\textsuperscript{93}

According to the Commission, the value of NGO’s contribution to policy-shaping is mostly seen in the stage of initiating legislation, since consulting with these stakeholders before proposing legislation improves policy design.\textsuperscript{94} Interest groups have close ties to the European Parliament as well.\textsuperscript{95} Committee rapporteurs and shadow rapporteurs rely on interest groups for information during the preparation of reports or legislative proposals.\textsuperscript{96} The heavy workload of MEPs operates as a way for lobbyists to enter the EU decision-making arena either by writing parts of the rapporteur’s report or by providing information on legislative amendments.\textsuperscript{97}

In light of this background, agenda-setting in the EU is not dependent solely on the activities of the Commission.\textsuperscript{98} Hence, although the ECI could not have been given any binding powers to oblige the Commission to act, there could be more to the concept of the ECI than meets the eye when it comes to its effect on EU agenda-setting. Considering the Commission’s responsiveness to proposals from the European Parliament and Council, as

\textsuperscript{93} Henry Hauser (n 88) 692.
\textsuperscript{94} Commission Discussion Paper (n 91) 7; Sabine Saurugger (n 86) 1281; See 2001 White Paper on Governance (n 86) 14 where it was stated that ‘[NGOs] play an important role at global level in development policy [and they] often act as an early warning system for the direction of political debate’.
\textsuperscript{96} Maja Kluger Rasmussen (n 95); Beatte Kohler-Koch ‘Organised Interests in the EC and the European Parliament’ (1 EloP 009, 1997) 10.
\textsuperscript{97} David Judge and David Earnshaw, ‘No simple dichotomies: lobbyists and the European Parliament’ (2002) 8(4) The Journal of Legislative Studies 61, 63; Maja Kluger Rasmussen (n 95) 2.
\textsuperscript{98} Sebastiaan Princen (n 49) 23.
well as its exchanges with multiple actors, the non-binding nature of the ECI does not necessarily imply that it cannot have any influence on the Commission’s monopoly of initiative.

All things considered, it can be concluded that the development of the ECI as a mechanism to influence EU law-making depends to a large extent on the reactions of the Commission, the European Parliament, and the Council to submitted ECIs and on the follow-up actions of these EU Institutions to such ECIs. The reactions of the EU Institutions will also be significant with regard to the future use of the ECI, since ‘participation without power can lead to more disaffection, as citizens go through the exercise of engaging only to have decisions taken elsewhere and for reasons unrelated to citizen input’. At the same time, the ECI’s functionality and potential use by citizens also depends on its legal infrastructure. Lessons from national experiences with citizens’ initiatives indicate that participatory democratic mechanisms do not always lend themselves to citizens as a well-functioning method of increasing popular input into the political system. Instead, the use of such mechanisms is largely subject to the applicable procedures, and particularly to the institutional hurdles faced by the relevant actors as part of the initiative process.

II. The Legal Infrastructure of the ECI

According to a Commission’s statement at the time of the ECI Regulation’s adoption, the ECI would ‘add a new dimension to European democracy, complement the set of rights related to the citizenship of the Union and increase the public debate around European politics’. Such a broad, political assertion on the speculative value of this mechanism does not necessarily correspond to reality. It is one thing to declare the theoretical potential of citizens’ initiatives; to live up to these declarations is another matter. Therefore, in order to understand further the nature of the ECI, it is necessary to look beyond its

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99 See fns 77-79, 82.
100 Michael Dougan (n 1) 1844; Luis Bouza Garcia (n 1) 269, 273.
101 ibid
103 Michael Dougan (n 1) 1816; Luis Buza Garcia (n 1) 267.
104 Brigitte Geissel (n 22) 171.
105 Brititte Geissel (n 22) 172; Miguel Sussa Ferro (n 9).
106 Commission Green Paper on ECI (n 8) 5.
in institutionalisation in the Treaty. Its practical dimension should also be analysed so as to identify whether the instrument lends itself for use by EU citizens.

The practical dimension of the ECI can be examined based on two factors. The first factor concerns the design of the ECI’s regulatory framework and particularly the inclusion of obstructive demands and the introduction of facilitating elements for potential ECI organisers. Since the design and the implementation of the ECI Regulation is vital for the functioning of the ECI as a participatory mechanism, an overly demanding regulatory framework for the ECI would impair the commitment of the EU institutions to the attainment of the ECI’s objectives. The second factor that is relevant to the ECI’s practical dimension is the way in which the ECI has been used by EU citizens to date. A description of the background to the ECI’s inclusion in the Treaty of Lisbon is due before turning our attention to the examination of the ECI’s regulatory framework and its practical dimension.

A. The background to the ECI

While the ECI mechanism was first introduced in the ill-fated EU Constitutional Treaty, the original suggestion for such a mechanism was first put forward in the run-up to the Amsterdam Intergovernmental Conference (IGC) in 1996 by the former foreign ministers of Austria, Wolfgang Schussel, and Italy, Lamberto Dini. According to their idea, signatures representing 10% of the electorate from at least three Member States would be sufficient to make a valid legislative proposal to the European Parliament. The timing for such a proposal seemed right considering that the European Council’s agenda for the Amsterdam IGC had embraced the notion of ‘a Union closer to its citizens’ as a response to the decreasing levels of popular support for the EU revealed by Eurobarometer surveys in the 1990s. Nevertheless, the proposal of Schussel and Dini was rejected.

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107 Miguel Sussa Ferro (n 9) 364.
110 Albert Weale, Michael Nentwich (n 109) 134.
111 European Council of Turin, Presidency Conclusions (29 March 1996).
Since the ratification of the Treaty of Amsterdam, the notion of citizens’ participation became an overlying theme of the EU institutional reform.\(^{114}\) Although the actual Amsterdam Treaty lacked any signs of furthering participatory rights for citizens,\(^{115}\) the vague rhetoric of ‘bringing the Union closer to its citizens’ as a means of improving the democratic legitimacy of the EU was not abandoned; it was included in Declaration no 23 that was annexed to the Treaty of Nice.\(^{116}\) What is more, the need to enhance citizens’ participation at the EU level and attract their support for the EU institutions was also manifest in the Convention for the Future of the EU (Convention), where suggestions to include a citizens’ initiative as a key mechanism for citizens’ participation re-emerged.

The mandate of the Convention was set by the Laeken Declaration which identified in broad terms ‘the democratic challenge facing Europe’.\(^{117}\) To tackle the challenge, the Declaration suggested that the decisions of the EU institutions should be brought closer to the choices of EU citizens. Yet, the Declaration did not provide any impetus for the establishment of a legal framework for participatory democracy in the EU as a way of facing the democratic challenges of the EU. During the Convention, the Praesidium declared that the way to bring citizens closer to the EU was to include elements of participatory democracy in the Constitutional Treaty in order to foster dialogue between the institutions and the citizens.\(^{118}\)

In the course of the Convention, participatory democracy was mainly defined in the form of a framework for dialogue between institutions and civil society.\(^{119}\) The emphasis on cultivating participatory democracy through civil dialogue was also widely supported by the majority of civil society organisations (CSOs) that contributed to the debate of the

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\(^{113}\) Albert Weale, Michael Nentwich (n 109) 134


\(^{115}\) Citizens’ participation remained confined to voting rights (Article 19 EC), the right to petition the European Parliament (Article 21 EC, Article 194 EC) and the right to apply to the Ombudsman (Article 21 EC, Article 194 EC); Paul Craig, ‘Democracy and Rule-making within the EC: An empirical and Normative Assessment’ (1997) 3(2) ELJ 105, 125.

\(^{116}\) Declaration n.23 annexed to the Treaty of Nice (2001) OJ C 80/85; Francesco Maiani (n 83) 4.

\(^{117}\) Laeken Declaration on the Future of the European Union of 15 December 2001, Part I.

\(^{118}\) CONV 650/03 of 2 April 2003, Praesidium, ‘The democratic life of the Union’ 1.

\(^{119}\) CONV 650/03 of 2 April 2003, Title VI ‘The Democratic Life of the Union’ in the 2003 Draft Constitution (Draft Articles 33-37).
Convention for the drafting of the ill-fated Constitutional Treaty. In tandem with these discussions during the Convention, a separate coalition of non-governmental organisations (NGOs) lobbied for the inclusion of elements of direct democracy in the Constitutional Treaty.

Particularly, a group of NGOs, with the main actors being ‘More Democracy’, ‘Democracy International’, and ‘Initiative and Referendum Institute Europe’ (IRI), drafted a proposal for the inclusion of elements of direct democracy in the EU Constitutional Treaty. They proposed the establishment of obligatory pan-EU referenda for Treaty amendments. Similar amendments concerning the establishment of a referendum mechanism attached to a citizens’ initiative or the submission of a Treaty for ratification by popular referenda were proposed by single Convention Members.

All the proposed forms of referenda and citizens’ initiatives were subsequently rejected by the Convention Praesidium, not least because of the incompatibility of most Member States’ constitutional rules with such referendum procedures. Nevertheless, the group continued lobbying, this time to include a proposal for a Citizens’ Initiative that was drafted by a member of the Convention, the German MP Jürgen Meyer, in the Constitutional Treaty. According to Meyer, the proposed Citizens’ Initiative would bring the EU closer to its people by bestowing a right to citizens to present legislative proposals.

120 Luis Bouza Garcia, ‘From civil dialogue to participatory democracy: the role of civil society organisations in shaping the agenda in the debates on the European Constitution’ (2010) 6(1) JCER 85, 92.
121 A Europe-wide network of NGOs campaigning for direct democracy in Europe <www.democracy-international.org/>
122 A transnational, non-for-profit think-tank dedicated to practices of modern direct democracy <www.iri-europe.org/>
to the Commission, which could then decide on its course of action.\footnote{Suggestion for Amendment of Article I-46 by Jurgen Meyer <http://european-convention.eu.int/docs/Treaty/pdf/34/34_Art%20I%2046%20Meyer%20EN.pdf> accessed 15 September 2015.} The proposal was adopted as a last-minute amendment to the proposed Constitution.\footnote{ECAS Report ‘European Citizens’ Initiatives’ (November 2004) 3 <www.ezd.si/fileadmin/doc/4_AKTIVNO_DRZAVLJANSTVO/Viri/European_citizens_initiatives_ecas.pdf> accessed 15 September 2015.}

Briefly put, the aforementioned NGOs originally lobbied for binding, obligatory EU-wide referenda for Treaty amendments. When these were turned down, the NGOs presented an alternative proposal drafted by Meyer for a non-binding citizens’ initiative. A central point of the proposal was that it linked the Citizens’ Initiative with the European Parliament’s right of legislative initiative set out by former Article 192(2) EC (now Article 225 TFEU),\footnote{According to ex Article 192(2) EC ‘The European Parliament may, acting by a majority of its Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing this Treaty.’} and the similar right of initiative of the Council in former Article 208 EC (now Article 241 TFEU).\footnote{According to ex Article 208 EC (Original Article 152 EEC Treaty) ‘The Council may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals.’} The close links of the proposal with the indirect right of initiative of the European Parliament and the Council was a contemplative choice; a non-binding right of legislative initiative was a familiar concept, which increased the chances for the acceptance of Meyer’s proposal.\footnote{Jurgen Meyer and Sven Holscheidt, ‘The history and the future of the European Citizens’ Initiative’ in Carsten Berg, Paul Carline, Bruno Kaufmann et al Initiative for Europe Handbook 2008 (IRI 2008) 92.}

In spite of the familiarity of the proposal, the idea of including a Citizens’ Initiative in the EU Constitutional Treaty faced resistance from some members of the Convention who feared that the mechanism could cause unnecessary delays in the EU policy-making procedures, or that it would encourage the generation of proposals of minor significance to the EU legislative agenda.\footnote{Julia De Clerck-Sachsse, ‘Civil Society and Democracy in the EU: The paradox of the European Citizens’ Initiative’ (2012) 13(3) Perspectives on European Politics and Society 299, 302.} Despite such criticism, there was a general decline to jeopardise the overall consensus over the Convention by arguing over a Treaty provision for the ECI.\footnote{ibid} As a result, the proposal was signed by 77 members of the Convention and was slightly altered before being included in the final text of the EU Constitutional Treaty (Article I-47(4)):
Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come.\(^{133}\)

The rejection of the Constitutional Treaty by the French and the Dutch citizens in 2005 did not signal the demise of the ECI clause. Like the majority of the European Constitutional Treaty’s provisions, the clause was included in the 2007 Reform Treaty and was later inserted verbatim in the final revised text of the Treaty of Lisbon.\(^{134}\) Given that issues from the aborted Constitutional Treaty could only be opened up for debate by a unanimous decision of the Member States, the ECI clause was not contested or debated during the drafting of the Lisbon Treaty.\(^{135}\) Hence, the ECI clause was transferred automatically, with minor changes, from the Constitutional Treaty to Article 11(4) TEU. Article 24(1) TFEU stipulated that secondary legislation in relation to the ECI should be adopted on the basis of the ordinary legislative procedure:

\[
\text{The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.}
\]

As a further means of complementing the procedural aspects of the ECI, in 2010 the Council and the European Parliament engaged in negotiations to adopt the ECI Regulation, which sets out the legal details and provisions of the ECI.\(^{136}\) The negotiations and the legislative process for the establishment of the ECI Regulation began with a European


\(^{135}\) Graham Smith (n 39) 279.

Parliament Resolution that requested the Commission to submit a proposal for an ECI Regulation.137

**B. Secondary legislation on the ECI: Regulation 211/2011**

After receiving the European Parliament Resolution, the European Commission published a Green Paper in order to give civil society, stakeholders, citizens, and all interested parties the opportunity to express their views on the formulation of the proposed Regulation.138 The consultation period lasted fifteen months139 and resulted in 329 submissions.140 In the attempt to establish the legal and institutional framework of the ECI, the Green Paper presented a number of issues for consultation: the interpretation of ‘a significant number of Member States’ stipulated in Article 11(4) TEU; the minimum number of signatures per Member State; whether there should be an age requirement to support a Citizens’ Initiative; the required wording of an Initiative proposal; rules governing the collection, verification and authentication of signatures; the time limit for the collection of signatures; whether there should be a registration stage for an Initiative; the requirements for transparency and funding of an Initiative; and the deadline for the Commission’s response to a successfully submitted Initiative. For each of these issues the Commission made some suggestions, drawing inspiration from the procedural rules for citizens’ initiatives at state level.141

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138 Commission Green Paper on the ECI (n 8).
141 Carsten Berg, ‘EU-Commission’s proposal for ECI needs improvement!’ <http://wiki.citizens-of-europe.eu/images/8/8a/091128_eci-news.pdf> accessed 15 September 2015. One example is the stipulation of a time limit for the collection of signatures, for which the Commission considered the relevant provisions of Latvia (30 days), Spain (6 months) and Slovenia (60 days). Commission Green Paper on the ECI (n 8) 9.
On 31 March 2010, the Commission presented its ‘Proposal for a Regulation of the European Parliament and of the Council on the Citizens’ Initiative’ which was accompanied by a summary of the public consultation’s outcome. According to the Commission, the majority of the contributors to the public consultation characterised the ECI as a positive step towards encouraging public dialogue and bridging the gap between EU institutions and citizens. The Commission also pointed out that the procedure had to ensure the accessibility of the ECI for all EU citizens. At the same time, the contributors emphasised that the legal requirements should not make the collection of one million signatures too difficult. Two guiding objectives of the Proposal were therefore put forward. The first was that the substantial conditions of the ECI should guarantee that the Initiatives are ‘representative of a Union interest’. The second was that the conditions for bringing an ECI should be ‘simple and user-friendly’ without imposing ‘unnecessary administrative burdens on the Member States’.

Most of the Commission’s provisions regarding the ECI procedure were inserted in the final version of the ECI Regulation without any modification. For instance, the time limit for the collection of statements of support was set at twelve months (Article 5(5)) amid suggestions from ECI stakeholders that it should be set at eighteen months to allow small groups to secure support for their proposal and communicate their message across Member States. In addition, the EU institutions opted for a flexible form of campaigning which allowed for the collection of signatures on paper, online, and electronically, using an advanced electronic signature system (Article 5(2)). Contributors to the consultation procedure for the ECI Regulation had called almost unanimously for the possibility of online signatures, arguing that it would be a facilitating factor for ECI organisers. Considering that at Member State level only Spain and Finland have recently introduced

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143 Commission Proposal on the ECI (n 142) 3.
144 Commission Outcome of Public Consultation (n 140) 3.
145 Commission Proposal on the ECI (n 142) 2.
146 ibid
147 ibid
148 2010 Salzburg Manifesto for a European Direct Democracy, which is the outcome of an annual gathering organised by IRI and aiming to monitor and promote the development of the ECI. <www.slideshare.net/freemind/salzburg-manifesto-2010-en> accessed 15 September 2015.
149 Commission Outcome of Public Consultation (n 140) 4.
legislation that supports online signatures for citizens’ initiatives, the e-collecting aspect of the ECI can validly be considered a novelty on the part of the EU.\(^{150}\)

Although the threshold of one million signatures was already set by Article 11(4) TEU, a contentious issue during the drafting of the ECI Regulation was the interpretation of ‘a significant number of Member States’ from which one million signatures must be collected. The aim was to set signature thresholds which would ensure that the Initiative proposals are supported across the Member States and that they represent topics which concern EU citizens.\(^{151}\) In its Green Paper on the ECI, the Commission explained that the number of required signatures should not be set too high, in order to make the procedure less burdensome for organisers.\(^{152}\) It thus proposed to set the threshold at 1/3 of the Member States, a percentage which matched the Treaty provisions on enhanced cooperation\(^{153}\) and corresponded to the number of national parliaments needed to trigger the subsidiarity procedure.\(^{154}\)

The Commission’s position was supported by the Council but the European Parliament demanded that the threshold was set at 1/5 of the Member States, to facilitate the launch of an initiative.\(^{155}\) A compromise was eventually reached between the three institutions to set the threshold at 1/4 of the Member States (Article 7(1)).\(^{156}\) Consequently, ECI organisers need to collect signatures from a minimum of seven Member States. The provision tallies with the Member States’ right of a legislative initiative regarding judicial cooperation in criminal matters or police cooperation (Article 76 TFEU).\(^{157}\) Given the parallelism


\(^{151}\) Commission Green Paper on the ECI (n 8) 4.

\(^{152}\) ibid

\(^{153}\) Article 20 TEU.

\(^{154}\) Article 7(2) of the Protocol on the Principles of Subsidiarity and Proportionality Attached to the Treaties; Commission Green Paper on the ECI (n 8) 5.


\(^{156}\) The final compromise also reflects the Opinion of the European Economic and Social Committee (SCO/001), the Opinion of the Committee of the Regions on the European Citizens’ (2010) C 267/57 and the view of civil society as expressed in the Salzburg Manifesto (n 148).

\(^{157}\) As a disclaimer, it should be noted that future acts on Police and Judicial Cooperation in Criminal Matters (PJCCM) will be adopted as Directives (Article 82(2) TFEU and, therefore, proposed by the Commission.
between an indirect right of legislative initiative of citizens bestowed by the ECI and the Member States’ legislative initiative, this choice can be considered more relevant to the nature of ECI than the thresholds originally suggested by the Commission.

In addition, a quota for the minimum number of signatures that should be obtained from each Member State was commonly agreed by the Commission, the European Parliament, and the Council. The purpose of the signature threshold was again to ensure that a proposed ECI is genuinely representative of a topic that is of interest to the EU citizenry. The Commission’s Green Paper originally envisaged that at least 0.2% of the population of each Member State should have signed an ECI for their signatures to count towards the requirement of one million. Nonetheless, demographic changes and migration flows in Member States would mean that the signature thresholds for a Member State would constantly change, requiring ECI organisers to keep changing their signature targets.

To avoid the uncertainty that would be caused by asking for a set percentage of signatures, the EU institutions refrained from specifying a percentage of signatures from each Member State. Instead, it was agreed that the threshold of signatures which must come from each Member State should equal the number of MEPs of each Member State multiplied by 750, which is the total number of MEPs (Article 7(2)). As an example, ECI organisers currently have to gather 54,750 signatures from the UK but only 4,500 signatories from Malta for these countries to be included in the one million of total statements of support.

In its final version, the ECI Regulation provides for a four-stage procedure to bring an ECI: (1) registration of an ECI with the Commission; (2) signature collection; (3) signature verification; and, (4) examination of an ECI. For the first stage, there is a precondition to registering an ECI: an Initiative can only be proposed by a citizens’ committee of seven natural persons—excluding MEPs—who are residents of at least seven different Member States (Article 3(2)). This citizens’ committee is responsible for liaising with EU institutions during the progression of the ECI. The organisers must designate one representative and one substitute, who are responsible to speak and act on behalf of the citizens’ committee. Seen from a comparative perspective, the requirement for an ad hoc

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158 Commission Outcome of Public Consultation (n 140) 3.
159 Commission Green Paper on the ECI (n 8) 5.
160 Bruno De Witte, Alexander Treschel et al (n 9) 14.
161 Annex I sets out the minimum number of signatures required per Member State. These were modified by a Council Regulation since the original ECI Regulation to reflect the accession of Croatia to the EU: Council Regulation (EU) No 517/2013 [2013] OJ L 158/1.
committee to promote an initiative is common practice.\textsuperscript{162} Although their exact arrangements differ, the committees work as filters to prevent the flooding of registrations to the institutions responsible for receiving the initiatives.\textsuperscript{163}

The Regulation clarifies that a proposed Initiative will not be registered – and thus cannot start collecting signatures – if the citizens’ committee is not properly established (Article 4(2)(a)). To allow for registration to take place, the organisers need to give some personal information as well as information on the subject matter and the objectives of their proposals. They also have to indicate the Treaty provisions that they consider relevant for the proposed action and declare all sources of funding at the time of registration.\textsuperscript{164} Three more conditions determine whether an initiative will be registered with the Commission; they constitute the so-called ‘legal admissibility test’. The test requires an ECI to be registered only if its subject matter is not ‘manifestly frivolous or vexatious’ (Article 4(2)(c)); ‘manifestly contrary to the values of the Union as set out in Article 2 TEU’ (Article 4(2)(d)); and ‘manifestly outside the competences of the Commission to submit a legislative proposal for the purpose of implementing the Treaties’ (Article 4(2)(b)).\textsuperscript{165}

The legal admissibility test primarily allows the Commission to assess whether the proposal falls within the framework of the Commission’s powers to initiate legislation. The stage at which the admissibility test should be conducted was one of the points of disagreement between the EU institutions during the negotiations of the ECI Regulation. An \textit{ex ante} admissibility test, at registration stage, was initially dismissed by the Commission which argued that such an approach would prevent the promotion of public debate on the issue of a proposed initiative. For the Commission, it was vital that a proposed initiative fostered debate even if the objectives of the Initiative could not be met at the EU level. Thus, according to the Commission’s Proposal, the admissibility of a proposed Initiative should be examined after the collection of 300,000 signatures.\textsuperscript{166}

\textsuperscript{162} Victor Cuesta Lopez (n 43) 262.
\textsuperscript{163} Bruno De Witte, Alexander Treschel et al (n 9).
\textsuperscript{164} Annex II of the ECI Regulation sets out the required information for registering a proposed initiative. The original information was modified by Commission Delegated Regulation (EU) No 887/2013 [2013] OJ L 247/11. The Delegated Regulation requires two additional pieces of information from the seven members of the citizens’ committee: their telephone numbers and, documents that prove their full names, postal addresses, nationalities and dates of birth.
\textsuperscript{165} Chapter 4 of this thesis examines in depth the legal admissibility test of the ECI.
\textsuperscript{166} Commission Proposal on the ECI (n 142) Article 8.
Nevertheless, an intermediary test of admissibility could lead to citizens’ frustration. It would give the impression to EU citizens that some topics could be accepted as Initiatives even though these Initiatives would have to be rejected at the end of the signature collection process on legal grounds. In this respect, the European Parliament advanced an argument of legal certainty to support the view that the admissibility test should take place at the point of registration. Since the ECI was established by a Treaty provision, the argument goes, it would be inappropriate to sacrifice legal certainty in favour of facilitating public debate. Somewhere in the middle of the positions of the European Parliament and the Commission, the Council preferred an admissibility test that would take place after the collection of 100,000 signatures. The demand of the European Parliament was finally satisfied, so the choice of an intermediary admissibility test was rejected in favour of a test that takes place at the registration stage. If the Commission rejects an ECI, it must give clear reasons for the rejection in a Communication, which the organisers can contest before the CJEU (Article 4(3)).

Upon completing the above prerequisites and passing the legal admissibility test, an ECI is then registered with the Commission. A description of the ECI’s objectives and any other relevant information, such as the declared amount of funding and links to the websites of individual ECIs, are uploaded on a dedicated ECI website set up by the Commission. The website makes the ECI campaigns visible to the public, as it sets out information about every submitted Initiative proposal, even those that were rejected or withdrawn, and those that did not manage to collect the minimum number of signatures. In this way, it is easier for the ECI organisers to communicate their proposal to a wider array of possible signatories than would be the case in the absence of a centralised information platform.

After stipulating the rules for the registration of an initiative, the ECI Regulation sets out the conditions for the signature collection stage. As mentioned earlier, signatures can be collected on paper using specific forms that are included in Annex III of the ECI Regulation (Article 5(2)). Collecting signatures online is more demanding since it requires the prior certification of an online signature collection system (OSCS). There are three

167 Bruno De Witte, Alexander Treschel et al (n 9) 13.
169 Salvatore Aloisio et al (n 140) 133.
171 An ECI can be withdrawn at any time between registration and submission of collected signatures to the Commission. Article 4(5) of the ECI Regulation.
conditions for the certification of an OSCS (Article 6(4)): the system must ensure that only natural persons can sign; that the collected data are securely protected against loss or alteration; and that the statements are given in a form that complies with Annex III of the ECI Regulation.

Apart from the technicalities, a notable matter during the negotiations of the ECI Regulation was the amount of personal data that should be required from signatories. In an attempt to simplify the signing process, MEPs sought to delete the Commission’s proposed requirement to provide an ID number when signing. Their position reflected the opinion of experts, who argued that requiring an ID number was disproportionate to the character of the ECI and that it would discourage people from signing.172 Nonetheless, instead of removing the ID requirement from the ECI Regulation, it was decided in the negotiations that the Member States should have the flexibility to choose the personal information required for the collection and thus the verification of collected signatures. The various country-by-country requirements for signature collection are stipulated in Annex III of the ECI Regulation.

If the organisers manage to collect the necessary one million signatures, they should submit all the statements of support to the relevant national competent authorities for verification (Article 8(1)).173 The authority responsible for the validation of a signature is determined by a complex system of signature attribution to the Member States; its complexity is explained in the next chapter of this thesis, since it is directly linked with legal issues pertaining to EU citizenship. For now suffice to say that the national competent authorities have three months to issue a certificate with the number of valid statements of support (Article 8(2)). To guarantee the protection of the signatories’ personal data, the national competent authority must destroy all statements of support after the validation process (Article 12(4)). The same obligation applies to the ECI organisers (Article 12(3)).

The ECI organisers are not only responsible for destroying all the collected data after the verification process but also have personal liability for any ‘damage they cause in the

172 European Parliament Report on the ECI (n 144) Amendment 50; AFCO Press Release ‘Hearing on Citizens’ Initiative rules: We don’t want red tape’ REF:20101004IPR84968, Professor Jurgen Meyer and former MEP Sylvia- Yvonne Kaufmann, who participated in the European Parliament expert hearings, were both against a requirement for signatories to provide their ID numbers.

173 The list of the competent authorities of each Member State is available online at the ECI website: <http://ec.europa.eu/citizens-initiative/public/implementation-national-level> accessed 10 September 2015.
organisation of a citizens’ initiative in accordance with applicable national law’ (Article 13), for example in cases of false declarations or fraudulent use of data (Article 14). Article 12 compels the organisers to take technical and organisational measures to protect signatories’ data. In accordance with Article 14, Member States shall make provisions for ‘effective, proportionate and dissuasive’ penalties in order to ensure that the ECI Regulation is not infringed.

Even though it imposes the complete accountability for an ECI on the organisers, the legal framework in place does not allow the organisers to do much to influence the Commission’s discretion concerning the final outcome of their initiative. The final stage of the ECI is the examination of an initiative by the Commission. After the validation of signatures is completed, the organisers can submit their ECI to the Commission, together with information about the sources of support and funding received (Article 9). The Regulation affords unlimited discretion to the Commission for the follow-up of successfully submitted ECI. It only requires that the Commission’s final legal and political conclusions should be made public within three months after the submission of an ECI (Article 10(1)(c)).

As a result of the European Parliament’s intervention in the negotiation of the ECI Regulation, a public hearing procedure was inserted into the examination stage of an ECI.174 According to the European Parliament, the purpose of the public hearing is to demonstrate that the voice of citizens be heard, and to assure the organisers that the Commission would give serious thought to any possible actions. Article 11 of the ECI Regulation requires that the public hearing must be organised at the premises of the European Parliament and should be attended by representatives of the Commission. No such provision existed in the original Proposal of the Commission, which merely allowed for a four-month timeframe for the Commission to examine a successfully submitted ECI and to set out its conclusions in a Communication.175

Between the submission of an ECI and the date of the public hearing, the Commission must publish the successfully submitted ECI in the register and Commission representatives must meet with the ECI organisers to listen to the details of their proposed initiatives (Article 10(1)(b)). In comparison with the Commission’s original Proposal, the

175 Commission Proposal on the ECI (n 142) Article 11.
follow-up of an ECI was granted additional political importance in the ECI Regulation. Including an opportunity for a public hearing was therefore an improvement to the ECI Regulation. Although it does not have any formal impact on the final decision of the Commission, a public hearing could have an indirect impact on the follow-up of an ECI, as explained earlier. For instance, it could trigger pressure from other EU institutions towards the Commission to take action based on a successfully submitted ECI.

The preceding discussion has illustrated that the ECI Regulation contains a number of potentially obstructive elements for potential ECI organisers, such as the signature thresholds that must be reached for each Member State within one year of campaigning, technical issues regarding the OSCS, and the uncertain nature of the organisers’ potential liability in cases of data misuse. At the same time, the ECI’s framework includes some facilitating elements, such as the ability to collect signatures online, and the opportunity for ECI organisers to present their successfully submitted initiatives at a public hearing. Having described the legal framework of the ECI Regulation, it is now pertinent to give an overview of the development of the ECI since its establishment in 2012.

III. The ECI in practice: The first three years

In the context of the 3-year review of the ECI Regulation, required by Article 22 of the ECI Regulation, the Commission issued a Report highlighting the positive outcomes of the ECI in creating links and networks among EU citizens and facilitating pan-European debates. Notably, the Report did not even mention the fact that none of the successfully submitted ECIs resulted to legislative proposals by the Commission. It noted, however, that the institutional and legal framework of the ECI has presented a number of challenges for the ECI organisers. Notwithstanding this observation, the Report did not present any suggestions to address these challenges, presumably because it was intended to be a starting point for a dialogue between the Commission, ECI stakeholders, and the EU Institutions to identify any necessary reforms. The subsequent section examines the operation of the ECI in light of the Commission’s Report and illustrates the experiences of the first few citizens who experimented with this new participatory mechanism.

176 Francesco Maiani (n 83) 18.
178 Commission 3-year Report on the ECI Regulation (n 177) 16.
A. ECIs under the microscope

As of September 2015, 52 ECIs had been submitted for registration with the Commission. Of those, 32 were registered and 20 were refused registration. 11 ECIs were withdrawn, four of which were re-registered at a later date. 18 ECIs concluded the 12-month collection period without having collected one million signatures. Finally, of all the registered ECIs, only three managed to collect the necessary signatures, namely ‘Right 2 Water’, ‘One of Us’, and ‘Stop Vivisection’. All three proceeded to the public hearing stage and received a reply from the Commission in the form of a Commission Communication. Generally speaking, the submitted ECIs concerned a diversity of topics, from education to environmental issues, and from animal protection to transport. The following table illustrates the variety of topics that were the focus of the submitted (registered and rejected) initiative proposals, grouped into 12 policy areas.\(^{180}\)

*Table 2.1*

**LIST OF INITIATIVE PROPOSALS PER POLICY AREA**

<table>
<thead>
<tr>
<th>Policy area</th>
<th>Proposed initiatives</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Affairs</td>
<td>One of Us</td>
<td>Registered; Successfully submitted</td>
</tr>
<tr>
<td></td>
<td>Unconditional Basic Income (UBI)</td>
<td>Registered</td>
</tr>
<tr>
<td></td>
<td>For a Socially Fair Europe! Encouraging a stronger cooperation between EU Member States to fight poverty in Europe</td>
<td>Registered</td>
</tr>
<tr>
<td></td>
<td>Creation of a European Public Bank</td>
<td>Rejected</td>
</tr>
<tr>
<td></td>
<td>One Million Signatures for a ‘Europe of Solidarity’</td>
<td>Rejected</td>
</tr>
<tr>
<td></td>
<td>Recommend singing the European Anthem in Esperanto</td>
<td>Rejected</td>
</tr>
<tr>
<td></td>
<td>Cohesion Policy for the equality of the regions and sustainability of the regional cultures</td>
<td>Rejected</td>
</tr>
</tbody>
</table>

\(^{179}\) The withdrawal and re-registration of these ECIs was a strategic move, since most of them lost valuable time from the 12 months of signature collection due to the delay in certifying their OSCS. Re-registration thus took place in order to gain back the lost time in spite of the fact that any signatures collected prior to withdrawal were discarded.

\(^{180}\) The form of the table is based on the non-legally binding guide that was issued by the Commission to help ECI organisers identify whether their idea can be turned into an ECI proposal. The guide sets out in alphabetical order the policy areas of the TFEU where the Commission has competence to initiate legislation: [http://ec.europa.eu/citizens-initiative/public/competences#treaties](http://ec.europa.eu/citizens-initiative/public/competences#treaties) accessed 10 August 2015. Details of the subject matters and the legal bases of each ECI are presented in Appendices I and II of this thesis. For an alternative classification of the ECIs in ten policy domains, see Luis Bouza Garcia and Justin Greenwood ‘The European Citizens’ Initiative: A new sphere of EU politics?’ (2014) Interest Groups & Advocacy 1, 19.
<table>
<thead>
<tr>
<th><strong>EU Institutional and Constitutional Affairs</strong></th>
<th><strong>Environment, Climate and Energy</strong></th>
<th><strong>Animal Protection</strong></th>
<th><strong>Research and Industry</strong></th>
<th><strong>Education</strong></th>
<th><strong>Internal Market</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Together for a Europe free from legalised prostitution</td>
<td>Central Online Platform for the ECI</td>
<td>Water and Sanitation are a human right! (Right to Water)</td>
<td>European Free Vaping Initiative</td>
<td>High Quality European Education for All</td>
<td>European Initiative for Media Pluralism</td>
</tr>
<tr>
<td>Rejected</td>
<td>Registered</td>
<td>Registered; Successfully submitted</td>
<td>Registered</td>
<td>Registered</td>
<td>Registered</td>
</tr>
<tr>
<td>Minority SafePack – one million signatures for diversity in Europe</td>
<td>Let me Vote</td>
<td>Pour une gestion responsable des déchets, contre les incinérateurs</td>
<td>Act 4 Growth</td>
<td>Teach for Youth – Upgrade to Erasmus 2.0</td>
<td>Registered</td>
</tr>
<tr>
<td>Rejected</td>
<td>Registered</td>
<td>Registered</td>
<td>New Deal 4 Europe</td>
<td>Education is an Investment!</td>
<td>Registered</td>
</tr>
<tr>
<td>Right to Lifelong Care</td>
<td>Enforce the self-determination human right in the EU</td>
<td>Suspension of the EU climate and energy package</td>
<td>An end to front companies in order to secure a fairer Europe</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rejected</td>
<td>Rejected</td>
<td>Registered</td>
<td>Withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Ensuring the EU membership of a state that emerges from the secession of an EU Member State</td>
<td>End Ecocide in Europe</td>
<td>Registered</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The Supreme Legislative and Executive Power in the EU must be the EU Referendum</td>
<td>Turn me Off!</td>
<td>Registered</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>To hold an immediate EU referendum on public confidence in European Government’s competence</td>
<td>My voice against nuclear power</td>
<td>Registered</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>A new EU legal norm, self-abolition of the European Parliament and its structures, must be immediately adopted</td>
<td>Rejected</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Recommend singing the European anthem in Esperanto</td>
<td>Recommended</td>
<td>Registered</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Strengthen citizens’ participation in decision-making about collective sovereignty.</td>
<td>Registered</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
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</tr>
</tbody>
</table>
Within the 12 policy areas, the proposed initiatives promoted various causes. For instance, ‘One of Us’ and ‘Right to Lifelong Care’ are both categorised as matters of social affairs but their objectives were quite distinct. The former asked the Commission to stop financing activities, such as research projects, that presuppose the destruction of human embryos, while the latter proposed legislation that would oblige Member States to provide long-term health care, particularly to elderly citizens. The two ECIs on telecommunication are additional examples. ‘Single Communication Tariff Act’ asked for the elimination of roaming charges in the EU whereas ‘On the Wire’ concerned the privacy of communications between lawyers and their clients.

Five proposed initiatives linked their objectives directly or indirectly with austerity measures and the economic crisis ¹⁸¹ thus indicating that the ECI can bring to the surface salient and topical issues. Of those proposals, two originated from Greece: ‘One Million Signatures for a Europe of Solidarity’ suggested cancelling part of the Greek debt, and ‘Education is an Investment’ proposed to protect the education budget of a Member State against budget cuts relating to that State’s deficit. Strong connections with Greek anti-austerity movements were also made by the organisers of the first ECI that collected one million signatures, ‘Right 2 Water’, which mainly opposed the privatisation of water services.

Animal protection and environmental matters also stand out as prominent areas, although five of the 12 proposed initiatives were refused registration by the Commission. The majority of the proposals that concerned EU Institutional and Constitutional Affairs were

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<tr>
<th>Telecommunications</th>
<th>Single Communication Tariff Act</th>
<th>Registered</th>
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<tr>
<td>On the Wire!</td>
<td>Registered</td>
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<tr>
<td>Transport</td>
<td>30 km/h – making the streets liveable!</td>
<td>Registered</td>
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<td>Fair Transport Europe – equal treatment for all transport workers</td>
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<td>Budget</td>
<td>Fraternite 2020 – Mobility, Progress, Europe</td>
<td>Registered</td>
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<tr>
<td>Free Movement</td>
<td>Termination of the Bilateral Agreement between EU and Switzerland (Swiss Out)</td>
<td>Withdrawn</td>
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<tr>
<td>External Action</td>
<td>Stop TTIP!</td>
<td>Rejected</td>
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¹⁸¹ See ‘New Deal 4 Europe’, ‘1 million signatures for a Europe of Solidarity’, ‘Education is an Investment’, ‘Creation of a European Public Bank’ and ‘Right 2 Water’.
also found inadmissible, including three proposals with an apparently Euro-sceptic undertone which were submitted by the same individual.\(^{182}\) Of the two ECIs that were registered from this category, one proposed the improvement of the ECI signature collection procedure (‘Central Online Platform for the ECI’) and the other proposed the extension of the voting rights of EU citizens that reside outside of their country of nationality (‘Let me Vote’).

Notwithstanding the above observations, any attempt to discuss the registered and rejected ECIs requires a thorough understanding of the ECI legal admissibility test (Article 4(2) of the ECI Regulation). The test determines the scope of the ECI and thus the extent to which EU citizens can put issues of interest on the EU’s agenda and promote legislative changes. Given that the legal admissibility test is a prerequisite for registering an ECI with the Commission, the task of examining the registered and rejected ECIs is more complicated than simply reading statistics from the above list.

For instance, it would be tempting to take the list of submitted ECIs at face value, find that 43% of all proposed initiatives were refused registration by the Commission, and argue that this is a high number of rejections.\(^ {183}\) Based on this interpretation of the available data, it could be concluded that the Commission has adopted a restrictive interpretation of the test which does not allow for the maximum number of proposed initiatives to be registered. An alternative interpretation could perceive the data as an indication of the misplaced expectations of EU citizens regarding the purpose and scope of the ECI mechanism,\(^ {184}\) or as evidence that citizens are unfamiliar with the EU competence typology.

As for the actors behind the registered ECIs, practice has shown that, contrary to initial concerns,\(^ {185}\) the mechanism has not been hijacked by well-established interest groups or

\(^{182}\) ‘The Supreme Legislative and Executive Power in the EU must be the EU Referendum’ ; ‘To hold an immediate EU referendum on public confidence in European Government’s competence’ ; ‘A new EU legal norm, self-abolition of the European Parliament and its structures, must be immediately adopted’.


\(^{184}\) Commons Select Committee, European Scrutiny, Documents considered by the Committee on 21 July 2015 <www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/342-ii/34212.htm> accessed 15 September 2015; Chapter 4 of this thesis analyses in depth the legal limitations placed on the ECI as a result of the legal admissibility test.

\(^{185}\) Rafal Trzaaskowski, ‘The European Citizens’ Initiative: A victory for democracy or a marketing trick?’ (2010) 9 European View 263, 266.
large EU-level CSOs and NGOs. Such concerns about the need to ensure that proposed initiatives are the expression of grassroots movements were the reason behind the European Parliament’s insistence to add the requirement for a Citizens’ Committee to the ECI Regulation. Indeed, a number of the ECIs presented so far were bottom-up expressions of ordinary citizens’ participation.\textsuperscript{186} ‘End Ecocide’ is a good example of an initiative organised entirely by young activists; it depended on actions by volunteers and did not have any significant sponsorship from big organisations.\textsuperscript{187}

‘Fraternite 2020’ also originated from groups of young citizens, students, and academics. ‘Single Communication Tariff’ and ‘Pour une gestion responsable des déchets, contre les incinérateurs’ were launched by individuals. Four other ECIs – namely ‘Teach4Youth’, ‘Weed Like to Talk’, ‘Turn Me Off’, and ‘Moveurope’ came from Science-Po University. They were submitted by groups of students who experimented with the ECI as part of their course in European Studies. In comparison to these ECIs, ‘Education is an Investment’, ‘30 km/h’, and ‘High Quality European Education for All’ all had some support from local or EU small or medium-size NGOs and think tanks. ‘UBI’ was submitted by a rather well-organised group of citizens that were already active in political organisations but were not affiliated with a particular organisation or political party. Moreover, ‘Education is an Investment’ was launched by a group of activists with the support of ‘To Diktyo’, a small Greek EU-oriented think-tank, and ‘30 km/h’ was backed by a medium-size network of 76 organisations in 18 countries.\textsuperscript{188}

It is also notable that some of the proposed Initiatives that were submitted by larger organisations, such as trade union federations, were rejected as legally inadmissible.\textsuperscript{189} In addition, a well-organised, well-funded ECI that was submitted at the very early stages of the ECI (10 May 2012) and which advocated for a Directive for the protection of dairy cow welfare (‘Dairy Cows’) was withdrawn less than three months after registration (20 July 2012). Its organisers, which included the ‘Ben and Jerry’s’ ice-cream chain, stated in a

\textsuperscript{186} The subsequent discussion is based on information from the researcher’s interviews with ECI organisers, from the ECI websites and from the following sources: Carsten Berg and Janice Thomson, An ECI That Works! (The ECI Campaign, 2014); Luis Bouza Garcia (n 70); Luis Bouza Garcia and Justin Greenwood (n 169).

\textsuperscript{187} According to an organiser, there were a lot of organisations that declared support but they had minimal contribution to the campaign. Interview with an organiser of the ‘End Ecocide’ ECI, March 2014.

\textsuperscript{188} Carsten Berg and Janice Thomson (n 175) 47.

\textsuperscript{189} ‘Minority Safepack’ was launched by FUEN (Federal Union of European Nationalities), and ‘Right to Lifelong Care’ was organised by FERPA (European Federation of Retired and Old Persons).
letter to the Commission that ‘the ECI currently does not work and the effort of making it work detracts from the ability to successfully campaign for a Dairy Cow Directive’. As a result, the organisers stated that they would ‘continue to lobby the EU for an EU Directive on dairy welfare and hope to revisit the ECI when the European Commission address the core issues that are making this took unworkable in its existing format’. It is, therefore, apparent that the ‘Dairy Cow’ organisers perceived the ECI as an additional route to influence the EU law-making process which, however, was not worth the effort that was needed at that point in time.

With regard to the ECI organisers, it has been argued that describing them as ‘ordinary EU citizens’ is misleading, because the majority of them were ‘often more educated than average, with pro-European leanings and militancy backgrounds’. Even if this rather general characterisation has some traction, it does not change the fact that the ECI does not, strictly speaking, seem to be have been monopolised by already well-established large NGOs or CSOs. The majority of organisations that have been involved with the ECI so far are not part of the firmly established organised EU civil society which operates within the Brussels’ traditional lobbying territory. It has also recently been argued that most NGOs are not interested in supporting or bringing ECIs because they prefer the traditional route of institutionalised advocacy and expert dialogue with EU institutions. These remarks confirm initial hypotheses in the literature that the ECI was likely to attract individuals and organisations which could eventually become new players in the field of EU civil society.

The lack of a more diverse body of promoters could be attributed to the lack of awareness about the ECI among EU citizens rather than a general disinterest in the mechanism. Taking this sentiment into account, the main question becomes whether the ECI can

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191 ibid
193 Luis Bouza Garcia (n 77) 137.
194 Luis Bouza Garcia and Justin Greenwood (n 180).
195 Louis Bouza Garcia (n 1) 265; Louis Bouza Garcia (n 77) 137,138.
function as an opportunity for citizens rather than whether it has functioned as one so far. Based on the facts, one may venture to suggest that the ECI is a tool at the disposal of EU citizens; a tool that can be used by anyone with an interest in EU affairs and with an idea worth endorsing. Such a conclusion, however, should be carefully balanced against the outcomes of the ECI campaigns. In other words, the initial willingness of grassroots movements to use the ECI may fade as a result of initial experiences with the procedural framework of the ECI. None of the above-mentioned grassroots ECIs managed to collect the necessary one million signatures. On the contrary, the three ECIs that were successfully submitted to the Commission were endorsed by considerably bigger organisations and already established movements.

The first successful ECI, ‘Right 2 Water’, was organised by EPSU, the European Federation of Public Service Unions which comprises 270 trade unions representing over 8 million workers.\textsuperscript{197} Inter alia, the ECI campaign was supported by the European Trade Union Confederation (ETUC), the European Anti-Poverty Network (EAPN), and the European Environmental Bureau (EEB).\textsuperscript{198} Together, these EU-based CSOs consist of more than 300 member organisations, including national trade unions, as well as voluntary and grassroots groups. What is more, ETUC already had some experience with campaigning because of its pre-Regulation attempt to launch an ECI.\textsuperscript{199} This vast network of CSOs benefitted the ‘Right 2 Water’ campaign by providing access to pools of potential signatories, staff resources, and volunteers for the promotion of the campaign.

Likewise, ‘One of Us’ had the support of numerous national pro-life movements and entities established in the Member States. It also seems that the organisers were no strangers to lobbying or EU agenda setting; one of the initiators, Carlo Casini, is in fact an MEP and member of the AFCO Committee, and the campaign is said to be promoted by the Vatican.\textsuperscript{200} The campaign was run at national level by country coordinators, with a central coordinator overseeing and organising the signature collection process on a full-

\textsuperscript{197} EPSU website, accessible at: <www.epsu.org> accessed 15 September 2015.
\textsuperscript{198} ‘Right 2 Water’ website, accessible at: <www.right2water.eu/node/37/view> accessed 15 September 2015.
time basis from Brussels. The view was expressed that coordination of the campaign from Brussels was a crucial element for the success of an ECI and strongly encouraged potential ECI organisers to make similar provisions.\footnote{Interview with an organiser of the ‘One of Us’ ECI, February 2014.} Full-time staff were also employed by EPSU for the ‘Right 2 Water’ campaign. The third successfully submitted ECI, ‘Stop Vivisection’ was reportedly organised by volunteers and had a more relaxed central coordination than the other two ECIs, yet it was backed by ‘a pan-alliance of more than 250 animal protection groups, scientific organisations and companies selling “animal cruelty-free” products’.\footnote{Carsten Berg and Janice Thomson (n 186) 29; ‘Stop Vivisection’ website \textlangle}www.stopvivisection.eu/en/content/supporters\textrangle accessed 15 September 2015.\footnote{The financial statements of the ECI campaigns are available at the official ECI website.}

In addition to the benefit of strong networks, the three ECIs had access to substantial financial resources. According to the financial statements submitted by the organisers to the Commission (as required by Articles 4(1) and 9 of the ECI Regulation), EPSU contributed 140,000 euros in total to ‘Right 2 Water’.\footnote{Janice Thomson, “A space inside Europe for the public” before “A European Public Space”: The European Citizens’ Initiative and the future of EU public engagement’ \textlangle}5 \textlangle www.involve.org.uk/wpcontent/uploads/2011/03/ECI-A-Space-Inside-Europe-for-the-Public.pdf\textrangle accessed 15 September 2015.\footnote{They stand in sharp contrast to the budget of the ECIs that were launched by grassroots movements: ‘Fraternité 2020’ had an approximate initial budget of 7,000 euros, ‘End Ecocide’ had 3,324 euros and ‘UBI’ 2,580 euros.}

\textbf{B. The experiences of ECI organisers}

The majority of the ECI campaigns were not only less funded than the three successful initiatives, they also had difficulties with raising funds. The cost of organising a signature collection campaign is not negligible. Beyond the expenses of certifying the server for the online collection (Article 6(2) of the ECI Regulation), which could reach up to 30,000 euros, organisers also incurred costs to set up a website, print out leaflets or newsletters, set
up events, and attend conferences for the promotion of their initiatives.\textsuperscript{205} The process for the verification of the signatures alone cost around 2,900 euros for one of the submitted ECIs.\textsuperscript{206} Even Ms. Del Pino, who was talking for the campaign with the largest monetary resources, asserted that their funds were insufficient to develop the campaign at an equal level on both the national and the EU level.\textsuperscript{207}

Besides limited funds and time, translations also posed obstacles for the organisers. An ECI can be translated into multiple EU official languages and uploaded on the electronic register (Article 4). In practice, translations needed to be almost of a professional quality before being approved by the Commission thus causing frustration for the organisers. Recently, this matter was addressed by the EESC, which offered to translate every registered ECI in all EU languages, in an attempt to ‘break down the barriers of bureaucratic obstacles to citizens’.\textsuperscript{208}

The Commission has also taken some actions to address some of the ECI’s teething problems. Such actions concerned problems with the signature collection procedure, which constituted the biggest obstacle to the citizens’ attempts to bring ECIs. As mentioned earlier, one of the most positive aspects of the ECI Regulation was that it allowed signatories to support an ECI online (Article 5(2)). In reality, things were not as positive due to problems created by Article 6 of the ECI Regulation, which requires the setting of a server and software to collect the signatories’ data. The server must be certified in the Member State where the data will be stored. Without going into technical details, the entire procedure of certification is overly complicated for any non tech-savvy individual. Due to the difficulties with certification, the Commission has offered to host the OSCS on its own servers in Luxembourg as a temporary solution.\textsuperscript{209} It has also extended the collection


\textsuperscript{206} Presentation by Mr. Antonio Mellado on behalf of ‘One of Us’ in the ‘ECI Day 2014’ conference, Brussels 15 April 2014.

\textsuperscript{207} Carsten Berg and Janice Thomson (n 186).

\textsuperscript{208} EESC Press Release 024/2015, 9 April 2015, ‘ECI Day: EESC launches main support tool for committed citizens: It will translate ECI submission texts in all EU languages’

\textsuperscript{209} First lessons of Implementation Study (n 205) 34.
deadline for the first nine registered ECIs which lost time from their campaigns as a result of these difficulties.\footnote{Commission offers own servers to help get first European citizens' initiatives off the ground\footnote{<http://ec.europa.eu/isa/news/2012/eci_en.htm> accessed 15 September 2015.}}

In addition, the Commission provided free-of-charge software for the collection of signatures, as required by Article 6(2) of the ECI Regulation. Yet the software was characterised by serious shortcomings and ECI organisers have complained that its operation is impossible without considerable expenditure and constant endeavour. In light of calls for fundamental changes in the design of the system, the Commission contracted a study on the ‘ECI Information and Communication Technology impacts\footnote{Information available at the ECI official website <http://ec.europa.eu/citizens-initiative/public/legislative-framework> accessed 15 September 2015.}’ which reflected on the OSC process and proposed some technical and practical improvements.

Apart from technical teething problems, some of the uncertainties in the interpretation of the ECI Regulation have also been resolved. One of these uncertainties concerned the extent of liability of the members of the citizens’ committee regarding the collection of personal data from signatories. Given that the signature system requires some signatories’ data to allow the support of an ECI, the members of a citizens’ committee are bound by the Data Protection Directive 95/46/EC\footnote{Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.}. In particular, ECI organisers are considered to be ‘data controllers’ within the meaning of the Directive (Recital 21 of the ECI Regulation). As such, they are personally liable for the collection of signatures.\footnote{National legislation implementing Directive 95/46/EC across the Member States should provide that ‘any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.’ (Article 23 of the Directive).} Their liability and the respective penalties for false declarations or fraudulent use of data are determined by ‘applicable national law’ (Articles 12 and 13 of the ECI Regulation).

It has been argued that the wording of the Regulation creates unlimited liability for ECI organisers in cases of data mismanagement, even when such mismanagement results from the actions of volunteers that collect signatures at Member State level.\footnote{Presentation by Alexander Prosser at the ‘ECI Day 2014’ conference, 15 April 2014, Brussels.} If, for example, the privacy law of Italy is violated by local volunteers, the members of the Citizens’ Committee could face charges in Italian courts and subsequently be penalised with fines of
thousands of euros— not to mention the expenditure of hiring a lawyer.\textsuperscript{215} Since the provisions of the Regulation were left open to interpretation, the organisers of the first few ECIs were unsure of their obligations and responsibilities as data controllers. Some were even deterred from collecting signatures on paper because of this uncertainty.\textsuperscript{216}

The Commission has shed some light on the interpretation of the relevant legal provisions, indicating that ECI organisers do not face unlimited liability.\textsuperscript{217} Instead, they are bound only by the national data protection law of the Member State where the main activities of the campaign are being carried out. Even so, compliance with data protection rules is an onerous task. The ECI organisers, who were not acquainted with the interpretation and the requirements of national data protection legislation, found themselves tangled in legal requirements, such as the need to notify competent national authorities before the collection of personal information and to ensure the safe storage of signed paper forms.\textsuperscript{218}

It can be concluded from the above analysis that a successful ECI requires a solid network, as well as financial resources and time. With regards to these three factors, the differences between the successful and the unsuccessful ECIs become apparent. A model of ‘two-speed participation’ is thus discerned: groups of EU citizens can submit an ECI without any support from big organisations but it takes actors with big networks, substantial financial resources and time, and campaign ‘know-how’, to reach the necessary signature thresholds. It has been argued that the interference of organisations in the process of an ECI subordinates citizens’ participation to the preferences of non-elected intermediary actors.\textsuperscript{219} Nonetheless, by virtue of the ECI’s nature, all actors launching campaigns are non-elected and are acting as intermediary parties between citizens (signatories) and EU institutions. Whether these organisers are individuals, members of large CSOs, or trade union federations -as in ‘Right 2 Water’- would not make a difference in this respect. As shown earlier in this chapter, the involvement of these actors, and more generally of

\textsuperscript{215} ibid
\textsuperscript{216} Ana Gorey, Feedback to the Ombudsman (n 196).
\textsuperscript{217} Also, under Article 23 of Directive 95/46/EC, the organisers can be exempted from liability if they prove that they were not responsible for the actions that gave rise to the damage.
\textsuperscript{218} Commission, ‘The European Citizens’ Initiative: Guidelines and recommendations for practical implementation’ (15 April 2013) 15; First lessons of implementation Study (n 205) 34.
interest groups in EU decision-making, is encouraged by the EU institutions. Why then should things be different when it comes to participating via an ECI?²²⁰

It is submitted that, as long as it allows the ECI mechanism to be used by ordinary citizens and volunteers, the ECI Regulation should not be interpreted as implying the complete exclusion of NGOs or CSOs from supporting ECI campaigns. First experiences show that collecting a million signatures across a minimum of seven Member States within one year is a burdensome task. Certainly, to an extent, the success or failure of an attempt to collect signatures depends on factors that are unrelated to the legal framework of the ECI. These are factors such as the motivations and the aims of the ECI organisers, the topic of the proposal, the interaction between the organisers and the public, as well as any previous experience of the organisers with campaigning.

Concluding Remarks

This chapter has demonstrated that the ECI, as a non-binding agenda-setting mechanism, should be assessed vis-à-vis the broader EU institutional framework, including the multiplicity of the actors that influence the EU agenda. In this respect, it was argued that ECIs that are supported by the European Parliament or the Council may have chances of resulting in a legislative proposal even if the ECI Regulation does not provide for a legal obligation on the Commission to act. Beyond such hypotheses about the potential outcome of the ECI to influence EU law-making, the chapter also looked at the negotiation and drafting of the ECI Regulation, as well as the particulars of an ECI’s lifecycle. The discussion also juxtaposed the relevant legal provisions with the empirical findings on the ECI’s first few years of operation.

Ultimately, the ECI has promoted a model of two-speed participation for EU citizens. Whilst there is evidence of the participation of grassroots movements and individual citizens, there are critical differences between these campaigns and the campaigns that managed to reach the one million signature threshold. Money, networks, and time, are prerequisites for a successful ECI. This is not to say that every ECI with these three factors will necessarily succeed in collecting the million signatures. Instead, it is to argue that the signature collection stage of an ECI, which is the first step in the ECI process, is an arduous task.

²²⁰ Adam W Chalmers (n 90).
As this chapter has explained, some of the initial teething problems with the ECI’s legal framework have been resolved. Taking stock of the hurdles faced by the ECI organisers, as well as criticisms of the ECI Regulation, a number of suggestions have been voiced that could potentially close the gap created by this two-speed participation and put the two categories of ECI organisers on a more equal footing. These suggestions mainly revolve around the review of the ECI Regulation and the provision of better support to the ECI organisers, either in terms of financing the campaigns, giving legal advice in respect of data protection matters, redesigning the OSCS, or extending the signature collection time.  

The Commission’s recent 3-year Report on the ECI Regulation is seen by the Commission as the premise for future dialogue with all interested actors, including the European Parliament and the Council, on the implementation of the ECI’s legal framework. By way of contrast, ECI stakeholders, and particularly the ECI campaign, have been pushing for a reform of the legal framework since day one of the ECI Regulation’s implementation. Subsequent chapters of this thesis engage in further discussion on some of the proposals, keeping in mind the Commission’s declaration that it does not prioritise a revision of the ECI Regulation and that it would prefer to seek solutions as part of the current legal framework.

Beyond the experiences and the needs of the organisers, the potential signatories of ECIs also need to be taken into account when examining the added value of the ECI to the EU citizens’ participatory landscape. After all, the ECI aims not only to bring the EU institutions closer to the citizens, but also to ‘complement the set of rights related to the citizenship of the Union’. The way in which the ECI works in practice to achieve this purpose is the focus of the next chapter, which illustrates the connections between some of the campaigning problems previously mentioned and deeper issues of EU citizenship,

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221 See Appendix VI of this thesis for the positions of the EU Institutions, the Ombudsman and the ECI Campaign on the review of the ECI Regulation.

222 One may even wonder about the impact of such a campaign on citizens’ motivation to use the ECI, given the urge of these ECI stakeholders to show that ‘the new participatory tool is under threat and needs urgent changes when it comes to the official review of the ECI rules in 2015.’ See Carsten Berg statement in ‘The ECI Campaign, ‘Workshop on European Citizens’ Initiative shows the instrument is at the crossroads’ (22 October 2014) <www.ecicampaign.org/workshop-on-european-citizens-initiative-shows-the-instrument-is-at-the-crossroads/> accessed 15 September 2015.


224 Commission Green Paper on the ECI (n 8) 3.
which were brought under the spotlight of EU legal scholarship long before the establishment of the ECI.
CHAPTER 3

THE ECI IN LIGHT OF EU CITIZENSHIP

Introduction

EU citizens’ participation in the EU via the ECI materialises in two ways: by organising an ECI and by signing an ECI. ¹ By allowing for citizens’ political participation in these two ways, the ECI has potential to add value to the concept of EU citizenship encompassed in Article 9 TEU (‘every national of a Member State shall be a citizen of the Union’). At the same time, it is evident that the ECI regulatory framework is affected by the contours of EU citizenship and by the on-going dependence of the latter on nationality. This limitation particularly concerns the criteria for the acquisition of EU citizenship, given that each Member State is competent, under national law, to determine the criteria for the acquisition and loss of its nationality. Similarly, Member States are also given the competence under the ECI Regulation to define the criteria according to which their nationals – and thus EU citizens -can organise and sign an ECI.

This chapter focuses upon some technical aspects that relate to setting in motion the ECI mechanism. It will examine, in particular, the signature requirements as well as the inclusion and exclusion criteria for a citizen to participate in an ECI. The chapter starts by setting the scene, illustrating the connection between the ECI and EU citizenship. It contemplates the EU Institutions’ claims that the ECI can advance EU citizenship rights, by discussing those claims in light of the Treaty: Part II of the TEU on the Democratic Principles of the EU, and the relevant TFEU provisions. It then examines the operational side of the ECI and explains the requirements of the ECI Regulation regarding the collection and validation of signatures. These requirements lead to several issues with the accessibility of the ECI to EU citizens.

The operational defects of the ECI are then considered. Chapter 2 already discussed some of the limitations of the ECI mechanism vis-à-vis certain accessibility issues, such as the

obstacles facing the certification of the online signature collection system (OSCS) and the personal liability of the ECI organisers. The current chapter takes stock of the previous analysis and further illustrates how the signature process prevents some of the EU citizens who have exercised their right to free movement from signing an Initiative. The exclusive nature of the ECI with regard to its non-availability to third-country nationals (TCNs) who are long-term residents of EU Member States will also be considered. Linking the exclusion of these two groups (certain mobile EU citizens and all TCNs) with the wider concept and characteristics of EU citizenship, the chapter concludes by exploring whether the ECI should be seen as initiating a new era for the political rights attached to EU citizenship or whether things remain largely unchanged.

Inter alia, it is demonstrated that the ECI confirms the status quo of EU citizenship as a concept that can only be accessed on the basis of national citizenship; third-country nationals and mobile EU citizens are not given any additional rights in terms of civic participation under the ECI. Moreover, the participatory opportunity given to EU citizens is constrained by some technical and operational aspects of the ECI which are determined by the mechanism’s legal design. This finding is pertinent in light of arguments suggesting that EU citizenship is gradually moving away from its traditional focus on market citizenship, from the contours of national citizenship in the context of citizens’ participatory rights, and in light of the current climate of mistrust across the EU towards migration and immigration.

I. Setting the scene

Broadly speaking, a form of citizenship confers membership of a political community on its beneficiaries, and affords them a status that involves rights of political participation in that community.\(^2\) Correspondingly, EU citizenship was formally codified in the Maastricht Treaty to reinforce a sense of collective identity and belonging to the EU political community.\(^3\) It was expected that EU citizens would develop close ties with the


EU institutions as a result of having a formal legal status, and would perceive themselves not only as nationals of a Member State but also as citizens of a multicultural Europe.\(^4\)

In addition to the aim of triggering such psychological effects, the introduction of EU citizenship was also intended to tackle the legitimacy crisis of the EU by introducing a set of political rights for EU citizens.\(^5\) Yet instead of bringing about any substantial new citizens’ rights of civic involvement, the codification of EU citizenship mainly constitutionalised rights which resembled instruments that already existed at national level in the form of petitions and Ombudsman services. The right to petition the European Parliament and the right to complain to the Ombudsman were established at the EU level. They were both promoted as participatory rights, although it would be more accurate to describe them as instruments to address citizens’ complaints. Based on the Maastricht Treaty, the right of EU citizens to vote in European Parliament elections and in municipal elections in their country of residence – if different to their country of nationality – were the main avenues for citizens’ participation in EU politics.\(^6\) Put differently, the political dimension of EU citizenship was primarily conceived in terms of voting rights for European Parliament elections.\(^7\)

Since the enactment of the Maastricht Treaty, active civic involvement and political participation as dimensions of EU citizenship have generally been side-lined.\(^8\) Instead, academic discourse focused on EU citizenship as a ‘formal, rights-bearing status’.\(^9\) The dearth of attention to the political aspect of EU citizenship can be attributed to the absence of any substantial changes to the concept since its codification.\(^10\) By way of contrast, the rights-based model of EU citizenship, which dictated the advancement of the free


\(^5\) ibid


\(^9\) Stijn Smismsans (n 7) 62.

\(^10\) Jo Shaw, ‘Contrasting Dynamics of EU Citizenship’ in Paul Craig, Grainne de Búrca, The Evolution of EU law (OUP 2011) 582.
movement provisions and the principle of non-discrimination, was more fully developed through the jurisprudence of the CJEU.

The rights-based model was initially one of ‘market citizenship’, thus not applying to internal situations which did not include cross-border economic activity. In a series of judgments, the CJEU gradually weakened the need for a link between EU citizenship and economic activity, and in Rottmann it went as far as to declare that EU law should be taken into account when a Member State is contemplating the withdrawal of a person’s nationality. Consequently, Rottmann was said to ‘have replaced the market integration paradigm with that focused on citizens’ rights’.

Despite the enforceable rights which derived from the interpretation of EU citizenship by the CJEU, no substantial changes have been made in terms of political rights since the introduction of citizenship in the Maastricht Treaty. The Luxembourg courts barely touched upon the issue of political participation of EU citizens. The most notable examples of cases were Aruba and Gibraltar, which both concerned voting rights in the European Parliament elections. It has therefore been argued that the notion of EU citizenship rights was developed as a different dimension of EU citizenship than that of citizens’ participation.

Against this background, the ECI appears to be the first participatory right to be included in the Treaty after the only rights to have been previously included being the right to vote in European Parliament and municipal elections, the right to petition the European

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15 For an indicative review of the academic debates around EU citizenship see Dimitry Kochenov, ‘The essence of EU citizenship emerging from the last ten years of academic debate: beyond the cherry blossoms and the moon?’ (2013) 62(1) ICLQ 97.
16 See Jo Shaw (n 10).
19 Stijn Smismans (n 7) 63-66; Stijn Smismans, ‘New Governance – The solution for active European citizenship, or the end of citizenship?’ (2006) 13 ColumJEurL 595, 598-599.
Parliament, and to address the Ombudsman.\(^{20}\) As such, the ECI constitutes part of the attempt in the Treaty of Lisbon to substantiate the role of the EU citizen as a political actor.\(^{21}\) Along those lines, the Commission has presented the ECI as an instrument that aims to ‘complement the set of rights related to the citizenship of the Union’,\(^{22}\) indicating that one of the reasons behind the ECI’s establishment was to compensate for the hitherto lack of mechanisms that encourage EU citizens’ civic and political involvement.\(^{23}\)

The inclusion of Article 11(4) in the Treaty can, indeed, be seen as broadening the concept of active EU citizenship in relation to its pre-Lisbon form\(^{24}\) – or at least as having the potential to broaden it. This view is based on the argument that whilst the concept of EU citizenship in Part Two of the TFEU satellites around the individual participatory rights of EU citizens (Articles 20-24 TFEU), Article 11 TEU is an expression of a broader participatory notion.\(^{25}\) This notion goes beyond any enforceable rights of individuals, such as the right to free movement, and extends to the concept of active EU citizenship by enhancing the role of civil society (Articles 11(1) - (3) TEU) and the citizens (Article 11(4) TEU) in the political affairs of the EU.\(^{26}\)

At first sight, the Treaties somewhat conceal the full scope of the connection between the ECI and EU citizenship. On the one hand, the link between the two in the TEU is established by virtue of the legal geography of both Article 9 TEU and Article 11 TEU which are included in the same Title of the Treaty (Title II). On the other hand, the TEU’s reference to the ECI as a declaratory right is not accompanied by a formal recognition in the TFEU of its function as a participatory right. The absence of any explicit reference to

\(^{20}\) This note refers only to the mechanisms provided for an individual citizen’s participation under the Treaties and specifically under Part II of the TEU. For other participatory mechanisms that exist at EU level but are not stipulated in the Treaties see Michael Nentwich ‘Opportunity Structures for Citizens’ Participation: The Case of the European Union’ (1996) 1 EloP <http://eiop.ac.at/eiop/texte/1996-001.htm> accessed 1 September 2015; For citizens’ participation from the perspective of administrative law see Joanna Mendes Participation in EU Rulemaking. A Rights-based Approach (OUP 2011).
\(^{21}\) Jo Shaw (n 10) 605.
\(^{24}\) Stijn Smisms (n 7) 67-68.
\(^{25}\) ibid
\(^{26}\) ibid
the ECI in the TFEU contradicts the dual nature of the ECI as both a form of public participation and a mechanism bestowing a right of indirect initiative to EU citizens.\textsuperscript{27}

Notwithstanding the mismatch between the TEU and the TFEU, there are clear indicators that Article 11(4) TEU generates some rights for EU citizens. For instance, Article 24 TFEU paved the way for the adoption of the ECI Regulation, which sets out the rights and obligations that flow from the ECI. The article is positioned in Part Two of the TFEU, alongside the rights that derive from the acquisition of EU citizenship. In this respect, the ECI Regulation is the bridge between the declaratory provisions in Article 11(4) TEU and the TFEU substantive rights of EU citizenship. The Commission also acknowledged the nature of the ECI as a citizens’ right in the 2013 Citizenship Report.\textsuperscript{28}

According to the above textual analysis, the ECI constitutes a substantive political right attached to EU citizenship. This conclusion was recently confirmed by the General Court (GC). In the judgment of the first ECI case, \textit{Anagnostakis v Commission}, the GC stated that Article 24 TFEU gives EU citizens a right to bring an ECI, and referred to Recital 1 of the ECI Regulation\textsuperscript{29}, according to which:

\begin{quote}
The Treaty on European Union (TEU) reinforces citizenship of the Union and enhances further the democratic functioning of the Union by providing, inter alia, that every citizen is to have the right to participate in the democratic life of the Union by way of a European citizens’ initiative.
\end{quote}

While the justiciability and enforceability of this right is not completely defined yet,\textsuperscript{30} it is pertinent to go beyond a reading of the Treaty to identify whether the procedural rules of the ECI enable the development of the political, participatory dimension of EU citizenship.\textsuperscript{31} To that effect, the Treaty’s aspirations to encourage EU citizens’ democratic

\begin{flushright}
\textsuperscript{27} ibid
\textsuperscript{28} Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘EU Citizenship Report 2013. EU citizens: Your rights, your future’, COM(2013) 269 final, 3,5; Also see Recital 1 of the ECI Regulation.
\textsuperscript{29} Case T-450/12 \textit{Anagnostakis v Commission}, judgment of 30 September 2015, not yet reported, para 26; Jo Shaw also argued that a clear link between ECI and EU citizenship derives from the location of Article 24 TFEU (n 10) 606.
\textsuperscript{30} There are still six more ECI cases pending before the GC. The scope and enforceability of the rights that derive from Article 11(4) TEU, Article 24 TFEU, and the ECI Regulation, are analysed in Chapter 6 of this thesis.
\textsuperscript{31} Stijn Smismans (n 19) 611.
\end{flushright}
participation should be examined vis-à-vis the practical operation of the ECI’s legal framework.

As will be seen below, the evolution towards an enhanced form of EU political citizenship envisaged with the introduction of the ECI in the Treaties is constrained in two ways. The first constraint is practical and stems from the hurdles faced by EU citizens (both ECI organisers and potential signatories) in their attempt to engage with the ECI. The second constraint relates to the rules on eligibility for signing and organising of an ECI. Both constraints can be traced primarily back to the fact that the ECI carries with it the limitations that result from the complementary role of EU citizenship to national citizenship.32 The following exploration of these constraints and their causes leads to a critical reflection on academic commentators’ expectations that future developments in the area of EU citizenship should be focused on the creation of ‘a more inclusive, multi-layered and multicultural conception of citizenship.’33

II. The operational side of the ECI

The ECI could be seen as evidence that the notion of EU citizenship has transcended its original market-based features and is slowly evolving into a form of ‘political citizenship’.34 In the grand scheme of things, however, it is questionable whether the ECI alone is sufficient to make such a transition, particularly when taking into consideration the obstacles to launching an ECI. Such obstacles limit EU citizens’ attempts to engage with this new participatory mechanism. Some of the most notable impediments to an ECI campaign are a direct consequence of the rules defining the groups of people who are eligible to organise or sign an ECI. These rules are set out in the ECI Regulation and define the technical aspects of the signature collection process thereby determining the accessibility of the ECI.

A. Technical aspects

As a reminder, it should be noted that the ECI Regulation sets two basic thresholds for the collection of signatures. The first prescribes the required number of Member States

33 Dora Kostakopoulou (n 8) 623.
34 Samantha Besson and André Utzinger (n 2) 580; For a discussion on the disconnection of EU citizenship from the internal market see Dimitry Kochenov and Richard Plender, ‘EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text’ (2012) 37 (4) ELRev 369, 386-389.
from which signatures must be gathered, and the second stipulates the number of signatures to be collected from each Member State. These thresholds emphasise the transnational character of the ECI by ensuring that the support for an initiative comes from a representative sample of the EU population. After the end of the 12-month period allowed for the collection of signatures for an ECI, the ECI organisers need to send all of the collected signatures for verification by the competent national authorities of each Member State of those who signed the ECI.

The Member States have established competent national authorities, through national legal instruments, to implement the requirements of the ECI Regulation for the verification of signatures. The responsibility of national authorities for the verification of signatures is defined by the requirements for signature collection outlined in Annex III of the ECI Regulation. The option for a centralised verification check of the signatures at EU level was excluded from the outset, since there is no body at the supranational level which has the necessary information to check the validity of signatures. Therefore upon engaging with Annex III, one should be prepared to deal with a variety of rules for signature collection across Member States.

The diversity of signature requirements is a direct outcome of the leeway given to Member States during the negotiation of the ECI Regulation to determine such requirements. In accordance with the Member States’ preferences, the methods of signature collection, and thus validation, prescribed in Annex III of the ECI Regulation can be divided into two categories: signatures from Member States that ask for personal identification numbers,

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36 Commission Green Paper on the ECI (n 22) 4.
37 All the information on the national competent authorities of the Member States, as well as the national legal instruments that implement the ECI Regulation can be found in: <http://ec.europa.eu/citizens-initiative/public/implementation-national-level> accessed 1 September 2015.
38 Articles 7 and 8 of the ECI Regulation.
39 Commission Green Paper on the ECI (n 22) 7; In the words of a national competent authority official, central coordination of the signatures at the EU level is, even today, a ‘far-fetched suggestion’. Carsten Berg, ‘National Authorities in the ECI Process: First Verification Experiences of the German Signature Verification Office’ in Carsten Berg and Janice Thomson, An ECI That Works (The ECI Campaign 2014) 95.
and from Member States that do not need such personal information. For Member States that require a personal identification document number, the signatures must be validated by the Member State that issued the personal ID (Article 8(1)(b) of the ECI Regulation). For the rest of the Member States, the signatures must be validated either by the Member State of residence or of nationality of the signatory (Article 8(1)(a) of the ECI Regulation).

Given the two distinct sets of signature requirements, Part C of Annex III lists the specific information required by each Member State for the verification of signatures. As things currently stand, ten countries do not require the provision of an ID number to validate signatures; signatories need to give their name, address, date and place of birth, and nationality. These ten countries can be divided into three sub-groups. Firstly, Belgium, Denmark, Germany, and Luxembourg accept the submission of signatures from their residents and from nationals residing abroad provided that the latter have informed the national authorities from their home country of their place of residence. Secondly, Ireland and the United Kingdom will only validate signatures from their own residents. Thirdly, Slovakia, Finland, the Netherlands, and Estonia validate signatures both from their residents and their nationals who reside outside the country. The remaining 18 countries need personal identification document numbers to accept statements of support for verification. Signatories supporting an ECI under these countries need to give the same details as for the above-mentioned ten countries (name, address, date and place of birth, and nationality) in addition to ID card number or passport number or permanent residence certificate depending on each country’s rules. In line with these requirements, Annex III also includes two different forms for the collection of signatures.

Once the 12 month deadline is reached, organisers should supply a list of signatures for each of the Member State to the competent national authority, which then has three months to complete the validation. To examine the repercussions of the varying signature requirements on the political right of EU citizens to participate in an ECI - either by organising or by signing one - it is instructive to take a step back and discuss these

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40 Article 8(1) of the ECI Regulation.
41 The Commission can adopt amendments to the Annexes based on Article 16 of the ECI Regulation. The information used here is in line with the latest modification of the lists in 2015. See infra (n 142).
42 Some examples are: Czech Republic, Greece and Spain.
43 Some examples are: Italy, Cyprus, Hungary.
44 Some examples are: Greece, Romania.
45 The forms and the lists are provided in the Annexes of the ECI Regulation. Validation of signatures takes place either with random sampling or by checking each signature.
requirements as part of the general provisions of the ECI Regulation regarding eligible signatories, keeping in mind that the conditions for bringing an ECI were supposed to be ‘simple and user-friendly’. 46

B. Accessible to all?

Either as a result of its legal design, or by virtue of its operation in practice, the ECI is less accessible to some members of the EU citizenry than others. For instance, only citizens who are of the age to vote in European Parliament elections are able to sign or organise an ECI (Article 3(4) of the ECI Regulation). An eligible signatory must be over 18 in all countries except Austria, where the voting age is set at 16. 47 At the time of the negotiations on the ECI Regulation, the signatories’ age limit was agreed despite opinions voiced by MEPs who argued that the limit should be set at 16 in order to generate more debates among young people regarding future EU policies. 48 Although the ECI Campaign is currently advocating a change to the ECI Regulation to lower the age of eligibility to 16, 49 the Commission and the Council do not seem to share this view.

Participation by young people could indeed have benefitted both the ECI organisers and young EU citizens. The former would have probably been able to find support for their ECI campaign more easily, particularly given that younger people are generally more competent with social media where campaigners promote their ECIs. As for young people, they would have the ability to become engaged with EU matters that may currently fall outside of their radars.

A recent study conducted for the European Commission regarding young people’s views about political participation indicated that they prefer new forms of political engagement, such as signing petitions. 50 Moreover, the ECI has appealed to younger citizens so far.

46 Commission Green Paper on the ECI (n 22).
50 Report produced for the European Commission by the Education, Audiovisual and Culture Executive Agency (EACEA) ‘Political Participation and EU Citizenship: Perceptions and Behaviours of Young People
Statistics from the past three years indicate that the majority of the members of ECIs’ Citizens’ Committees were persons aged 21-30.\(^{51}\) Notwithstanding the potential (albeit practically unknown) benefits of people aged below 18 being allowed to sign ECIs for ECI campaigns and underage citizens, the importance of their exclusion should not be overstated. After all, EU citizens in all Member States can sign an ECI the moment they turn 18 and, if an underage person is interested in the topic of an ECI, she can always volunteer to collect signatures. It is thus questionable whether lowering the age limit would make any valuable contribution to the attempts to foster an active form of EU citizenship through the ECI.

On a different note, disabled citizens are also practically excluded from signing ECIs, since neither the OSCS nor the paper forms facilitate the endorsement of an ECI by such citizens in any particular way.\(^{52}\) In the 2013 Citizenship Report, the Commission mentioned that it was proposing measures to strengthen the rights of people with disabilities, but those measures only referred to facilitating the mobility of those people.\(^{53}\) There was no reference to facilitating political participation via an ECI or other participatory mechanisms. In fact, it can be noted as a general observation that the 2013 Citizenship Report barely referred to the ECI at all, except for briefly remarking that the Commission will continue to promote its use.\(^{54}\)

Since the drafting of the ECI Regulation, concerns have been voiced about the negative impact of excessive data requirements on EU citizens’ engagement and on the willingness of EU citizens to launch an ECI campaign.\(^{55}\) On this basis, it was contended that the ECI


\(^{52}\) This issue was raised by some ECI organisers in the workshop ‘An ECI that works’, Brussels, 5 December 2013.


\(^{54}\) ibid.

\(^{55}\) A survey conducted by ECAS during the negotiations of the ECI Regulation indicated that there was strong resistance from the majority of the respondents to provide their personal data. The survey had a rather small sample of 360 responses which, however, were collected from citizens of the 27 Member States as well as from citizens of accession candidate countries on the issue of ID requirement; The ECI Campaign, ‘EU citizens strongly dissatisfied with the personal data requirement in the Citizens’ Initiative draft regulation, survey reveals’ 4th October 2010 <www.citizens-initiative.eu/?p=395> accessed 1 September 2015;

Similarly, an e-voting pilot research conducted among Austrian students showed that students were more
mechanism is less accessible to the citizens of the 18 countries that require the provision of personal data such as national ID or passport numbers than to the citizens of the ten countries that have more lenient signature requirements. The outcome of the empirical research confirms that the ECI organisers share the concerns over data requirements. In the view of most of the organisers, some countries – such as France and Italy – require excessive personal data for the purpose of an ECI.\(^{56}\) In turn, the need for such data deters citizens from signing an ECI. For instance, one of the organisers of ‘Right 2 Water’ asserted that the number of signatures coming from Member States which require personal ID numbers would have been ‘at least double’\(^{57}\) if such requirements did not exist. Similarly, the organisers of ‘UBI’, ‘30 km/h – making streets liveable’ and ‘Education is an Investment’ mentioned that EU citizens expressed reluctance or discomfort with providing their personal data.\(^{58}\)

The representative of ‘End Ecocide’ resorted to statistics showing the number of people who click on ‘sign’ at the online signature collection form and to the number of people who actually finalise and submit their signatures. The statistics indicate that, in total, only 44% of the people who clicked on the relevant section ended up signing the ECI.\(^{59}\) In her view, the fact that this percentage differs from country to country, together with the observation that the numbers are higher in countries with stricter data requirements, points to a correlation between citizens’ willingness to sign and the amount of data requested from each citizen for the verification of the signature.


\(^{57}\) Jerry Van den Berge, ‘Water and Sanitation are a Human Right! Water is a Public Good, not a Commodity!’ in Carsten Berg and Janice Thomson, An ECI That Works (The ECI Campaign 2014) 19.

\(^{58}\) Conclusions from interviews conducted by the author with ECI Organisers.

\(^{59}\) Prisca Merz, ‘Feedbacks from "End Ecocide in Europe"’ to European Ombudsman’s Own-Initiative inquiry (n 56).
The views of the organisers should be read with a caveat; there are no available statistics on the reasons why citizens refrain from signing or on the number of citizens who have complained about data requirements. Despite this caveat, the expression of hesitation by citizens should not come as a surprise, especially in light of the current climate of distrust around the use and abuse of personal data in the aftermath of the NSA scandal\textsuperscript{60} and incidents of identity theft in Bulgaria and Romania.\textsuperscript{61} Furthermore, issues of privacy and data protection came into the spotlight recently with the case of \textit{Google Spain v AEPD and Mario Costeja González},\textsuperscript{62} where the CJEU recognised the right to be forgotten. The applicant was allowed to request Google to remove links with his personal information from its internet search engines. Privacy and data protection, which constitute rights enshrined in Article 7 and 8 of the Charter respectively, were also emphasised through the annulment of the Data Retention Directive by the CJEU.\textsuperscript{63} These recent events may have fuelled the reluctance of EU citizens to provide their ID or passport numbers to sign an ECI.

At the same time, the relatively unknown nature of the ECI among EU citizens could also be the source of citizens’ reluctance.\textsuperscript{64} Citizens who have never heard of the ECI may be suspicious about the signature requirements since they would not be aware of the security requirements imposed by the ECI Regulation on ECI organisers for the collection of personal data. In fact, not only are there strict technical specifications for certifying the OSCS, organisers also face personal liability for any misuse of collected data.\textsuperscript{65} In addition, most organisers use the OSCS provided by the Commission and therefore have

\textsuperscript{60}The scandal refers to the 2013 reports about US National Security Agency’s secret surveillance programmes. See \textless www.bbc.co.uk/news/world-us-canada-23123964\textgreater accessed 1 October 2015; For a discussion on the Internet and the protection of privacy see Council of Europe ‘Snooping on People’s Privacy – the Implications of Internet Mass Surveillance on Human Rights’ ALER-T (2013) 11, 9 December 2013.

\textsuperscript{61}See \textless www.romanianewswatch.com/2008/08/international-identity-theft-ring.html\textgreater accessed 9 October 2014; First Lessons of Implementation Study (n 56) 39.

\textsuperscript{62}Case C-131/12 \textit{Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González}, judgment of 13 May 2014, not yet reported.

\textsuperscript{63}Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31; Joined Cases C-293/12 and C-594/12 \textit{Digital Rights Ireland and Seitlinger and Others}, judgment of 8 April 2014, not yet reported.

\textsuperscript{64}ECI Organisers’ replies to European Ombudsman’s Own-Initiative inquiry (n 56), See question 8: ‘Do you have any concerns or comments in relation to the treatment of personal data provided by citizens signing an initiative (either online or on a paper form)?’

\textsuperscript{65}See Chapter 2 of this thesis.
no direct access to the data, which means that there is little room for doubt when it comes to the security of the information that is collected online.

The mismatch between the amounts of data required from signatories of different Member States was said to contradict Recital 4 of the ECI Regulation, according to which citizens should be subject to similar conditions for supporting an ECI regardless of their Member State of origin.66 The argument is based on the view that citizens of Member States that require ID numbers or passport numbers or other similarly sensitive personal data are less willing to sign an ECI than citizens of the other Member States and thus they have less access to the ECI.67 In this respect, the data requirements set out in the ECI Regulation could be seen as contrasting with Article 9 TEU, which states that ‘in all its activities, the Union shall observe the principle of the equality of its citizens’. This disparity becomes more evident when Article 9 and Article 11(4) TEU are perceived as part of the TEU provisions on democratic principles, indicating that the more generic provision of Article 9 TEU expands to cover the more specific Article 11(4) TEU.68

In theory, further inequalities in citizens’ participation arise from the signature quotas set for each Member State. Article 7(2) of the ECI Regulation specifies that there are thresholds of signatures to be reached in at least seven Member States.69 In accordance with the required numbers of signatures, which are prescribed in Annex I of the ECI Regulation, the 28 Member States can be grouped into four categories: 10 countries require between 1,000 and 10,000 signatures70 (Category A), 9 countries require between 10,000 and 20,000 signatures71 (Category B), two countries set a minimum of 20,000 to 40,000 signatures72 (Category C) and five have a minimum of 40,000 to 80,000 signatures (Category D):

67 Elizabeth Monaghan (n 55).
69 See Chapter 2 of this thesis.
70 Estonia, Cyprus, Malta, Slovenia, Ireland, Croatia, Lithuania, Denmark, Slovakia and Finland.
71 Bulgaria, Austria, Sweden, Belgium, Czech Republic, Greece, Hungary, Portugal, Netherlands.
72 Romania and Poland.
Table 3.1

MINIMUM NUMBER OF SIGNATORIES PER MEMBER STATE

<table>
<thead>
<tr>
<th>Signatures</th>
<th>Country</th>
<th>Signatures per Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. 1,000 – 10,000</td>
<td>Estonia, Cyprus, Malta, Luxembourg</td>
<td>4,500</td>
</tr>
<tr>
<td></td>
<td>Slovenia</td>
<td>6,000</td>
</tr>
<tr>
<td></td>
<td>Latvia</td>
<td>6,750</td>
</tr>
<tr>
<td></td>
<td>Ireland, Croatia, Lithuania</td>
<td>9,000</td>
</tr>
<tr>
<td></td>
<td>Denmark, Slovakia, Finland</td>
<td>9,750</td>
</tr>
<tr>
<td>B. 10,000 – 20,000</td>
<td>Bulgaria</td>
<td>13,500</td>
</tr>
<tr>
<td></td>
<td>Austria</td>
<td>14,250</td>
</tr>
<tr>
<td></td>
<td>Sweden</td>
<td>15,000</td>
</tr>
<tr>
<td></td>
<td>Belgium, Czech Republic, Greece, Hungary, Portugal</td>
<td>16,500</td>
</tr>
<tr>
<td></td>
<td>Netherlands</td>
<td>19,500</td>
</tr>
<tr>
<td>C. 20,000 – 40,000</td>
<td>Romania</td>
<td>24,750</td>
</tr>
<tr>
<td></td>
<td>Poland</td>
<td>38,250</td>
</tr>
<tr>
<td>D. 40,000 – 80,000</td>
<td>Spain</td>
<td>40,500</td>
</tr>
<tr>
<td></td>
<td>Italy, United Kingdom</td>
<td>54,750</td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>55,000</td>
</tr>
<tr>
<td></td>
<td>Germany</td>
<td>74,250</td>
</tr>
</tbody>
</table>

The number of signatures required from each Member State is the sum of its MEPs multiplied by 750 which is the total number of MEPs. Since the thresholds were decided in this way, they have inherited the same shortcoming as those of the digressively proportional allocation of MEPs: one citizen does not equal one vote. As such, the signature of a citizen from one of the countries of Category D of the above table carries less weight than the signature of a citizen from a country of Category A.73 Further issues arising from the allocation of signatures with regard to the equality of voting have been

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sufficiently discussed in other publications and thus there would be little value in repeating them here.

It is more valuable instead to examine the implications of the signature allocation system for citizens. The central issue in this respect is whether citizens of certain Member States are excluded from campaigns because of the signature thresholds. Put differently, inequalities of opportunities in citizens’ participation are likely to arise if some Member States are excluded from the campaigners’ efforts. In this regard, an observation stands out from the data collected from the three successful ECIs: overall, the threshold of signatures was reached in more countries in Category D than those in Category A. This could be an indication that the three most successful campaigns may have focused on collecting signatures from the largest Member States in order to reach and exceed the required one million signatures more efficiently. It is striking to note that of the 1,659,543 signatures collected by ‘Right 2 Water’, 1,236,455 came from Germany and 65,233 from Italy. Likewise, of the 1,721,626 signatures collected by ‘One of Us’, 623,947 came from Italy, 137,874 from Germany, and 144,827 from Spain. Italy and Germany were also the countries with the most verified signatures in ‘Stop Vivisection’, with 690,325 and 164,304 signatures respectively.

There could be multiple reasons behind the strategy of the campaigners and the outcome of the campaigns. For example, the topic of the ECI was perhaps more appealing to the citizens of those countries. The promotion of the campaign could also have been more successful in those countries than in others because it was embraced by national media and personalities. For instance, ‘Right 2 Water’ gained attention in Germany after a much-discussed TV documentary on water privatisation, whilst ‘One of Us’ was publicly endorsed by the Pope. Another reason could be the difficulty in keeping up with and coordinating a campaign across all 28 Member States. Although further quantitative and qualitative research is necessary to draw more precise conclusions from the data, it is sufficient to note at this point - in a rather preliminary manner - that citizens from smaller

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74 Michael Dougan (n 73) 1824; Graham Smith (n 1); Elizabeth Monaghan (n 55).
75 See Appendix IV to this thesis ‘Country-by-country signature thresholds met by ECIs’; Data from the European Commission 3-year Report on the ECI (n 51) 11; Only data from the three successful ECIs are used here because they are the only official data published by the Commission.
78 European Commission 3-year Report on the ECI (n 51) 11.
Member States were not necessarily ignored by the ECI campaigns. Despite the focus of campaigners on collecting signatures from countries with larger population, there is also evidence that the citizens from the Member States of Categories A and B were not entirely left out of the attempts of the organisers, especially in the ‘One of Us’ campaign. Moreover, the data indicates that signatures from only four countries were not declared in the total of collected signatures for the three ECIs, demonstrating that there was some sort of engagement with the campaigns across the vast majority of the 28 Member States.

Apart from the constraints to citizens’ participation described above, which arise from the system of signature allocation prescribed in the ECI Regulation, there is a more compelling issue to be addressed. The accessibility to an ECI emanates from and depends upon one’s status as a Member State national and thus as an EU citizen. Normatively speaking, all EU citizens should be able to sign or organise an ECI and everyone who is not an EU citizen should be excluded from participating in an ECI. Yet, despite the rhetoric of the ECI being a tool for EU citizens, the ECI Regulation excludes a number of citizens from organising or endorsing an ECI. It is revealing that some EU citizens who have exercised their free movement rights can be left out of signing or even organising an ECI.

**III. The ECI and EU citizenship: nothing new under the sun**

Could it be that the ECI, in its attempt to alleviate the EU democratic deficit, is creating a participatory deficit by prohibiting some mobile EU citizens from signing? This prohibition does not arise from the specifics of Article 11(4) TEU. Instead, it stems from the provisions of the ECI Regulation or specifically, as will be subsequently explained, from the juxtaposition of the Member States’ varying requirements to verify an ECI’s collected signatures. The resulting situation can be parallelised with the loss of voting rights both in the Member State of residence and nationality for some EU citizens who exercise their free movement rights. On this matter, it has been commented that ‘[i]t is ironic that, while the EU exists in part to encourage mobility between the Member States, it gives rise at the same time to a structural “citizenship deficit”’.79 In the same way, the rules implementing the ECI create a participatory deficit vis-à-vis the right to sign an ECI.

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79 Jo Shaw (n 6) 2553.
A. Exclusion of EU citizens from signing an ECI

At the time of the negotiations on the ECI Regulation, the Commission emphasised that the establishment of a system for the verification of citizens’ signatures should be guided by a twofold objective. Firstly, Member States should be able to guarantee the veracity of signatures without imposing restrictive requirements on citizens. Secondly, the agreed system should not impose any unnecessary administrative burdens on Member States. Two alternative options were put on the table: the verification of citizens’ signatures should take place either in their Member State of nationality or in their Member State of residence. At the end of the day, each Member State was left to opt for one or the other individually.

The system that was agreed may be more efficient than others in terms of limiting the administrative burdens of Member States, but it mixes residence-based criteria with nationality-based criteria for signature allocation, thus indirectly precluding some EU citizens from taking part in an ECI. It would appear that the Commission’s declaration in its Green Paper on the ECI that ‘any approach chosen would need to allow EU citizens that reside outside their country of origin to support citizens’ initiatives’ was ignored in the later stages of the ECI Regulation’s drafting. To begin with, the current signature assignment system does not allow EU citizens who reside outside their country of nationality to choose whether they would like to sign under their country of nationality or their country of residence. For instance, Belgian, Danish, German, and Luxembourg nationals residing outside of their country of nationality can only sign under their home country if they have informed their national authorities of their new place of residence.

To use a further example, a Bulgarian national living in Cyprus cannot contribute to the number of statements of support needed for Cyprus because the authorities of the latter only validate signatures based on personal identification document number (identity card or passport) issued by the Cypriot authorities. In such instances, nationality seems to be a more important citizen-Member State link than residence. Putting this sentiment aside, the

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80 Commission Green Paper on the ECI (n 22) point 5.
81 Michael Dougan (n 73) 1827-1828.
82 Commission Green Paper on the ECI (n 22) point 5.
83 Michael Dougan (n 73) 1827-1828.
84 This situation is the same for all EU citizens who are residing in a Member State which only verifies personal documents issued by its national authorities. See ‘Requirements to sign up to a European Citizens’ Initiative’ <http://ec.europa.eu/citizens-initiative/public/how-to-signup> accessed 1 September 2015.
lack of a choice as to the country with which a person would like to be associated when signing an ECI is not of major importance if the person is still able to participate; after all, the ECIs are supposed to be transnational in character.

By contrast, some EU citizens residing outside of their country of nationality do not have the option to endorse an ECI. Their exclusion is a consequence of the intersection of the signature requirements of their Member State of nationality with those of their Member State of residence. For example, UK or Irish nationals residing in France cannot use their residence link with France to sign an ECI. At the same time, they cannot use their nationality link with the UK or Ireland, since these countries only verify the signatures of their residents. Moreover, EU citizens who reside outside of the EU are only able to sign an ECI if their Member State of nationality allows it. It is thus apparent from these observations that, when it comes to the signatories of an ECI, the emphasis is generally placed on a citizen’s nationality rather than where she resides.

Conversely, the ECI Regulation defines who can organise an ECI based on the criterion of residency. Article 3(2) of the ECI Regulation imposes a precondition: an ECI can only be proposed by a citizens’ committee of seven EU citizens who are residents of at least seven different Member States. Seven EU citizens originating, for instance, from the UK, who are residents of seven different Member States, are able to organise an ECI on a topic that affects them and their fellow citizens in each of their Member States of residence. Nevertheless, due to the different signature requirements explained above, some of those ECI organisers, who have not acquired the nationality of the country in which they reside, may be unable to sign their own ECI.

Although residency is a set criterion for the eligibility of the Citizens’ Committee, the eligibility of an EU citizen to sign an ECI remains at the discretion of the Member States. Member States were responsible for deciding whether to allow signatures on residency-based or on nationality-based criteria. The ad hoc exclusion of EU citizens from signing an ECI has been criticised by the ECI organisers since the ECI came into existence. Although the cause of this problem is the national preferences of Member States, some ECI organisers blame the Commission for drafting the ECI Regulation without foreseeing how

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85 UK only validates signatures from residents, and France only validates signatures from nationals.
86 In the list of the requirements to sign an ECI (n 84) it is specifically mentioned that ‘UK/ Irish nationals living in another member state should select that member state’. 
the respective provisions would operate in practice. At a conference on the ECI in 2013, ECI organisers remarked that a number of potential supporters were lost as a result of the provisions, and that numerous mobile EU citizens complained about not being able to sign ECIs. The matter was also raised with the European Ombudsman as part of her own-initiative inquiry on the ECI. Before reflecting on the meaning of this exclusion, it is pertinent to discuss the ban on participation of another group of citizens: TCNs.

**B. Exclusion of Third-Country Nationals from organising or signing an ECI**

TCNs who are legally resident in the EU are excluded from organising or signing an ECI, even when they are considered to be long-term residents under EU law. At first sight, such an outright exclusion does not tally with the general attitude of the Council Directive 2003/109 towards TCNs. The Recital to the Directive specifically states that ‘the legal status of third-country nationals should be approximated to that of Member State nationals’ and that long-term residents should be able to enjoy a set of rights similar to those enjoyed by EU citizens. Moreover, the Commission has argued in the past that the legal status granted to TCNs could potentially develop into ‘a form of civic citizenship’.

The ECI Regulation is not consistent with such declarations. During its drafting, the inclusion of TCNs who are long-term residents was not discussed by either the Commission or the European Parliament.

The attitude of the EU institutions could be attributed to the wording of Article 11(4) TEU, which specifically refers to citizens who are nationals of Member States. Although the exclusion of TCNs from the scope of the ECI is required by the relevant Treaty provision,

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87 Conversation with an ECI organiser, 6 December 2013.
88 Ana Del Pino (‘One of Us’), Prisca Merz (‘End Ecocide in Europe’) comments in ‘An ECI that Works’ conference, Brussels, 5 December 2015. There was even a petition to the European Parliament from a Dutch national who was living in Austria for more than 20 years and could not take part in an ECI. By the time PETI Committee replied to the petition, the rules applying to Dutch nationals changed. Since the situation was addressed, the petition did not proceed any further. See: Committee on Petitions, Petition 02/84/2013 by Robert Olaf de Clercq (Dutch) concerning participation in a European citizens’ initiative.
92 Only the EESC Opinion mentioned the inclusion of TCNs in the scope of an ECI: see Opinion of the European Economic and Social Committee (SCO/001).
it gives rise to inconsistency when discussed in light of other political rights bestowed upon TCNs. This is clearly the case where the current status of the ECI is considered vis-à-vis the case of Spain v UK. In that case, Spain challenged certain UK measures that allowed Commonwealth citizens, who were residing in Gibraltar but were not Member State nationals, to vote in European Parliament elections. The ECJ ruled in favour of the UK, allowing the group of TCNs to vote in the European Parliament elections.

Spain v UK is an example of the CJEU’s willingness to allow a group of citizens to benefit from EU political rights despite the lack of any connection between those citizens and the single market or between those citizens and the European Parliament. It is this ruling that leads to an inconsistency: whilst some TCNs are able to vote in European Parliament elections, no such nationals are granted the more informal democratic right to organise and sign an ECI. Even though this claim may hold true, the case of Spain v UK could be alternatively interpreted to explain the exclusion of TCNs from signing or organising an ECI as the case confirms the dependence of EU citizenship rights on national law. Commonwealth TCNs were entitled to vote in European Parliament elections because the UK permitted it in accordance with its competences and in compliance with (then) prevailing Community law. In the same vein, the right to participate in an ECI indirectly depends on national provisions that define the nationals of each Member State, thus effectively excluding long-term resident TCNs from participating in an ECI.

The prohibition on long-term resident TCNs from signing an ECI goes to the heart of the arguments that the concept of EU citizenship is slowly decoupling from nationality. It has been argued, for example, that the change in the wording of the Treaty provision on citizenship from ‘[c]itizenship of the Union complements national citizenship’ (ex-Article 17 TEC) to ‘[c]itizenship of the Union shall be additional to national citizenship’ (Article

93 Michael Dougan (n 73) 1821-1822.
94 Case C-145/04.
95 Spain argued that the measures violated Articles 17, 19 and 189 of the then EC Treaty, because they allowed persons who were not EU citizens to vote at EU elections.
97 Michael Dougan (n 73) 1822.
98 Leonard FM Besselink and Jan Herman Reestman, ‘Dynamics of European and national citizenship: inclusive or exclusive?’ (2007) 3(1) EuConst 1, 2.
99 Case C-145/04.
100 Samantha Besson and Andre Utzinger (n 2) 576.
20 TFEU) could open the door to long-term resident TCNs obtaining EU citizenship without the need to first obtain national citizenship from a Member State.\textsuperscript{101}

The preceding argument can be summarised as follows: If EU citizenship complements national citizenship then national citizenship is an absolute prerequisite for EU citizenship. If, however, EU citizenship is additional to national citizenship – as stipulated by the Treaty of Lisbon – then there is a possibility that EU citizenship can exist without the need for national citizenship. In this respect, Schrauwen supports the view that the concept of EU citizenship could become detached from that of national citizenship, allowing long-term resident TCNs to benefit from the full range of rights and duties associated with EU citizenship.\textsuperscript{102} Nevertheless, this assertion is unfounded when considered in the context of the ECI as a participatory right attached to EU citizenship.

Academic commentators who have adopted views similar to Schrauwen’s\textsuperscript{103} would be disheartened by the current ECI Regulation. The Regulation does not give any signs of the aforementioned detachment. It does not suggest that the ECI encapsulates such a progression of EU citizenship or that the EU Institutions have revisited EU citizenship in relation to political rights for TCNs. Moreover, the overall design of the ECI does not reveal a vision of EU citizenship as citizenship that will be detached from national citizenship or that could be created by ‘thickening out the concept of “legal residence” in the Member States’.\textsuperscript{104} TCNs are left outside the scope of the Regulation, in the same way they are generally not afforded the right to vote in local, national or European Parliament elections.\textsuperscript{105}

It can be argued that the exclusion of long-term resident TCNs is incongruent with the fact that some Member States reserve rights of residence for persons who are able to show that

\textsuperscript{101} Annette Schrauwen (n 7) 60.
\textsuperscript{102} ibid
\textsuperscript{103} For commentators who support the inclusion of TCNs into the scope of EU citizenship see Dora Kostakopoulou, ‘Invisible Citizens? Long-Term Resident Third-Country Nationals in the EU and Their Struggle for Recognition’ in Richard Bellamy and Alex Warleigh-Lack, \textit{Citizenship and Governance in the European Union} (Continuum 2001); Andreas Follesdal, ‘Third Country Nationals as European Citizens: The case Defended’ in Dennis Smith and Sue Wright (eds) \textit{Whose Europe? The Turn towards Democracy} (Blackwell 1999).
\textsuperscript{104} Norbert Reich, ‘Union Citizenship-Metaphor or Source of Rights?’ (2001) 7 ELJ 4, 18-19.
\textsuperscript{105} Although 15 Member States allow all or some TCNs to vote in local elections: Belgium, Denmark, Finland, Ireland, Luxembourg, Netherlands, Portugal, Spain, Sweden, UK, Estonia, Hungary, Lithuania, Slovenia, Slovakia.
they have been integrated in that particular State.\textsuperscript{106} For instance, a TCN needs to pass an examination and demonstrate integration in Dutch society in order to establish herself in the Netherlands.\textsuperscript{107} Even after proving this type of bond with her place of residence, she would still be prohibited from casting her opinion by signing an ECI. Admittedly, signing an ECI may not be the primary concern of a long-term TCN compared to claiming rights for her family\textsuperscript{108} or the right to mobility between Member States.\textsuperscript{109} Even so, the exclusion of this class of citizens affects the type of issues which can reach the Commission through an ECI. Issues concerning long-term resident TCNs are unlikely to form the subject-matter of a proposed ECI given the difficulties facing potential organisers in trying to collect the necessary number of signatures.

Banning long-term resident TCNs from signing an ECI seems to be incongruous with other participatory rights that exist at EU level. TCNs are allowed to bring a petition to the European Parliament and complaint to the Ombudsman (Articles 227 and 228 TFEU respectively). These political rights are included in the Article 20 TFEU provisions on EU citizenship yet they are not confined to the use of EU citizens.\textsuperscript{110} Nonetheless, the reasons for such a limitation may simply be attributed to the potential practical difficulties that Member States would face in verifying the signatures of non-nationals.

Putting these thoughts aside, the ECI’s design (with respect to long-term TCNs) tallies with the legal geography of Article 11(4) TEU in Title II of the TEU, which comes after a reference to EU citizenship (Article 9 TEU). Without speculating about the wishes of the Treaty drafters, suffice to say that, currently, the ECI as a participatory mechanism does not open the doors to an expansion of the political dimension of EU citizenship beyond the nationals of the Member States. Instead, the ECI has inherited the basic characteristics of the existing institution of EU citizenship: the heterogeneity of the conditions for acquiring

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\textsuperscript{106} See for example Netherlands.
\textsuperscript{107} See relevant case C-508/10; Leonard Besselink and Jan Herman Reestman (n 98) 4.
\textsuperscript{108} Article 8 of the European Convention on Human Rights; Case C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-6279.
\textsuperscript{109} Article 14 of Directive 2003/109/EC.
\textsuperscript{110} Case C-145/04 para 73; Also see First Lessons of Implementation Study (n 56), where it is stated that ‘[w]hile the first two are linked to a situation which allegedly negatively affected the individual, the ECI is a tool for setting the EU agendas and, therefore, the corresponding rights, for example to petition the EP, complain to the Ombudsman or sign an ECI, do not seem comparable.’
and losing nationality of a Member State and the dependence of those conditions on national provisions and legislation.\textsuperscript{111}

C. Reflections and the Way Forward

Despite the alleged transnational character of the ECI, the signature collection and validation requirements confirm that Member States remain by and large the provider and controller of EU citizenship rights and thus of the right to become involved in an ECI.\textsuperscript{112} The prevalence of distinct national citizenship models implies that there is no common framework defining which EU citizens are included or excluded from signing an ECI. As a solution to general problems of disenfranchisement, and in order to realise the full potential of EU citizenship, albeit not in the context of the ECI per se, Kostakopoulou has suggested conferring full franchise upon EU citizens in their state of residence and strengthening formal and informal participatory mechanisms.\textsuperscript{113} The ECI only partially opens the way to such a development, by virtue of its character as an informal participatory mechanism. At the same time, the ECI is further proof that the conditions which could allow for the detachment of the status of EU citizenship from the limitations of nationhood have not yet emerged.

The exclusion of TCNs from the ECI can be explained by arguing that one of the ECI’s aims is to promote the concept of a common EU political identity\textsuperscript{114} and a sense of alliance between EU citizens across Europe. Migration is a politically sensitive topic connected to feelings of unease, especially in this day and age.\textsuperscript{115} The exclusion of EU citizens from signing an ECI is more troublesome. In this regard the ECI Regulation resembles the

\textsuperscript{111} Theodore Konstadinides, ‘La fraternite europeene? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU citizenship’ (2010) 35(3) ELRev 401, 414.
\textsuperscript{112} Christina Reh (n 32) 625.
\textsuperscript{113} Dora Kostakopoulou (n 11) 240.
\textsuperscript{114} Michael Dougan (n 73) 1822.
\textsuperscript{115} In a recent news article, UK Home Secretary Theresa May spoke of the ‘tragic consequences of a broken European migration system’ and put forward statistics to argue for the reduction of net migration from within the EU. Theresa May ‘A borderless EU harms everyone but the gangs that sell false dreams’ (The Sunday Times, 29 August 2015) <www.thetimes.co.uk/article/1600014.ece> accessed 1 September 2015. In addition, the 2015 Eurobarometer survey indicated that immigration is currently the primary concern of EU citizens across Member States: Standard Eurobarometer 83, Spring 2015 Public Opinion in the European Union, 14 <http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_en.htm > accessed 1 September 2015.
disenfranchisement of EU citizens who take advantage of their right to free movement from their right to vote in elections.\textsuperscript{116}

Disenfranchisement in terms of voting results from the juncture of the voting rules of an EU citizen’s home country and those of her host country. EU citizens who have exercised their free movement rights (mobile EU citizens) are not allowed to vote in the national legislative elections of a host Member State.\textsuperscript{117} The same citizens may also be unable to vote in their home country elections, since Member States have absolute discretion to define the groups of citizens that are allowed to cast a vote in national elections.\textsuperscript{118}

Disenfranchisement may also occur indirectly. For example, the home Member State may not prohibit voting by their expatriate nationals but it may limit it by imposing preconditions such as a minimum amount of time to be spent in the state of nationality, or a maximum number of years spent in the host state.\textsuperscript{119} Therefore, while mobile EU citizens benefit from the free movement principle, they may simultaneously be deprived of their democratic voting rights and of the opportunity to participate in an ECI.

In spite of the similarity between EU citizens’ disenfranchisement in terms of voting and their exclusion from signing an ECI, the consequences of the latter should not be exaggerated. EU citizens who cannot sign an ECI are only a small proportion of the EU population and their inclusion would probably not make a big difference to the outcome of an ECI. In 2010, it was estimated that 11 million citizens across the 28 Member States were deprived of their right to support an ECI because of the provisions of Annex III.\textsuperscript{120} This number roughly amounts to 2.7% of the EU population and it has diminished since the adoption of the ECI Regulation given that a number of Member States have relaxed their personal data requirements on two occasions (in 2013 and 2015).\textsuperscript{121}

Nevertheless, one instance where this exclusion has a discernible impact concerns ECIs that relate to issues that concern mobile citizens in particular. The ‘Let Me Vote’ ECI is

\textsuperscript{116} Michael Dougan (n 73) 1830.

\textsuperscript{117} Only Ireland and the UK allow British, Irish and Commonwealth citizens to vote in national elections, based on Representation of the People Act 1983, s.1(1)(c).


\textsuperscript{121} See infra (n 142).
one example. The campaign specifically targeted EU citizens who resided outside their
country of nationality, by proposing to grant those citizens voting rights in the regional and
national elections of their host country. In this respect, a promoter of ‘Let Me Vote’
commented that the exclusion of some EU citizens from signing was ‘a determining
factor’\textsuperscript{122} for the campaign as it could not reach out to those citizens that would be affected
by the proposal. In addition, the exclusion of some EU citizens from using an ECI is
notable from a symbolic point of view. It may not have a big impact on the outcome of
most ECIs, but the fact that an EU citizen cannot participate in an ECI automatically
deprives her of a Treaty-bestowed right (Article 11(4) TEU).

In that respect, the exclusion of EU citizens from signing an ECI can be distinguished from
the disenfranchisement of EU mobile citizens from voting. Whilst bringing an ECI is a
participatory opportunity given to EU citizens by the Treaty, voting in national elections
depends solely on Member States’ national legislation. In practice, despite the different
levels on which the ECI and national elections are regulated, the solutions to both issues
can currently only come from Member States. An effort to give expatriates voting rights in
their host state was recently made by the government of Luxembourg, which held a
referendum on whether non-Luxembourg residents should be allowed to vote in national
elections.\textsuperscript{123}

Needless to say that, unlike extending voting rights, simplifying the ECI data requirements
would not necessitate any far-reaching measures connected to national sovereignty and the
democratic system of representation. With regard to the ECI, what is at stake is simply a
citizens’ opportunity ‘to add his or her name to a list of potentially one million people

\begin{footnotesize}
\textsuperscript{122} Interview with an organiser of the ‘Let Me Vote’ ECI, March 2014. British nationals residing in Spain
were specifically mentioned by the organiser. It should be noted that, since the time of the interview, Spain
has relaxed its signature requirements. Ms Ana Gorey, the representative of the ECI ‘High Quality European
Education for All’ also commented that one of the difficulties of the campaign was to reach their target group
which was comprised of mobile EU citizens, see Ana Gorey, Feedback to the European Ombudsman’s Own-
Initiative Inquiry (n 56).

\textsuperscript{123} The proposal suggested to franchise non-Luxembourg residents who have resided for at least ten years in
Luxembourg and who have previously voted in local or European elections in Luxembourg. In 2013 polls
indicated that 50\% of Luxembourgers were in favour of such reforms, but the proposal was voted down in
June 2015 by an overwhelming 78.02\% of the referendum voters. Michele Finck, ‘Towards an ever closer
union between residents and citizens? On the possible extension of voting rights to foreign residents in
Luxembourg’ (2015) 11(1) EuConst 78, 79; Eric Maurice, ‘Luxembourg referendum rejects foreigner voting
rights’ (EUObserver, 8 June 2015) <https://euobserver.com/beyond-brussels/129004> accessed 1 September
2015.
\end{footnotesize}
asking the Commission to take action.\textsuperscript{124} Based on this consideration, the Ombudsman has called for proportionate administrative requirements for signing.\textsuperscript{125} A number of suggested reforms have been voiced, on the basis that harmonising and simplifying the signature requirements will maximise the accessibility of the ECI. For instance, the ECI Campaign advocates the complete elimination of ID requirements and suggests that all Member States should accept to verify the signature of both their nationals, regardless of residency, and EU citizens residing in their territory.\textsuperscript{126}

Proposals were also submitted for the elimination of multiple signature forms and their replacement with one single EU form with minimum personal data requirements, which could be verified by any national authority.\textsuperscript{127} The new form would not require ID numbers, thus alleviating the alleged reluctance of citizens to sign an ECI. It would also benefit the ECI organisers and volunteers, as it would remove the complication of carrying multiple forms and loosing time in choosing the correct one depending on the nationality or residency of the potential signatory.\textsuperscript{128} As with most petitions, ECI volunteers only have a few minutes to convince potential signatories to sign their initiatives. If the data requirements were harmonised, the process would be streamlined and volunteers would have more time to interact with signatories and to engage in dialogue. Harmonisation could also limit the organisers’ personal potential liability in connection to the campaign by reducing the amount of personal data to be collected.\textsuperscript{129}

The above proposal follows the Opinion of the European Data Protection Supervisor, who recommended removing the requirement to include personal ID number on ECI signature forms.\textsuperscript{130} At the time of drafting the ECI Regulation, the Supervisor specifically noted that the personal ID numbers have no added value for the purpose of verifying the statements

\textsuperscript{124} European Ombudsman final decision on the ECI (n 89) para 34.
\textsuperscript{125} ibid
\textsuperscript{126} The ECI campaign (n 49).
\textsuperscript{127} Study for the PETI Committee, Policy Department C: Citizens’ Rights and Constitutional Affairs, ‘Towards a revision of the European Citizens’ Initiative?’ PE 519.240 (July 2015) 37 (Hereinafter ‘Towards a revision of the ECI Study’).
\textsuperscript{128} Prisca Merz, Heike Agthe, Susanne Kendler, Feedback to the European Ombudsman’s Own-Initiative Inquiry (n 56).
\textsuperscript{129} First Lessons of Implementation Study (n 56) 16; For a discussion on the personal liability of the organisers, see Chapter 2 of this thesis.
of support. Nonetheless, officials from national authorities do not seem to share his opinion; they recently highlighted the necessity of the required data for the verification of signatures. In particular, a member of the Expert Group on the ECI commented: ‘[w]e need the data. I understand the problem but, really, I do not have a golden rule as to how it can be solved.’

A revision of the ECI Regulation would be necessary in order to modify the signature collection framework set out in Article 8 of the Regulation. According to the Commission, there are no plans for a proposal to review the Regulation before the end of 2015. An alternative solution may be the use of electronic signatures for signing ECIs, an option provided for by the ECI Regulation but not yet in use. Although national authorities appeared to be more receptive to this simplifying option, they are unsure as to how it could materialise at the moment. In this respect, the newly-adopted eIDAS Regulation could enable a better use of the electronic signatures in the long-run, therefore providing a viable solution to the accessibility problems of the ECI. The European Parliament has taken the suggestion a step further. It proposed to the Commission to consider the establishment of an ‘EU digital citizenship’. Although the meaning of such e-citizenship is not defined in the Draft AFCO Report, it would appear to encompass an e-ID for all EU citizens, thus exceeding the scope of the current eIDAS Regulation which sets out a mutual recognition framework for national e-IDs issued by Member States.

131 ibid
132 Observations from the conference ‘The European citizens’ initiative and the promise of participatory democracy’ Brussels, 16 June 2015; Carsten Berg (n 39) 95
133 Sabine Eckart, German Federal Ministry of the Interior and Member of the Expert Group on the ECI, comment at the conference ‘The European citizens’ initiative and the promise of participatory democracy’ Brussels, 16 June 2015.
135 Article 5 of the ECI Regulation; European Commission 3-year Report on the ECI (n 51) 7; The exchange of views among national officials in the latest Expert Group Meeting showed that, with respect to the electronic signatures system, difficulties resulted from the different use and legal framework around those signatures at the national level, and that ‘the current provisions of the ECI Regulation allow the use of electronic signature but may not be designed to make the best use of it.’ The topic was set aside for future discussions. See Minutes of Expert Group Meeting, 15 June 2015, <http://ec.europa.eu/citizens-initiative/public/legislative-framework> 15, accessed 10 September 2015.
136 Expert Group Meeting, 15 June 2015, (n 135) 15.
As a result of the Member States’ discretion to set the criteria for the validation of signatures, there is not much that the EU institutions can do to maximise the accessibility of the ECI under the current ECI Regulation. The Head of the Institutional Affairs Unit of the Commission, Mario Tenreiro, explained that the Commission is well aware of the relevant issues but that it is unable to take any drastic measures: the requirements can only be modified by the Member States. Nevertheless, an Expert Group operating at the EU level enables the exchange of views between members of the competent national authorities regarding the implementation of the ECI Regulation.

Credit must also be given to the Commission for facilitating the overall signature collection process by providing guidelines and recommendations to national competent authorities and the ECI organisers.

To an extent, the Commission’s attempts to persuade the Member States to simplify their data requirements have paid off. Since the adoption of the Regulation, the requirements of four Member States (Spain, Luxembourg, and Netherlands in 2013, and Malta in 2015) were removed or relaxed.

Anything more than pressurising the Member States would require an amendment to the ECI Regulation.

Conclusion

The examination of the ECI’s legal framework and practice in this chapter has illustrated some of the fundamental characteristics of EU citizens’ political participation rights.

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139 Mario Tenreiro, comment during the ‘An ECI that Works’ conference, Brussels, 5 December 2013.
142 Commission Delegated Regulation No 887/2013 of 11 July 2013 replacing Annexes II and III to Regulation (EU) no 211/2011 of the European Parliament and of the Council on the citizens’ initiative [2013] OJ L 247/19; Spain allowed signatures that provide a foreigner’s identification number (whilst previously it would only accept id or passport and would require permanent residence); Netherlands allowed Dutch nationals residing outside of the country to sign, Luxembourg no longer requires national identification number. France also changed its requirements but it could be considered an exception given that it has limited the list of documents that it accepts for validation and it added the requirement of a signatory’s date of birth. Commission Delegated Regulation (EU) 2015/1070 of 31 March 2015 amending Annexes III, V and VII of Regulation (EC) No 211/2011 of the European Parliament and of the Council on the citizens’ initiative [2015] OJ L 178/1; Malta allowed signing with the use of a residence card and Sweden only requests the personal identification number instead of passport or ID.
Firstly, any attempt to promote a notion of EU active citizenship among EU citizens through the ECI is constrained by the rules in Article 8 and Annex III of the ECI Regulation. This chapter has shown the ways in which the technical aspects of the ECI and the different signatory requirements imposed by the Member States restrict the ECI’s accessibility.

Secondly, there is a lack of common indicators as to the category of citizens who can sign an ECI, in the same way as there is a lack of common criterion for the acquisition and loss of EU citizenship. The eligibility of mobile EU citizens to sign an ECI often depends on the juxtaposition of two Member States’ different data requirements, in a similar way as the voting rights of mobile EU citizens may depend on the juxtaposition of national voting laws.

Thirdly, TCNs who are long-term residents in the EU are excluded from participating in an ECI. Had the Member States wished to expand the concept of EU political citizenship to this group of nationals, the ECI would have been a good route to do so, considering its non-binding, agenda-setting character. Instead, the exclusion of two groups of citizens (mobile EU citizens and TCNs) from the ECI indicates that the ECI is more of an affirmation of the current shape and form of EU citizenship, than a step in a different, more inclusive direction. In this sense, there is nothing new under the sun with regard to the cultivation of an EU-wide sentiment of political citizenship.

These observations prompted an important query as to whether there is a way to simplify the personal data requirements and make the signing equally accessible to all EU citizens regardless of nationality or residency. All things considered, under the ECI Regulation, the key role played by the Member States in defining the eligibility of citizens to take part in an ECI should not be underestimated.

Having examined some substantive aspects of the ECI in light of EU citizenship, an additional question arises, this time regarding the value of an ECI in suggesting legislative proposal. To what extent can EU citizens propose legislation that they consider important through an ECI? The limitations to the subject-matter of an ECI depends on the legal admissibility test according to which the Commission checks if the proposed ECI complies with the legal criteria of Article 4(2) of the ECI Regulation. It is the nature of this test and the effect that it has on EU citizens’ ability to propose legislation by bringing an ECI that will be discussed in the next chapter.
CHAPTER 4

THE SCOPE OF THE ECI: LEGAL ADMISSIBILITY TEST

Introduction

According to Article 4(2) of the ECI Regulation, an ECI will be refused registration in three circumstances: if it ‘manifestly falls outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties’ (Article 4(2)(b)), if it is ‘manifestly abusive, frivolous or vexatious’ (Article 4(2)(c)), or ‘manifestly contrary to the values of the Union as set out in Article 2 TEU’ (Article 4(2)(d)). The focus of this chapter is on the application of Article 4(2)(b) of the ECI Regulation, as this is the aspect of the legal admissibility test that has created controversy in its practical application.

The aim of this chapter is to discuss the legal confines imposed on the ECI as a result of the application of Article 4(2)(b), and thus the extent to which EU citizens can use the ECI as a way to propose legislation at EU level. The discussion commences by explaining the process of registering an ECI with the Commission, proceeding then to examine the two main limitations of the ECIs’ scope: that an ECI cannot propose Treaty modifications; and that it cannot propose acts which are not considered to be legal acts (for instance preparatory acts). With regard to the latter limitation, the chapter focuses on the much contested rejection of the ‘Stop TTIP’ Initiative, which is also illustrative of the EU citizens’ potential to make ECI proposals for the conclusion of international agreements under Article 218 TFEU. Subsequently, the chapter discusses the use of legal basis in ECI proposals. It considers the use of both specific and general (Articles 114 TFEU and 352 TFEU) legal bases for proposing ECIs, and the Commission’s approach in relation to each. Based on these considerations, it also looks at the Commission’s interpretation of what

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1 Material from this chapter and from chapter 5 was first published by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell, Friars House, 160 Blackfriars Road, London, SE1 8EZ, in European Law Review as: Anastasia Karatzia, ‘The European citizens’ initiative in practice: legal admissibility concerns’ (2015) 40(4) ELRev 509 and is reproduced by agreement with the publishers. For further details of European Law Review, please see <www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?productid=6968&recordid=427>
falls ‘manifestly outside’ its powers to propose a legal act and briefly discusses the implications of this interpretation on the other two provisions of the test (Articles 4(2)(c) and 4(2)(d) of the ECI Regulation).

Ultimately, it is suggested that certain contested issues regarding Article 4(2)(b), which arise in the broader context of the ECI’s purpose as a participatory mechanism, could potentially be resolved by the General Court (GC) by virtue of the pending ECI cases. This discussion lays the groundwork for the next chapter, which provides an in-depth examination the currently pending ECI cases and the opportunity they present for the GC to alleviate certain concerns regarding the ECI legal admissibility test.

I. Registering an ECI with the Commission

The so-called admissibility test is the first port of call for an ECI’s registration with the Commission. Article 4(1) of the ECI Regulation requires the organisers to provide the information set out in Annex II. As already explained in previous chapters, the purpose of the admissibility test is for the Commission to decide on the legal nature of a proposed ECI, and in particular whether the proposal falls within the Commission’s competence to propose an EU legal act. As such, the registration stage entails a preliminary examination of proposed ECIs by the Commission. An Initiative will be registered if its Citizens’ Committee is formed and designed in accordance with the ECI Regulation (Articles 4(2)(a) and 3(2)), and if it complies with certain legal criteria. In particular, it will not be registered if it ‘manifestly falls outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties’ (Article 4(2)(b)), if it is ‘manifestly abusive, frivolous or vexatious’ (Article 4(2)(c)) or ‘manifestly contrary to the values of the Union as set out in Article 2 TEU’ (Article 4(2)(d)).

The word ‘manifestly’, which is used in the wording of all three criteria for legal admissibility, has created certain uneasiness as to the threshold it sets for the rejection of

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2 According to Annex II, the necessary information for registering a proposed ECI is: (a) the title of the proposed ECI in no more than 100 characters; (b) the subject matter, in no more than 200 characters; (c) a description of the objectives of the proposed ECI in no more than 500 characters; (d) the provisions of the Treaty considered relevant by the organisers for the proposed action; (e) the full names, postal addresses, nationalities and dates of birth of the members of the Citizens’ Committee; and (f) all sources of support and funding for the proposed ECI at the time of registration.
proposed ECIs. It has been suggested, for example, that it should be sufficient to demonstrate that the Initiative is not ‘manifestly outside’ the Commission’s powers rather than showing that it clearly falls inside the framework of the Commission’s powers. This approach is mainly supported by advocates of a flexible interpretation of Article 4(2)(b) of the ECI Regulation, who support the idea that the Commission should not be overly demanding when examining the Treaty provisions suggested by ECI organisers as the legal basis for action.

The lack of guidance as to the meaning of the term ‘manifestly’ indicates that the Commission is left with some discretion to interpret the admissibility criteria. It was commented that, as a result of such discretion, the Commission could end up rejecting proposed ECIs on the basis of political considerations instead of legal conclusions. A political decision at the stage of admissibility could lead to the registration of ECIs which fit the Commission’s political agenda; the participatory mechanism would end up being directed by the Commission towards particular legislative issues or, more notably, away from other issues.

Moreover, it is recognised that, generally speaking, the choice of the legal basis for a legislative measure must be based on objective factors rather than on the EU institutions’ confidence that the aims of the measure should be attained. Accordingly, the preliminary assessment should take place strictly on the basis of legal considerations; political considerations should only be taken into account when the Commission is deciding its course of action on a successfully submitted ECI.

Nevertheless, it is difficult to identify whether a Commission’s decision to reject an ECI is motivated by political rather than purely legal reasons. The decision is made by the Commission behind closed doors, so it is practically impossible to know whether any factors beyond legal considerations informed the relevant conclusions. Still, official replies are sent out by the Commission to citizens whose proposals are rejected. The replies are

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5 Bleddyn Davies, ‘Giving EU Citizens a voice: Regulation 211/2011 on the EU Citizens’ Initiative’ (2011) 33 (3) JSWFL 289, 290; Michael Dougan (n 3) 1838.

6 Francesco Maiani, (n 3) 12; Michael Dougan (n 3) 1838.


available in the public domain through the ECI official website, as required by Article 4(3) of the ECI Regulation. Although inevitably some of the factors behind the Commission’s decisions as to the legal admissibility of ECIs may be unknown, it is pertinent to look into the reasons for rejection given by the Commission. The analysis of rejected ECIs will help to expose and understand the approach of the Commission in examining the legal admissibility of proposed ECIs.

Put together, the limitations to an Initiative’s legal admissibility that are imposed by Article 4(2)(b) of the ECI Regulation and the attitude of the Commission at the admissibility stage, illustrate the limits faced by EU citizens in proposing changes to EU legislation by initiating an ECI. In other words, the stricter the interpretation adopted by the Commission in relation to Article 4(2)(b), the more limited the scope of the ECI is bound to be and the less the ECIs that will be registered.

II. The Legal Scope of an ECI

Before looking at the ECIs submitted for registration with the Commission, it is instructive to recall some basic figures from the ECI’s first years of operation. As of September 2015, 47 ECIs were submitted for registration with the Commission. Of those, 27 were registered and 20 were refused registration. Ten ECIs were withdrawn, four of which were re-registered at a later date. The numbers indicate that 43% of all proposed Initiatives were refused registration by the Commission; a high number of rejections according to campaigns supporting the ECI instrument. The reason given by the Commission for the refusals was that the proposed Initiatives ‘fell manifestly outside the framework of [its] powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties’.

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9 See Appendices I and II to this thesis.
10 The withdrawal and re-registration of those ECIs (allowed by Article 4(5) of the ECI Regulation) is a strategic move, since most of the ECIs lost valuable time from the 12 months of signature collection due to the delay in certifying their online signature collection systems. Re-registration took place in order to gain back the lost time rather than due to problems with the legal basis, in spite of the fact that any signatures collected prior to withdrawal were discarded.
12 Article 4(2)(b) ECI Regulation.
Once a proposed ECI is submitted for registration, its subject-matter goes under the microscope. According to an EU official, a proposed ECI is considered as a whole, and if there is doubt about the question of competence in relation to the proposal, the doubt should be interpreted in favour of registering the Initiative. It should be noted at this point that the registration of ECIs does not depend on whether any further action by the EU is proposed by the ECI, or if a change of current practice in an EU policy area is suggested, or even whether the EU is asked to refrain from a particular course of action. Examples from each of these categories can be seen both in registered and rejected ECIs. There are, however, two main limitations to the scope of an ECI. The first limitation is that an ECI cannot propose Treaty modifications. In September 2014, the Commission added a second limitation regarding the type of acts (in the form of a distinction between legal and preparatory acts) that can formulate the subject matter of an ECI proposal. Both of these limitations will be considered in turn.

A. An ECI cannot propose Treaty modifications

Divergent opinions are voiced as to whether the ECI’s legal framework allows for Treaty modification proposals. The academic debate revolves around the correct interpretation of Article 11(4) TEU and the Preamble of the ECI Regulation, which provide that an ECI can propose ‘legal acts of the Union required for the purpose of implementing the Treaties’. It has been submitted that Article 11(4) TEU clearly excludes proposals for the amendment of Treaties from the scope of the ECI, even though such proposals fall within the powers of the Commission under Article 48 TEU. Indeed, Article 11(4) TEU and the ECI Regulation tally with such an interpretation. For instance, it could be argued that if the Treaty drafters had intended to allow Initiative proposals for Treaty

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13 Interview with an EU Official, February 2014.
14 An example of a registered ECI is ‘30 km/h making the streets liveable’ which calls for the adoption of an EU-wide 30 km/h speed limit in urban areas. An example of a rejected ECI is ‘Recommend singing the European Anthem in Esperanto’ which proposed to establish singing the European Anthem in the Esperanto language.
15 An example of a registered ECI is ‘One of Us’ which proposed the end of financing of activities which presuppose the destruction of human embryos by the EU. An example of a rejected ECI is ‘Abolish Bullfighting’ which proposed an EU-wide ban of bullfighting.
16 An example of a registered ECI is ‘Suspension of the EU climate and energy package’ which calls for the suspension of the 2009 EU Climate and Energy Package until a climate agreement is signed by China, USA and India. An example of a rejected ECI is ‘Stop TTIP’ which proposed to prevent the conclusion of the TTIP Agreement between USA and the EU.
modifications, they would have chosen a broader wording for Article 11(4) TEU. In other words, why would the specification ‘for the purpose of implementing the Treaties’ in Article 11(4) TEU have been used, if not to exclude Initiative proposals for Treaty amendment?

Contrary to views suggesting a literal interpretation of the ECI’s legal framework, it has been argued that Article 11(4) TEU does not clearly exclude Article 48(2) TEU (according to which the Commission may submit to the Council proposals for the Treaty amendment which could serve to increase or reduce EU competences) as a legal basis for a proposed Initiative.\(^{18}\) Moreover, it has been submitted that in certain instances, a proposed Initiative could require a Treaty amendment for the purpose of implementing the Treaties.\(^{19}\) For example, a proposal to give effect to certain Treaty objectives under Articles 2 and 3 TEU may require a Treaty amendment or the introduction of new legal bases. This illustrative proposal would call for an amendment of the Treaties in order to implement existing Treaty provisions (for instance, in order to further the objectives set out in Articles 2 and 3 TEU) and hence could be compatible with Article 11(4) TEU. In this respect, certain Initiatives that involve an amendment to the Treaties could be registered without contradicting Article 11(4) TEU.

Beyond interpreting the wording of Article 11(4) TEU literally, commentators have also considered the policy aspects of excluding Initiative proposals for Treaty modifications from the scope of the ECI. They focused on the impact of the limitation on citizens’ perception of the ECI as a participatory instrument. It was accordingly argued that citizens would be disappointed to discover that the ECI was not available as a means of influencing critical matters regarding the EU’s constitutional framework.\(^{20}\) Excluding proposals for Treaty modification from the scope of an ECI was also said to prevent opinion formation by transnational groups of citizens that could enhance the democratic legitimacy of the Treaty amendment process.\(^{21}\)

Putting the above remarks aside, the Commission specified early on that proposals for Treaty amendments were excluded from the scope of an ECI. The proposed Initiative ‘My voice against nuclear power’ was the first to be rejected on this ground in June 2012. It had

\(^{18}\) James Organ (n 4) 438.
\(^{19}\) Michael Dougan (n 3) 1835.
\(^{20}\) ibid
\(^{21}\) James Organ (n 4) 438.
proposed to shut down gradually all nuclear power plants in the EU. The Commission’s reply stated, inter alia, that Articles 11(4) TEU and 24 TFEU (the legal bases for the establishment of the ECI instrument) ‘cannot be interpreted as giving the Commission the possibility to propose a legal act that would have the effect of modifying or repealing provisions of primary law’, in that instance the Euratom Treaty. This was in spite of the fact that the Initiative did not explicitly refer either to Treaty alterations or Article 48 TEU; it was based on environmental protection and the precautionary principle.

Subsequently, the Commission rejected two Initiatives proposed by the same citizen: the first asked for the introduction of a referendum mechanism at EU level and the second requested the abolishment of the European Parliament and the creation of a new, efficient European governance structure. Both proposals suggested the introduction of new legal bases for the attainment of their objectives. In addition, the Commission rejected the ‘Enforcing Self-Determination Human Right in the EU’ Initiative, which proposed to accommodate the self-determination human right in the EU legal order. In its reply to the organisers, the Commission explained that Article 21 TEU, which was mentioned in the proposal, did not give power to the Commission to submit a proposal for a legal act, as it merely stated the principles of the EU external action. An Initiative proposing that citizens of a State that has seceded from a Member State should keep their EU citizenship was also rejected on lack of Commission’s powers to propose a Treaty amendment.

In light of the limitation that an ECI cannot propose Treaty modifications, the registration of one particular ECI could appear questionable. The ‘Let Me Vote’ ECI (registered in January 2013) proposed to allow citizens living abroad the right to vote in all political elections in their country of residence. The ECI organisers argued that such change would enhance the concept of EU citizenship and contribute to remedying the loss of voting rights experienced by EU citizens who are long-term residents of Member States, but not nationals of that country. As potential legal bases, the ECI proposed Article 20(2) TFEU and Article 25 TFEU. Given that Article 20(2) TFEU outlines the rights enjoyed by EU citizens but does not constitute a legal basis for action by the Commission, Article 25 TFEU.

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22 The proposed Initiatives were respectively named: ‘The Supreme Legislative and Executive Power in the EU must be the EU Referendum as an expression of direct democracy’ and ‘A New EU legal norm, self-abolition of the European Parliament and its structures, must be immediately adopted’.

23 The Initiative was named ‘Fortalecimiento de la participación ciudadana en la toma de decisiones sobre la soberanía colectiva’.

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TFEU was most probably considered to be the appropriate legal basis for the registration of the ECI.

It would be tempting to draw the conclusion that a Treaty amendment is needed to achieve the objectives of ‘Let Me Vote’ and thus that the registration of this ECI is an anomaly vis-à-vis other ECI legal admissibility decisions. Such a view would be premised on the argument that Article 25 TFEU leads to a change in primary law by strengthening the list of citizenship rights in Article 20 TFEU.\(^{24}\) In that regard, Article 25 TFEU would be considered as falling into a category of Treaty amendment procedures comprised of numerous ‘special revision procedures’ which, although not mentioned in a single Treaty provision (like, for example, those included in Article 48 TEU), effectively amount to a Treaty modification.

Nonetheless, a closer examination of Article 25 TFEU indicates that a Treaty amendment is not necessary to achieve the objectives of ‘Let Me Vote’, for two reasons. Firstly, no change would take place in primary law as a result of the adoption of measures by the Council to increase EU citizenship rights under Article 25 TFEU.\(^{25}\) Article 25 TFEU provides that the Council ‘may adopt provisions to strengthen or to add to the rights listed in Article 20(2) TFEU’. Although such provisions would need to be approved by national constitutional procedures, they would not amend primary law in the sense of creating new competence for action by the EU. Secondly, giving effect to the ‘Let Me Vote’ proposal would not require an alteration of other primary Treaty provisions to accommodate the objectives of the aforementioned ECI. For instance, Articles 20(2) and 22(1) TFEU allow EU citizens to vote in municipal elections in their Member States of residence without prohibiting a future extension of voting rights to national elections, like the one ‘Let Me Vote’ suggests through Article 25 TFEU.

By way of contrast to the procedure under Article 25 TFEU, an Initiative proposal under Article 48(2) TEU would require the introduction of a new legal basis in the Treaties for the purpose of increasing or reducing the competences conferred on the EU. Organ argues that, with its approach, the Commission has drawn a fine line between acceptable Initiatives and Initiatives that it considers as those proposing Treaty changes.\(^{26}\)

\(^{24}\) James Organ (n 4) 437.


\(^{26}\) James Organ (n 4) 435-439; Organ provides a different view than the one in this chapter, by comparing the ‘Let Me Vote’ and ‘Self-Determination’ Initiatives and criticising the Commission’s approach.
Notwithstanding such criticism, from a purely legal point of view, the distinction between Article 25 TFEU and 48(2) TEU is sufficient to explain why ‘Let Me Vote’ was registered, whilst proposed Initiatives suggesting acts that involved the ordinary Treaty amendment procedure were rejected. In this respect, a proposed Initiative which requires the addition of a new competence in the Treaties will be rejected. Likewise, a proposed Initiative will be rejected if it requires the removal of an existing competence from the Treaties. Whether this is the correct way to interpret Article 11(4) TEU and the ECI Regulation is a different question, one which could potentially be answered by the GC.

In the recent judgment of Anagnostakis v Commission\(^\text{27}\), the GC referred briefly to this issue. The applicant argued that the Commission was mistaken to reject his proposal to incorporate a principle of international law (the principle of necessity) into the EU legal order. According to the Court, even assuming that there was such a principle in international law, this principle would still not be considered a legal basis on which the Commission can propose an act for the implementation of the Treaty.\(^\text{28}\) Although the Court did not elaborate this matter further, its statement implies that Treaty proposals are excluded from the scope of the ECI. Future judgments could be more revealing with respect to the debate on whether Treaty amendments fall or should fall within the scope of the ECI.

**B. An ECI must propose a legal act**

Recently the Commission added a second limitation to what is an acceptable subject-matter for the purposes of registering an ECI. In its letter of reply regarding the refusal to register the proposed Initiative ‘Stop TTIP’, it stated that ‘[a] citizen’s initiative inviting the Commission not to propose a legal act is not admissible under Article 2(1) of the ECI Regulation’. The ‘Stop TTIP’ Initiative proposed to halt the negotiations of the Transatlantic Trade and Investment Partnership agreement (TTIP) between the EU and USA, and to prevent the conclusion of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.\(^\text{29}\) Both TTIP and CETA are trade agreements.

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\(^{27}\) Case T-450/12 Anagnostakis v Commission, judgment of 30 September 2015, not yet reported.

\(^{28}\) Case T-450/12 para 65.

agreements between the EU and the two countries, which according to the EU will create new investment opportunities and further open market access.

‗Stop TTIP‘ invited the Commission to submit recommendations to the Council for a repeal of the Council’s decision to authorise the opening of the TTIP negotiations. In addition, the Initiative asked the Commission to submit a proposal for a Council decision not to conclude CETA. In its reply, the Commission refused both proposals. It declared that an ECI cannot invite the Commission to refrain from proposing a legal act or to propose a decision not to adopt a legal act (for the Initiative in question being a proposal not to conclude the TTIP and the CETA).

The reply is revealing in terms of the Commission’s interpretation of the ECI’s legal admissibility criteria. A closer inspection of the Commission’s reasoning discerns that the reply is formed of two arguments. The Commission’s first argument was that its proposals to the Council under Article 218 TFEU to authorise the opening of negotiations for international agreements were not proposals for legal acts. It explained that, because the Council’s decisions to authorise the opening of negotiations for an international agreement are preparatory acts, the Commission’s relevant proposals to the Council lacked legal effect vis-à-vis third parties. Accordingly, the argument of the Commission was that ‘Stop TTIP‘ was not proposing any legal acts for the purpose of implementing the Treaties. Instead, the Initiative invited the Commission to take action (meaning, to ask the Council to repeal the authorisation of the TTIP negotiations) which would not result in a modification of EU law. As such, the proposals of ‘Stop TTIP‘ did not fulfil the conditions set out in Article 4(2)(b). With its reply, the Commission thus established that an ECI cannot invite the Commission to adopt preparatory acts.

The second argument of the Commission further restricts the scope of an ECI to influence EU law-making. Put simply, the Commission declared that an ECI cannot invite the Commission to propose a decision not to adopt a legal act (for example, a proposal not to conclude the TTIP or the CETA) or to refrain from proposing a legal act. Hence, even a strong argument against the Commission’s above-mentioned interpretation of proposals to the Council as preparatory acts would not result in getting ‘Stop TTIP‘ registered. In other words, even if the Commission’s initial proposals to the Council were perceived to be legal acts, the negative nature of the ‘Stop TTIP’ Initiative’s proposal would still have made the ECI inadmissible. Conversely, the Commission commented in its reply that an ECI
requesting the signature and conclusion of an international agreement would be legally admissible.

The Commission’s rationale merits further consideration. What does the reply to ‘Stop TTIP’ mean for citizens wishing to bring ECIs relating to EU external relations and international agreements? Critics of the Commission’s reply to the proposed Initiative find it difficult to justify the Commission’s decision to refuse the registration of ‘Stop TTIP’ given that it is within the Commission’s powers to propose the termination of negotiations to the Council; but then again, it is also within its powers to propose Treaty amendments under Article 48 TEU, and yet an Initiative’s subject matter cannot require the alteration of Treaty provisions. Furthermore, the Initiative’s organisers are challenging the Commission’s decision before the GC. It is thus imperative for the purpose of understanding the Commission’s decision, to comment on the pending case’s main argument and examine the organisers’ assertion that the rejection of their proposed ECI is ‘legally not tenable’.

The argument can be summarised as follows: the organisers claim that the Commission infringed Article 11(4) TEU and Articles 2(1) and 4(2)(b) of the ECI Regulation by applying the ECI legal admissibility test in an unlawful manner. In particular, the organisers question the Commission’s distinction between preparatory acts (acts for the negotiating mandate of an international agreement) and legal acts (for the conclusion of an international agreement) in the context of the ‘Stop TTIP’ proposal. They assert that both acts are decisions within the meaning of Article 288 TFEU and hence that they both fall within the definition of ‘legal acts’ for the purposes of Article 11(4) TEU.

The organisers’ argument is supported by their contention that the Commission contradicts itself in the letter of reply by stating that it is prepared to register an ECI proposal for the signature and conclusion of an international agreement. This contention is based on the premise that, to propose an act such as the signature and conclusion of an international

31 Case T-754/14 Efler and Others v Commission action brought on 10 November 2014.
agreement, an Initiative would have to suggest that the Commission submits recommendations to the Council. The Council would then have to authorise the opening of negotiations as required by Article 218(2) TFEU. This requirement begs the question of whether an act authorising the opening of international negotiations would be a preparatory act without any legal effects. Yet, the Commission declared in its reply to ‘Stop TTIP’ that such preparatory acts cannot constitute the subject-matter of an Initiative proposal.

By way of contrast to the organisers’ claims, the Commission had explained in its letter of reply that there is a distinction between an act for the termination of an international agreement and an act for the conclusion of negotiations for the signing of an international agreement. As previously mentioned, the Commission stated that an Initiative must propose an act for the modification of EU law in order to be legally admissible. This statement is significant in understanding the Commission’s rationale for rejecting ‘Stop TTIP’. From its point of view, on the one hand, an Initiative that asks for negotiations to stop is not asking for the modification of EU law: there is no international agreement in place that would be modified. No legal act would have to be adopted by the Commission for the termination of pending negotiations. On the other hand, an Initiative which requests the signature and conclusion of an international agreement has the potential to introduce a change to EU law when the relevant agreement is signed.

It is also apparent from the Commission’s reply that an ECI which proposes the termination of an existing international agreement can be registered, since it would suggest the modification of EU law. The ‘Swissout’ ECI is illustrative of this. ‘Swissout’ proposed the termination of the bilateral agreement between Switzerland and the EU on the free movement of people and was registered in November 2012. Its registration tallies with the Commission’s explanation regarding the need for modification of EU law. Contrastingly, in the pending case, the organisers argue that, by refusing to register ‘Stop TTIP’ whilst registering ‘Swissout’, the Commission has acted inconsistently and thus infringed the general principles of good administrative practice (Article 41 of the EU Charter of Fundamental Rights) and equal treatment (Article 20 of the EU Charter of Fundamental Rights).

33 The original title is ‘Kündigung Personenfreizügigkeit Schweiz’, which can be translated as ‘Exclude Switzerland from the free movement principle.’ It was withdrawn on the 4th of February 2013.
34 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L 114/6.
It can be argued that the way in which the Commission explained its position does not present an inconsistency between the rejection of ‘Stop TTIP’ and the registration of ‘Swissout’. This holds true despite what appears to be a paradoxical outcome, as things currently stand: an ECI can propose the termination of an existing international agreement but not the termination of the negotiations towards such agreement. It is, however, noteworthy that the limitations imposed by the Commission in its rejection letter to the ‘Stop TTIP’ are not clearly indicated in the ECI Regulation. They result from the Commission’s own interpretation of the ECI’s legal framework.

The pending ‘Stop TTIP’ case is a good opportunity for the Court to step in and point out the correct interpretation of Article 4(2)(b) of the ECI Regulation with respect to proposals similar to that of ‘Stop TTIP’. This is particularly pertinent considering the organisers’ argument in the pending case, that the Commission’s refusal is unlawful because neither the ECI Regulation nor Article 11(4) TEU provide that only positively formulated Initiatives can be registered. Having examined the two main limitations to the scope of the ECI, the particulars of suggesting specific or general legal bases for the registration of an ECI, which are key to understanding the practical application of the ECI legal admissibility test, will now be discussed.

III. The legal basis question in proposed ECIs

Despite the asserted importance of the ECIs’ subject-matter, the ECI Regulation (Annex II) only requires a description of the proposed ECI and asks for the provisions of the Treaties considered relevant by the organisers. Therefore, a proposed ECI could, in theory, be registered without mentioning any specific legal basis. Such a relaxed approach has resulted in the submission of somewhat unrealistic Initiatives, such as those proposing the abolishment of the European Parliament and the introduction of a referendum mechanism at EU level. The ways in which ECI organisers have attempted to register their ECIs so far, and the responses of the Commission, provide further insights into the Commission’s interpretation and application of Article 4(2)(b) of the ECI Regulation.

A. Registering an ECI on a specific legal basis

Although legislative proposals generally need to be based on a *lex specialis*, the Commission is prepared to register ECIs that refer to non-legal bases. For the purposes of the current discussion, ‘non-legal bases’ are broadly defined as Treaty provisions that do
not constitute legal bases for action at EU level *per se* but rather state the objectives and the values of the EU, or specify the exclusive, shared, and supportive competences of the EU (Articles 3, 4, 6 TFEU). Treaty provisions used in that respect by organisers of registered ECIs are: Article 2 TEU (the values of the EU), Article 3 TEU (EU’s values and interests) and Article 5 TFEU (co-ordination of Member States’ economic interests with the EU). There are also registered ECIs which link provisions from the Charter of Fundamental Rights of the EU with the objectives of their proposals.\(^{35}\) It appears that such reliance on non-legal bases is used to underline the objectives of a proposed ECI and to strengthen the possibility of getting it registered. This strategy is not a novelty for EU law-making; existing Commission’s legislative proposals and adopted secondary laws provide such abstract references in their preambles.\(^{36}\)

The flexibility of the Commission in relation to programmatic provisions that do not in principle constitute legal bases can also be seen from an examination of the rejected ECIs. In its letters of reply to the organisers who mentioned programmatic provisions drawn from the Treaty or the Charter, the Commission remarks that such provisions do not constitute an appropriate legal basis for legislative proposals.\(^{37}\) The importance given by the Commission to such provisions, therefore, appears to depend on the rest of the proposal. If the Commission finds that there is an appropriate legal basis for the measures proposed, it will register a proposed ECI regardless of the fact that it may be referring to provisions which do not constitute legal bases *per se*.

In order to decide upon the legal admissibility of a proposed ECI, the Commission claims that it does not limit itself to reviewing only the Treaty provisions suggested by ECI organisers. Instead, in every letter of reply, it notes:

> *I regret to inform you that, further to the examination of the provisions of the Treaties mentioned in your application, and all other possible legal bases*

\(^{35}\) An example is the ECI ‘One Of Us’, which supports the end of the financing by the EU of activities that presuppose the destruction of human embryos and refers to Article 1 of the Charter on the right to respect for human dignity.


\(^{37}\) See, for example, the Initiatives: ‘Abolition of bullfighting and the use of bulls for fun’ regarding Articles 2,7 TEU and Article 3 of the Charter; ‘Cohesion policy for the equality of the regions and sustainability of the regional cultures’ regarding Articles 2 and 3 of the TEU; ‘Minority SafePack’ regarding Article 3(3) TEU and Article 21(1) of the Charter.
(emphasis added), the Commission hereby refuses the registration of this proposed initiative.

It would appear that the Commission engages in a review of all possible legal bases and only refuses registration of a proposed ECI if it does not find appropriate basis for action. There is indeed some evidence of the above approach in three ECIs in which proposals were made relating to environmental issues. All three were registered by the Commission even though they only referred to Article 191 TFEU (aims and principles of the EU environmental policy) and none mentioned Article 192 TFEU which is the legal basis for measures related to the EU environmental policy and states the decision-making process for their adoption. The Commission even registered an ECI which, rather anachronistically, referred to the former Article 3K of the Maastricht Treaty (now Article 191 TFEU).

In other instances, the existence of a specific legal basis can be the decisive factor between registration and rejection of a proposed ECI. Two similar Initiatives, one of which was registered and one which was rejected are ‘End Ecocide’ (registered), and ‘Together for a Europe free from legalised prostitution’ (rejected). Both Initiatives requested the criminalisation of certain issues. The former proposed the criminalisation of mass damage and destruction of the ecosystem (the criminalisation of ecocide) whilst the latter proposed the prohibition of the legalisation of prostitution. The organisers of both Initiatives suggested Article 83 TFEU as a legal basis which allows for the establishment of minimum rules on the definition of criminal offences and sanctions, in the areas of particularly serious crime with a cross-border dimension.

In its response to the organisers of the Initiative ‘Together for a Europe free from legalised prostitution’, the Commission correctly noted that Article 84 TFEU does not allow for

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38 See the ECIs: ‘30 km/h making the streets liveable’ which proposes a 30 km/h EU-wide default speed limit for urban/residential areas; ‘End Ecocide in Europe’ to criminalise ecocide at EU level; ‘Turn Me Off’ proposing to prohibit the practice of leaving the lights on in shops and offices when unoccupied; ‘European Free Vaping Initiative’ to prevent vaping from being classified as medicinal or tobacco products. It should be noted that the proposals for these ECIs were coupled with other legal bases such as Article 194 TFEU, Article 83 TFEU or Article 91 TFEU.

39 ECI ‘Pour une gestion responsable des déchets contre les incinérateurs’.

40 Article 83 TFEU further stipulates that the need for such rules should result from the nature or impact of the offences or from a need to combat them on a common basis. Moreover, it sets out a list of crimes for which such minimum harmonisation could apply, among which trafficking in human beings, sexual exploitation of women and children and organised crime. In addition to Article 83 TFEU, ‘End Ecocide’ suggested Articles 191 and 194 TFEU and mentioned the Aarhus Convention and Copenhagen Accor, and the other ECI suggested Article 84 TFEU.
harmonisation in the area of criminal law. It also explained that the banning of prostitution is not an issue which the Commission has competence to regulate according to Article 83(1) TFEU. In this sense, any potential regulation or banning of prostitution is in the domain of the Member States. Along the same line of thought, it could be argued that environmental offences such as the one proposed by ‘End Ecocide’ are not covered by the areas of crime in Article 83(1) TFEU either. Nonetheless, the protection of the environment is an EU policy according to Article 191 TFEU, which creates a link with the need for criminal measures and justifies the registration of the ‘End Ecocide’ ECI. It could even be argued that the registration of an Initiative asking for the criminalisation of prostitution, on the basis that it is a form of sexual exploitation of women under Article 83(1) TFEU, could potentially be inconsistent with the ruling of the CJEU that prostitution constitutes a service provided for remuneration under EU law, in Member States where it is legal under national law.

In reviewing Articles 83 and 84 TFEU as possible legal bases, the Commission must consider issues that are often difficult to assess, such as the effectiveness of the proposed measure. In reference to the aforementioned rationale of the legal admissibility test, issues like the effectiveness of a proposal should not be assessed by the Commission at that stage, but should rather be appraised after the successful submission of an ECI. Articles 114 and 352 TFEU, however, require the exercise of discretion on behalf of the EU Institutions for the purpose of deciding whether they can be used as legal bases. What happens, therefore, with the registration of Initiatives that propose one of the EU objective-related competences (Articles 114 TFEU and 352 TFEU) as a legal basis?

**B. Registering an ECI on a general legal basis and the interpretation of ‘manifestly outside the framework of the Commission’s powers to propose a legal act’**

It is well-known that the use of Articles 114 TFEU and 352 TFEU (the flexibility clause) as legal bases depends on the objective and functionality of the proposed measure. Whilst the former is a specific legal basis for the adoption of EU secondary legislation in the area of internal market, the latter is more flexible, allowing for the adoption of

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41 James Organ (n 4) 433.
42 Communication ‘Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through the criminal law’ COM(2011) 573 final, 9.
measures that are necessary to attain an objective of the Treaty and which cannot be otherwise adopted under a specific competence. Measures proposed on the basis of Article 114 TFEU must demonstrate a genuine ability to improve the conditions for the establishment and functioning of the internal market.\textsuperscript{45} Measures adopted under Article 352 TFEU must be necessary for the attainment of the Treaties’ objectives (the ‘necessity rule’).\textsuperscript{46} Hence, a decision by the Commission to propose legislation under these two Treaty provisions entails a judgement as to the fulfilment of the relevant criteria for the use of the two provisions as legal bases.

In relation to the ECI, the use of Articles 114 TFEU and 352 TFEU as a legal basis for the registration of a proposed ECI could result in a discrepancy. As has previously been explained, the legal admissibility test exists to decide solely on legal and objective grounds whether a proposed ECI falls within the powers of the Commission to propose legislation for the implementation of the Treaties. As a corollary, the Commission’s role at the admissibility stage is not to evaluate the functionality or the desirability of the proposed measures. On the contrary, as already outlined, measures proposed and adopted on the basis of Articles 114 or 352 TFEU require such evaluations. How, then, can the role of the Commission in the ECI legal admissibility test be reconciled with examining the admissibility of measures proposed by an Initiative, under the two general legal bases?

The Commission recently gave some information about its position on the admissibility of Initiatives that suggest the use of Articles 114 and 352 TFEU as legal bases. In its defence to a pending challenge, launched by the organisers of the rejected ‘Right to Lifelong Care’ Initiative, the Commission refers to its interpretation and application of the ECI legal admissibility test and particularly the criterion that a proposed ECI must not fall ‘manifestly outside’ the framework of the Commission’s powers to propose a legal act.\textsuperscript{47}

The ‘Right to Lifelong Care’ Initiative suggested legislation that would guarantee access to

\textsuperscript{45} Recourse to Article 114 TFEU as a legal basis for a legal act to prevent future distortion of competition or future obstacles to trade created by divergent national laws is possible if the emergence of such future obstacles is likely and if the measure in question is designed to prevent them. Case C-376-98 Germany v. Parliament and Council [2000] ECR I-8419 paras 84, 86, 106; Case C-58/08 Vodafone, 02 et al v. Secretary of State [2010] ECR I-4999 paras 32-33.


long-term care services. The organisers had put forward Article 14 TFEU (services of general economic importance), Article 153 TFEU (social policy), and Article 352 TFEU as possible legal bases. Whilst the first two Treaty provisions were expressly rejected by the Commission, there was no reference in the letter of reply to Article 352 TFEU. The main argument of the case is that the Commission misapplied the proper legal test of Article 4(2)(b) of the ECI Regulation and thus erroneously rejected the Initiative.

In its defence, the Commission explained what it perceives to be the correct interpretation of Article 4(2)(b) of the ECI Regulation. Firstly, an Initiative falls outside the framework of the Commission’s powers if there is no Treaty provision which would allow the Commission to propose a legal act that would cover the subject matter of the proposed Initiative. Secondly, (and most notably), a proposed Initiative falls ‘manifestly outside the Commission’s powers’ if there is a need to examine considerations that are not merely factual, in order to decide whether the subject matter of the Initiative can be proposed under the Commission’s powers. It can be interpreted then, that the Commission will refuse the registration of an Initiative if the suitability of a legal basis for its registration depends on considerations that are not factual.

The Commission further illustrates its interpretation of ‘manifestly outside’ by referring to Article 114 TFEU as an example of a Treaty provision whose suitability as a legal basis requires the consideration of factual circumstances. It explains that the use of Article 114 TFEU as a legal basis requires a factual assessment of whether the proposed legal act is designed to prevent future obstacles to trade that are likely to emerge because of differences in national laws. \(^48\) If the proposed legal act cannot prevent the emergence of such likely obstacles, Article 114 TFEU cannot constitute an appropriate legal basis. Therefore, by default and without considering the particulars of a proposed Initiative, it is possible to use Article 114 TFEU for the registration of ECIs.

The Commission’s pronouncement as to the meaning of the term ‘manifestly outside’ is significant not least because this was the first time that the Commission had explained its interpretation of the term. The given interpretation also differs from any suggestions put forward in the literature as to the meaning of the term. Academic commentators to date have argued that the criterion of ‘manifestly outside’ should characterise the flexibility of the Commission towards the application of the ECI legal admissibility test. For instance, it

was suggested that the criterion restricted the refusal of Initiative registrations only in cases where the objectives of an Initiative could clearly not be achieved through any of the available legal bases.\(^{49}\) An alternative view was that ‘manifestly outside’ suggested the preliminary nature of the ECI legal admissibility test and implied that final legal conclusions should be taken at the end of the process, after the public hearing of an ECI.\(^{50}\) The Commission’s interpretation of the term, however, adds a different dimension to the ECI legal admissibility test. According to the Commission, the registration of an Initiative depends on the type of considerations that need to be examined before deciding upon the existence of competence to propose a legal act.

On a related note, the suggested interpretation of the term ‘manifestly’ raises questions as to the meaning of the same term in the context of Article 4(2)(c) and 4(2)(d) of the ECI Regulation. Applying the same interpretation of ‘manifestly’ in Article 4(2)(b) to the other two provisions would make it difficult to identify the objective factors on which the Commission could justify the rejection of proposals as being ‘manifestly abusive, frivolous or vexatious’ (Article 4(2)(c)) or ‘manifestly contrary to the values of the Union as set out in Article 2 TEU’ (Article 4(2)(d)). How else can the Commission assess whether a proposal is ‘manifestly abusive, frivolous or vexatious’, if not by subjectively assessing the subject-matter of that proposal based on its own perception of the proposal’s subject-matter?\(^{51}\) Similarly, how could the Commission justify a rejection of a proposal for being manifestly contrary to Article 2 TEU if not by evaluating the proposal vis-à-vis its own understanding of the values of the Union? Both provisions could, therefore, require an assessment of factors which would entail an element of subjectivity. Alternatively, any rejections of Initiatives on Article 4(2)(c) or 4(2)(d) could be adjudicated in light of Article 11 of the Charter on freedom of expression. As such, only hate speech proposals or proposals endangering security or public safety should be rejected.\(^{52}\) Nonetheless, since there have not been any rejections based on either Article 4(2)(c) or 4(2)(d), the matter currently remains unsettled.

\(^{49}\) Francesco Maiani (n 3) 16; James Organ (n 4) 427.


\(^{51}\) See Michael Dougan (n 3) 1840-1841.

\(^{52}\) In the context of UK petitions, Marriott argues that the rejection of petitions as ‘offensive, joke or nonsense’ ‘could be seen as a significant interference with the fundamental right of freedom of expression, which affords protection to offensive, joke or nonsense “speech”.’ Jane Marriott, ‘A "meaningless charade"? Public petitioning and the indelible marks of history’ (2013) PL 755, 772.
The above sentiment aside, and taking the Commission’s stance into consideration, it should be noted that Article 352 TFEU has not yet been used as legal basis for registering proposed Initiatives. It is only explicitly mentioned once, in the Commission’s reply to the proposed ‘Abolish Bullfighting’ Initiative, which suggested the prohibition of bullfighting in the EU.\textsuperscript{53} The Commission stated that Article 352 TFEU is inadequate as a legal basis because the objective of the Initiative (the welfare of animals) is not \textit{per se} an objective of the EU set out in the Treaties. Given its statement that it considers all possible legal bases for a proposed Initiative, the Commission has also implicitly rejected the use of Article 352 TFEU in the context of other rejected proposals, such as the ‘Right to Lifelong Care’ Initiative.

Contrary to Article 114 TFEU, the use of Article 352 TFEU as a legal basis does not depend solely on factual circumstances, but rather requires an assessment of the necessity of the proposed measure. In all likelihood, an assessment of this kind would entail political considerations by the EU Institutions. It has even been suggested that ‘Article 352 TFEU would be reduced to a problem-solving mechanism interpreted literally to deal with politically sensitive issues’.\textsuperscript{54} As previously argued, political considerations should not be taken into account during the ECI legal admissibility test. Moreover, recourse of EU Institutions to Article 352 TFEU has been rare in recent years and especially after the Treaty of Lisbon.\textsuperscript{55} Therefore, could it be the case that, by default, no ECI will be registered on the basis of Article 352 TFEU? In this respect, further clarity on behalf of the Commission regarding the possibility to use Article 352 TFEU as a legal basis to register an ECI could be beneficial.

In contrast with the lack of Initiatives registered under Article 352 TFEU, most of the proposed Initiatives that suggested Article 114 TFEU as their legal basis were registered. In particular, the Commission did not hesitate to register ECI proposals in areas which had been previously harmonised under Article 114 TFEU, and which therefore did not require

\begin{footnotesize}
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\item[53] The original title of the proposal is: ‘Abolicion en Europa de la tauromaquia y la utilizacion de toros en fiestas de crueldad y tortura por diversion’. The registered ECI ‘New Deal for Europe’ also suggested Article 352 TFEU as its legal basis. However, a close look into the objectives of the proposal (to increase the own resources of the EU budget by imposing a financial transactions tax and a carbon tax in order to create a programme of public investments for the financing of EU public goods) indicates that there are other Treaty provisions (for example Article 311 TFEU) which can serve as a legal basis for a legal act of the EU covering the subject matter of the proposed ECI. Hence, ‘New Deal for Europe’ ECI was most likely not registered on the basis of Article 352 TFEU.
\item[54] Theodore Konstadinides (n 7) 259.
\item[55] For a detailed discussion on the use of Article 352 TFEU see Theodore Konstadinides (n 7).
\end{itemize}
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a new assessment as to whether they would genuinely improve the internal market. The
‘European Initiative for Media Pluralism’ (proposing the harmonisation of national
legislation on media pluralism\(^{56}\)) and the ‘Single Communication Tariff Act’ (asking for
the complete elimination of roaming charges in the EU\(^{57}\)) are two examples.

The above observation aside, the Commission also appears willing to assess whether a
proposed measure in an area that has not been previously harmonised can be registered on
the basis of Article 114 TFEU. The ‘Weed Like to Talk’ ECI, which was registered in
November 2013, proposed the legalisation of cannabis and the adoption of a common EU
policy on the control and regulation of the production, use, and sale of cannabis. Its
organisers suggested the harmonisation of cannabis legislation based on Article 169(2)(a)
TFEU, as a measure adopted pursuant to Article 114 TFEU. The ECI was registered
despite the lack of any previous harmonised legislative measures in the area of cannabis
legislation. Although Article 114 TFEU has been used to ban the marketing of tobacco
products,\(^{58}\) it has not been used before to propose the legalisation of a substance that was
subject to national legislation.

The Commission was less willing to register four other proposed Initiatives that related to
the welfare of animals; they were all refused registration on almost identical grounds. The
Initiatives’ specific subject matters varied: ‘Abolish Bullfighting’ requested the prohibition
of bullfighting and torture of bulls in the EU; ‘Stop Cruelty for Animals’ called for the
establishment of rules in all Member States for the uniform treatment of companion
animals; ‘Our concern for insufficient help to pet and stray animals in the EU’ and ‘Ethics
for Animals and Kids’ asked for harmonising legislation on the protection of pet and stray
animals in the EU. Only ‘Abolish Bullfighting’ explicitly referred to Article 114 TFEU in
its proposal but the Article was mentioned in the Commission’s letters of refusal to all four
ECIs. The starting point of the letters of refusal was Article 13 TFEU which provides that:

\(^{56}\) Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or
administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ
\(^{57}\) See Commission Press Release ‘Digital Agenda: Commission proposes more competition, more choice and
lower prices for mobile phones users abroad’ IP/11/835, 6 July 2011.
\(^{58}\) Directive 2001/37/EC on the approximation of the laws, regulations and administrative provisions of the
Also see C-210/03 Swedish Match Case [2004] ECR I-11893.
In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

The Commission clarified that Article 13 TFEU does not constitute a legal basis as such and that EU Regulations in the field of animal welfare were so far adopted on the basis of Article 114 TFEU or Article 192 TFEU, provided that they helped the development of specific policies to reach the objectives of the two Treaty provisions (the completion of internal market and the protection of the environment respectively). Referring to Article 114 TFEU, the Commission briefly reiterated what was already established by case law: in adopting harmonising legislation, the existence of different rules must have an impact on the internal market and the proposed measure must improve the functioning of the internal market. In a rather laconic way, the Commission then noted that none of the ECI proposals would contribute to the objectives of Article 114 TFEU, as they would not improve the functioning of the internal market, and so they could not be registered on that basis.

In contrast to the rejection of the above Initiatives, the Commission registered the ‘Stop Vivisection’ ECI which suggested the repeal of Directive 2010/63/EU and the adoption of a new Directive to make compulsory the use of data directly relevant for humans (instead of animals) in biomedical and toxicological research. When examining the four other ECIs, however, the Commission overlooked the Preamble of Directive 2010/63/EU which states that ‘animal welfare is a value of the Union that is enshrined in Article 13 TFEU’. Instead of interpreting Article 13 TFEU as a new insertion to the constitutional framework of the EU by the Treaty of Lisbon, the Commission referred to the ruling of the CJEU in Jippes. In this case, the CJEU held that ensuring the welfare of animals is not one of the objectives of the Treaty. The Commission argued that the Court’s interpretation remained valid even though it was given in light of the Protocol on protection and welfare

59 The Commission also registered ‘EU Directive on Dairy Cow Welfare’ which proposed a directive to improve animal welfare for dairy cows. Given that it was registered on the basis of Article 43 TFEU (Common Agriculture Policy) and not Article 114 TFEU, it was not included in the current analysis.
of animals attached to the Treaty of Amsterdam. According to the Commission, the Protocol is now Article 13 TFEU.

Had the Commission been more flexible with the interpretation of Article 13 TFEU, it might have registered some of the proposed Initiatives. Despite the lack of a specific animal welfare policy and a particular legal basis, it has been argued that legislation in the field of animal welfare could be adopted through internal market harmonisation. It is well-known that in practice EU Institutions can pursue non-market goals while at the same time satisfying the internal market requirement. Directive 2010/63/EU is an example of such an approach; it was adopted to harmonise national legislation regarding the protection of animals used for scientific purposes because the existing disparities constituted barriers to trade. The Commission’s interpretation of Article 13 TFEU is contested before the GC by the organisers of ‘Ethics for Animals and Kids’ who argue that the Commission failed to observe the limits of its competences.

It is worth noting, however, that even if the Commission had accepted that animal welfare as enshrined in Article 13 TFEU is a value of the Union, the ‘Abolish Bullfighting’ Initiative would still not have been registered. In its letter of reply, the Commission argued that bullfighting is part of the cultural tradition and regional heritage of some Member States, which need to be respected by the EU legislature according to Article 13 TFEU. Advocates of an overall more flexible legal admissibility test would perhaps disagree with the Commission’s reply on the following ground: if the ECI proposal was registered and succeeded in collecting one million signatures, it could indicate that bullfighting should not be considered a part of citizens’ cultural tradition anymore. Nevertheless, such criticism of the Commission’s rationale would be contrary to the current interpretation of the ECI Regulation, which prevents the registration of Initiative proposals for Treaty change. Registering the said Initiative would implicitly allow for a debate on Article 13 TFEU. It could be questioned whether bullfighting should be considered part of the cultural traditions and regional heritages but, from a legal perspective, the Commission’s

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64 T-361/14 HB v Commission, action brought on 31 October 2014.
justification regarding Article 13 TFEU is consistent with the position that an ECI cannot propose Treaty amendments.

Overall, it was demonstrated so far that the wording of Article 4(2)(b) of the ECI Regulation can be interpreted in different ways and that these different interpretations could lead to contrasting outcomes as to the registration of proposed Initiatives. Whether the approach of the Commission, as examined, is fit for the purposes of the ECI’s legal admissibility test is a matter for determination by the CJEU, and particularly by the GC. Without specifying precisely what remedies are available for organisers when their ECI is rejected on grounds of legal admissibility, the ECI Regulation notes that the Commission shall inform the organisers of all judicial and extrajudicial remedies available to them.⁶⁵ In every letter of rejection sent out by the Commission so far, one of the remedies mentioned is recourse to the GC based on Article 263 TFEU.

Three of the pending cases (from the organisers of ‘Stop TTIP’; ‘Right to Lifelong Care’; and ‘Ethics for Animals and Kids’ Initiatives) have already been considered to some extent above. Three additional cases challenge ECI legal admissibility decisions of the Commission. There is also one pending case brought by the organisers of the ‘One Of Us’ ECI, which was one of the two ECIs that went to the public hearing stage and got a final (negative) response from the Commission. Although the case does not challenge a Commission’s decision to reject an Initiative on legal admissibility grounds, it raises some notable questions in relation to the ECI legal framework. It is pertinent to examine the nature of these unprecedented ECI-related claims against the Commission and comment on the opportunities that have opened up for the GC to clarify certain contested aspects of the ECI legal admissibility test. With the preceding analysis in mind, the next chapter discusses judicial review in the context of the ECI and aims to identify the way in which the GC could be instrumental in interpreting Article 4(2)(b) of the ECI Regulation and, to an extent, Article 11(4) TEU. To conclude the current chapter, however, it is apposite to comment on the current calls for review of the ECI legal admissibility test and the reply of the Commission to such calls.

⁶⁵ Article 4(3) of the ECI Regulation.
Concluding Remarks: Reforming the ECI legal admissibility test?

To understand the reasons behind the calls for reform of the ECI legal admissibility test, it is necessary to give a brief insight into the Initiative organisers’ opinions regarding the legal hurdles surrounding the registration of ECIs. In general, the organisers of registered ECIs that were interviewed for the purpose of this study did not express strong disagreement with the way the Commission decides on the admissibility of an ECI. For instance, one organiser commented that drafting the ECI was easy because of the abundance of information available online and the obvious links between the issues of the proposed ECI with the relevant legal framework. It thus appears that the task of successfully registering an ECI is not impossible for laymen who are unacquainted with the TFEU’s competence typology. Yet, it should be noted that the ‘Teach for Youth’ ECI was written by former law students with the help of their law professor, and ‘Education is an Investment’ was prepared with the assistance of lawyers and economists; ‘End Ecocide in Europe’ was written by an environmental lawyer, and the suggested legal act that was attached in ‘One of Us’ was also drafted by lawyers.

As anticipated, organisers of rejected Initiatives criticised the ECI legal admissibility test. Mr. Anagnostakis, a lawyer, commented that ‘an attempt is being made [by the Commission] to restrict opinions expressed on certain issues via the ECI in order to preserve the current status quo’. Similarly, the representative of ‘Right to Lifelong Care’ stated that the need for the registration of an ECI is ‘completely incomprehensible to citizens and throws doubt on the real willingness of the EU to encourage a genuine popular expression’. Such criticisms persist despite reassurances from Commission officials that the decisions are based on purely legal considerations and that no political element is involved. Furthermore, a Commission official, speaking in a personal capacity, expressed his view that rejecting ECIs on the basis of purely legal grounds obstructs the development

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66 Findings from the interviews conducted by the researcher.
69 Carmen Preising, Head of Unit, European Commission Secretariat General, Unit C4, comment at the conference ‘The European Citizens’ Initiative and the Promise of Participatory Democracy’ 16 June 2015; Charlotte Rive, European Commission Secretariat General, Unit G4, comment at the workshop ‘ECI Legal Framework – Need for Reform?’ 10 December 2014.
of European debates.\textsuperscript{70} The ‘institutional mediation by the Commission at the start of the ECI process’ is said to limit the possibility for deliberation among citizens and obstruct citizens from challenging established EU legislation and policy.\textsuperscript{71} It has therefore been argued that the ECI should be seen as a policy-setting instrument that would allow citizens to avoid having to propose a legal act to the Commission.\textsuperscript{72}

The example of ‘Stop TTIP’ could be seen as an indication that a more relaxed legal admissibility test could indeed facilitate the public debate aspect of the ECI. The organisers of the aforementioned ‘self-organised’\textsuperscript{73} ECI, who describe themselves as ‘an alliance of more than 500 European organisations’\textsuperscript{74} decided to start an ECI campaign without official approval from the Commission. They are actively running a campaign, organise events and mobilise people across the EU to collect signatures voluntarily. Since October 2014, they have collected 2, 952, 682 signatures and they aim to reach 3 million signatures by the end of October 2015. Considering that their collected signatures surpasses the signatures of any of the successfully submitted ECIs, it can be argued that ‘Stop TTIP’ has contributed to the public debate on the topic of the Initiative, something that the organisers were prevented from doing under the auspices of the official ECI mechanism.

There have been calls to remove the legal admissibility test altogether, in order to allow for public debate.\textsuperscript{75} It has also been suggested that Initiative organisers should, in the first instance, set the subject of their Initiatives before the Commission, to provide it with the opportunity to point out the relevant legal bases.\textsuperscript{76} These suggestions, however, were never explicitly endorsed by the Commission. One must also consider, when suggesting such actions, that the Commission is not only the administrator of the Initiative process but also the arbiter of successfully submitted ECIs, hence there is a limit as to the extent that it should interfere with proposed Initiatives or adjust the objectives of Initiatives to make

\textsuperscript{70} Mario Tenreiro, ‘Citizens’ Initiative: What is next?’ in Carsten Berg and Janice Thomson (eds) \textit{An ECI That Works!} (The ECI Campaign 2014).

\textsuperscript{71} James Organ (n 4) 442.

\textsuperscript{72} Presentation by Onno Brouwer at the workshop ‘ECI Legal Framework – Need for Reform?’ 10 December 2014.

\textsuperscript{73} All information about the Stop TTIP is available at the website of the campaign: <https://stop-ttip.org/about-the-eci-campaign/> accessed 15 September 2015.

\textsuperscript{74} ibid

\textsuperscript{75} The ECI Campaign, ‘Recommendations from ECI campaigns and stakeholders for how to change the ECI’s governing rules’ <www.citizens-initiative.eu/an-eci-that-works/> accessed 19 September 2015.

them fit into the framework of its competence to propose legal acts. An alternative suggestion, which was put forward by ECAS, is the establishment of an ECI officer who would take responsibility for carrying out the test independently from the Commission. The establishment of a ‘Citizens’ Initiative Centre’ to advise Initiative organisers and provide information on the appropriate legal bases has also been suggested.

Overall, this chapter has demonstrated that the ECI framework has been worded in a way that leaves some scope for differing and often conflicting interpretations as to which Initiative proposals are legally admissible. The analysis of registered and rejected ECIs illustrates the Commission’s current approach towards Article 4(2)(b) of the ECI Regulation and thus the limits of proposing legal acts by way of an ECI. According to the application of Article 4(2)(b) of the ECI Regulation, currently, an ECI cannot propose Treaty modifications or proposals for preparatory acts such as suggesting the termination of negotiations for an international agreement. The discussion has also shed some light on the Commission’s interpretation of the much-discussed criterion of ‘manifestly outside the framework of the Commission’s powers to propose a legal act’ and has examined the use of Articles 114 and 352 TFEU as legal bases for the registration of proposed Initiatives.

All things considered, the Commission has chosen to interpret Article 4(2)(b) of the ECI Regulation in a particular way, which was exposed in the preceding analysis. As seen, the test is currently under criticism from several actors, and there have been calls for review, particularly asking for more detailed reasoning in the Commission’s responses, or even more radical changes in the conduct of the entire process. Whether the Commission’s interpretation and application of Article 4(2)(b) of the ECI Regulation can withstand legal criticism and whether the actual wording of Article 4(2)(b) is appropriate for the purposes of the ECI as a participatory mechanism are questions which could potentially be answered by the GC.

In its 3-year report on the ECI, the Commission notes that ‘registration is a major challenge for the organisers as an important number of proposed ECIs are manifestly outside the

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77 Similar to the Hearing Officer in EU Competition law, who is an independent arbiter with power over disputes ‘about the effective exercise of procedural rights between parties and DG Competition in antitrust and merger proceedings.’ <http://ec.europa.eu/competition/hearing_officers/index_en.html> accessed 14 September 2015; ECAS Report (n 47) 26.

scope of the Commission’s competences’, without specifying whether it intends to take any steps to address this challenge. At the same time, the European Parliament in its Draft Report on the ECI asks from the Commission to elaborate further its explanations of the reasons behind rejections of future proposed Initiatives and to explain in a more detailed manner its interpretation of the relevant legal bases in each letter. It also suggests that the Commission (via the Europe Direct Contact Centres), or an independent body, provides legal assistance to Initiative organisers. Similarly, the European Ombudsman’s own inquiry into the functioning of the ECI procedure suggests some changes to the application of the ECI legal admissibility test by the Commission. The European Ombudsman recommends that the Commission provides ‘robust, consistent and comprehensible reasoning’ when rejecting an Initiative, which will help future Initiative organisers to submit ECI proposals. She also encourages the Commission to engage with the ECI organisers by helping them clarify the objective of their proposed Initiative.

By contrast to the suggestions of the European Parliament and the European Ombudsman, the Commission maintains that its responses are ‘aimed to be as detailed and as explicit as possible’ and that Europe Direct Contact Centre is already available to potential organisers who require assistance. The Commission’s interpretation and application of the ECI legal admissibility test could change following the completion of the ECI Regulation’s evaluation. Further changes may take place if the GC takes the opportunity to clarify some more aspects of the ECI legal admissibility test over which ECI stakeholders, the European Parliament, and the Commission presently seem to be talking at cross-purposes. So far, the GC in the first ECI case, Anagnostakis v Commission, found that the Commission’s reasons for rejecting the proposed Initiative were sufficiently detailed. Anagnostakis and the six other ECI cases, which are currently pending before the CJEU, are the focus of the discussion in the subsequent chapter.

81 ibid
82 Letter from the European Ombudsman Emily O’Reily to Jose Manuel Barroso (Strasburg, 15 July 2014) OI/9/2013/TN.
84 Council of the European Union, ITEM NOTE 9832/15, INST 200, 11 June 2015.
86 Case T-450/12 paras 21-34.
CHAPTER 5

JUDICIAL REVIEW IN THE CONTEXT OF THE ECI

Introduction

As evidenced in the previous chapter, there are a number of uncertainties about the scope of the ECI and the extent to which it allows citizens to submit proposals for legal acts at the EU level. ECI stakeholders and the Commission presently seem to be talking at cross-purposes with regard to the interpretation and application of the ECI legal admissibility test. The root of these controversies can be traced back to the wording of Article 4(2)(b) of the ECI Regulation, which allows for different interpretations of the legal admissibility criteria. Whether the interpretation and practical application of the ECI legal admissibility test is fit for the purpose of the ECIs’ registration is a matter for determination by the CJEU. Indeed, some contested issues have already been discussed in Chapter 4 in light of the claims brought before the Court by the organisers of the ‘Stop TTIP’ and ‘Right to Lifelong Care’ Initiatives.

This chapter examines the nature of the unprecedented ECI-related cases against the Commissions and highlights the opportunities that have opened up to the General Court (GC) to clarify certain aspects of the ECI. There are currently six pending ECI cases; five of them concern the process of registration of proposed Initiatives, and the other questions the obligations of the Commission at the final examination stage of successfully submitted ECIs. In addition, the GC has recently ruled on the first ECI case that challenged the Commission’s refusal to register a proposed Initiative, Anagnostakis v Commission. The central aim of the following discussion is to explore the seven ECI cases in order to identify the ways in which the GC has contributed and could further contribute to the interpretation of the ECI Regulation and, by extension, of Article 11(4) TEU.

This discussion commences by explaining the two instances where ECI organisers may wish to contest the Commission’s actions in the context of the ECI: cases that challenge an Initiative’s rejection, and those that challenge the Commission’s follow-up actions. It is argued that the role of the Commission at each stage, as well as the scope of rights

\[1\] Case T-450/12 Anagnostakis v Commission, judgment of 30 September 2015, not yet reported.
bestowed on EU citizens by the ECI legal provisions, determine the admissibility of such cases in court and have an impact on their outcome. The chapter then analyses the potential for judicial review of the Commission’s decisions to reject proposed Initiatives. With respect to the first category of cases, the substantive and procedural grounds of review put forward by the applicants are examined in order to illustrate the range of matters that could be interpreted by the Court. A central part of this examination revolves around the first relevant judgment of the GC in Anagnostakis, where the Court dismissed the applicant’s claims. The analysis of the judgment is separated into procedural and substantial aspects, thus feeding into the overall examination of the ECI cases.

Subsequently, the chapter considers the potential of the CJEU to review the Commission’s follow-up actions to an ECI. To this effect, it explores the ‘One of Us’ case in depth, beginning with questions surrounding whether or not the case will be admitted in Court. Despite the lack of precedent that would provide evidence on the issue of admissibility, the chapter draws examples from the parallel case law on EU petitions to demonstrate a possible approach by the GC to the case at hand. In turn, it provides a critical treatise both of the claims submitted by the applicants in the ‘One of Us’ case, and the Commission’s response to such claims. As such, it demonstrates that the case raises questions regarding the overall usefulness of the ECI to EU citizens.

Finally, the chapter discusses the ECI case law from a different perspective. It places the issue of judicial review of the Commission’s decisions in the wider EU legal order, and examines it in relation to the CJEU’s position on the principle of democracy and the notion of citizens’ participation at the EU level. Ultimately, the chapter illustrates the gaps that are present in the operation and rationale of the ECI, which the GC is now called upon to close. Such calls to the GC are indications that the ECI is, as the title of this thesis suggests, still a laboratory for citizens’ participation in the EU.

I. Judicial Review from the perspective of ECI organisers

Initiative organisers may wish to turn to the CJEU on either of two occasions, depending on whether their proposed Initiative is registered or refused registration. If a proposed Initiative is rejected, its organisers may wish to challenge the Commission’s decision of inadmissibility. Six cases challenged the rejection of proposed Initiatives by the
Commission, of which five are still pending judgment. Where an ECI is registered, manages to collect one million signatures but is denied any further action by the Commission (such as the formal proposal of a relevant legal act) its organisers may wish to challenge the Commission’s final decision. One pending case belongs to this latter category of challenges.

Although both categories of case primarily address the Commission as a defendant, there are considerable differences between them which result, inter alia, from the distinct role of the Commission at each stage of the ECI. For the legal admissibility test, the Commission has an administrative role. It is responsible for reviewing a proposed Initiative objectively, and solely on legal grounds, without exercising any political judgement. Contrastingly, at the final stage of the ECI where the Commission decides upon a successfully submitted ECI, it acts as the appraiser of political and legal considerations, and factors pertaining to the subject matter of the submitted ECI.

The distinct role of the Commission at each stage of the ECI process could have an influence not only over the outcome of the cases, but also over the justiciability of the claims put forward by the ECI organisers. With regard to the Commission’s decisions on an Initiative’s legal admissibility, organisers are able to challenge what they consider to be unlawful practices of the Commission. It is considered a tenet of democracy that citizens should be allowed to protect their rights in judicial proceedings against unlawful administrative practices. However, where the Commission’s role at the final stage exceeds that of an administrator, it is questionable whether the same line of thought can be followed to argue that ECI organisers should be able to challenge the Commission’s refusal to act on their ECI.

The scope of rights conferred upon EU citizens by the ECI’s legal framework also determines which claims are justiciable before the CJEU. In respect of the ECI legal admissibility test, Article 4(3) of the ECI Regulation provides that, if the Commission

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3 Case T-561/14 One of Us and others v Parliament and Others, action brought on 25 July 2014.  
4 Federico Mancini and David Keeling, ‘Democracy and the European Court of Justice’ (1994) 57(2) MLR 175, 181.  
5 As will be subsequently seen, the ‘One of Us’ is challenging the scope of the Commission’s role and its discretion to decide the follow-up of an ECI.
refuses to register a proposed Initiative, it shall ‘inform the organisers of the reasons for such refusal and of all possible judicial and extrajudicial remedies available to them’. A Commission’s refusal to register an Initiative prevents the organisers from bringing an ECI and impedes other EU citizens from supporting the corresponding proposal. Both the right of the Initiative organisers and that of the potential signatories are primary rights bestowed upon them by Article 24 TEU. These two rights can only be denied to citizens under the criteria stipulated in Article 4(2)(b) of the ECI Regulation. In this sense, the role of the CJEU is to ensure that the Commission’s decisions on the inadmissibility of proposed Initiatives accord with Article 4(2)(b) of the ECI Regulation and, more generally, with Article 11(4) TEU, and can therefore withstand legal criticism. As such, the Commission’s letters of rejection are perceived as reviewable EU acts ‘intended to produce legal effects vis-à-vis third parties’, as required by Article 263(1) TFEU. The possibility for judicial review of the Commission’s decisions at the ECI legal admissibility stage is, therefore, clear.

Conversely, the justiciability of any rights at the final stage of an ECI is uncertain. Unlike Article 4(3) of the ECI Regulation, there is no stipulation in the ECI Regulation, in Article 11(4) TEU, or Article 24 TFEU, that organisers can appeal the Commission’s final decision. The only obligations of the Commission at the end of an ECI’s life cycle are those specified in Article 10 of the ECI Regulation: to publish an ECI in the public registry; to organise a public hearing for the ECI organisers; and to set out in a Communication ‘its legal and political conclusions on the citizens’ initiative, the action it intends to take, if any (emphasis added) and its reasons for taking or not taking that action’ (Article 10(1)(c)). What is more, the prevailing understanding of the ECI framework that is frequently repeated in this thesis, is that the ECI does not enable EU citizens to oblige the Commission to adopt legislative actions based on successfully submitted ECIs.

A literal interpretation of Article 11(4) TEU and Article 10 of the ECI Regulation shows that the Commission is not obliged to act on a successfully submitted ECI. Yet this interpretation is currently the bone of contention in the case brought by the ‘One of Us’ organisers against the Commission. Further issues which the GC is called to clarify concern the Commission’s interpretation of the legal admissibility test (Article 4(2)(b) of

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the ECI Regulation), as well as the procedural obligations of the Commission to give reasons. The ensuing analysis explores the pending ECI cases in order to understand the full scope of the ECI-related issues that have been submitted so far to the GC for clarification.

**A. Judicial Review of the Commission’s decisions on the admissibility of proposed Initiatives**

An ECI which has been rejected on any of the grounds stated in Article 4(2) of the ECI Regulation can be resubmitted as many times as its organisers wish. The Commission does not have the power to reject a proposed Initiative on the ground that a similar proposal was submitted by the same or another Citizens’ Committee at a different time; a slightly altered wording of the subject matter of the ECI could get an Initiative registered the second time around. A potential organiser may also contact the Commission with informal questions on the possibilities of registering an Initiative before she submits an official proposal.

Instead of resubmitting their ECIs, some organisers may decide to bring a case to the CJEU in order to challenge the rejection of their initiative. It has been argued that some applicants are merely playing ‘the politics of victimhood’ in an attempt to condemn the Commission or to expand the publicity of their proposals. Notwithstanding the motivation behind the decision to go to Court, judicial scrutiny functions as the main control of the Commission regarding an Initiative’s registration. As such, the purpose of judicial intervention regarding the ECI legal admissibility test is to ensure that the Commission is not deciding legal issues, such as the competence of the Commission to propose a legal act, based on factors beyond those which must be taken into consideration under Article 4(2)(b) of the ECI Regulation. Thus the main reason behind the involvement of the GC is to safeguard the EU citizens’ rights to organise and sign an ECI against any Commission decisions which may unjustly impede them.

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7 The ‘UBI’ ECI is an example.
8 According to the Commission’s 3-year report on the ECI, the Commission is willing to answer any such questions without, however, giving any absolute answer as to whether the proposal will be eventually registered. Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 211/2011 on the citizens’ initiative COM(2015) 145 final, 31 March 2015, 13 (Hereinafter Commission 3-year Report on the ECI Regulation).
In addition, the admissibility in Court of claims that challenge the Commission’s decisions to reject proposed Initiatives is telling of the character of the ECI itself. It indicates that the Commission does not have unlimited discretion in applying the ECI legal admissibility test. It should, however, be kept in mind that the CJEU’s judicial scrutiny of ECI-related issues is, to a considerable degree, uncharted territory (apart from the judgment of the GC in Anagnostakis). It has been suggested that the Luxembourg judges will apply a strict standard of review of the Commission’s decisions because the issues at stake concern the delineation of the Commission’s competence to propose legislation. Whilst it is a reassuring statement that the GC will clarify all of the uncertainties pertaining to the ECI process, it is also a wishful one; the attitude of the GC towards ECI-related issues remains to be seen.

Setting the above sentiment aside, Chapter 4 indicated certain contested issues in the interpretation and application of the ECI legal admissibility test by the Commission. At this point, it is instructive to contextualise the subsequent discussion by briefly describing the subject-matters of the six rejected Initiatives that challenged the Commission’s legal admissibility decisions. The first action, which was adjudicated recently by the GC, was brought by the organisers of ‘One Million Signatures for a Europe of Solidarity’ in October 2012. This proposal called for the establishment at EU level of the ‘principle of the state of necessity’, which would allow a Member State to refuse to repay its debt if its financial and political existence is endangered.

Almost a year later, ‘Cohesion Policy for the Equality of the Regions and the Preservation of Regional Cultures’ (‘Cohesion Policy’) also initiated proceedings before the GC after being rejected. The proposed initiative suggested that the EU ensures, through its cohesion policy, the sustainment of the development of regions with particular cultural characteristics. The third rejection was the ‘Minority SafePack’ initiative, which suggested the proposal of 11 acts from different policy areas (such as education and regional policy) with the objective of protecting national and linguistic minorities. Finally, ‘Right to Lifelong Care’ asked for the adoption of legislation to guarantee adequate social

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12 Case T-450/12 Anagnostakis v Commission, judgment of 30 September 2015, not yet reported.
13 Case T-529/13 Izsak and Dabis v European Commission, action brought on 27 September 2013.
protection, ‘Stop TTIP’ requested the termination of the negotiations for the TTIP and CETA, and ‘Ethics for Animals and Kids’ asked for legislation on the protection of stray animals. Taken as a whole, the cases put forward a number of claims, both on substantive and procedural grounds of review.

i. **Challenges on substantive grounds of review**

Given its extensive interpretation thus far, Article 263(2) TFEU is considered to be fairly comprehensive in terms of offering grounds of review, encompassing challenges on substantive grounds like the ones submitted by the six organisers of rejected ECIs. The six above-mentioned cases primarily argued that the Commission had infringed the provisions of Article 4(2)(b) of the ECI Regulation by misapplying the ECI legal admissibility test and incorrectly refusing the registration of the proposed Initiatives. In this regard, the cases present a number of substantive issues for interpretation by the GC. For instance, the organisers of ‘Right to Lifelong Care’ challenge the Commission’s refusal to use the general legal basis in Article 352 TFEU for the registration of their proposed Initiative.

Two other cases explicitly challenge the Commission’s interpretation of specific legal bases of the Treaty, particularly in relation to the respective initiatives’ objectives. In *Izsak and Dabis v European Commission*, the applicants are arguing that the Commission misinterpreted the objective of the ‘Cohesion Policy’ Initiative and thus incorrectly found that the proposal was not in accordance with Article 174 TFEU. Furthermore, the applicants submit that the Commission infringed three Treaty provisions (Articles 19(1), 167, and 174 TFEU) and a secondary legislation instrument (Regulation 1059/2003). Put differently, the applicants are challenging the Commission’s interpretation of the said legislative provisions vis-à-vis its understanding of the proposed Initiative’s objectives.

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18 The Court shall have ‘jurisdiction (…) on grounds of (…) infringement of the Treaties or of any rule of law relating to their application’.
20 In its letter of reply to the organisers, the Commission states that ‘promoting the conditions of national minorities cannot be understood as helping to reduce disparities between the levels of development of the various regions as set out in Article 174(2) TFEU.’ The organisers argue in their claim that the purpose of their Initiative was not to improve the situation of national minorities. For a discussion on the rejection of the particular Initiative that criticises the Commission’s application of Article 4(2)(b) as too strict, see James Organ ‘Decommissioning Direct Democracy?’ (2014) 10 EuCons. 422, 431.
Beyond contesting the Commission’s interpretation of particular Treaty provisions, the pending cases also challenge the Commission’s interpretation of the ECI’s legal framework and especially Article 11 TEU and Article 4(2)(b) of the ECI Regulation. For example, as already discussed, the organisers of ‘Stop TTIP’ object to the limitations imposed on the scope of the ECI by virtue of the Commission’s interpretation of the ECI legal admissibility test. Consequently, the case opens up the possibility for the Court to identify the limits of the ECI’s scope. Moreover, the claims submitted by the ‘Right to Lifelong Care’ organisers could potentially bring some wider issues before the Court. The organisers claim that the Commission did not take into account the underlying principles of the ECI Regulation when examining their Initiative.

Accordingly, the ‘Right to Lifelong Care’ case could provide the opportunity for the GC to consider the Commission’s interpretation of the ECI legal admissibility test vis-à-vis the purpose behind the inclusion of Article 4(2)(b) in the ECI Regulation. An issue that could emerge in the context of the case is how flexible the Commission should be when deciding upon the extent of its competences for the purpose of registering an initiative. In this regard, the Court could provide some clarification and guidance to the Commission on the correct interpretation of Article 4(2)(b) of the ECI Regulation, in light of the purpose of the legal admissibility test.

In Anagnostakis, the GC ruled on the Commission’s interpretation of the Treaty provisions suggested by the applicant in his Initiative proposal for the purposes of registering the proposed Initiative. Had the Court found an error of interpretation, it could have substituted its judgment for that of the Commission.\textsuperscript{22} Nevertheless, the Court dismissed all of the arguments submitted by the applicant who was attempting to show that the Commission breached Article 4(2)(b) of the ECI Regulation. In particular, the applicant argued that the Commission had, by rejecting the proposed Initiative, breached Article 4(2)(b) of the ECI Regulation, articles 122(1), 122(2), 136(1)(b), 222 TFEU, and, international law on the establishment of the principle of necessity.\textsuperscript{23} These Articles were most likely selected because of their relevance to the topic of the proposed Initiative. Article 136 TFEU was the Treaty basis for the establishment of the European Stability

\textsuperscript{23} Case T-450/12 paras 35-67.
Mechanism (ESM),\textsuperscript{24} and Article 122(2) TFEU was the basis for the creation of the European Financial Stabilisation Mechanism (EFSM),\textsuperscript{25} whilst the Initiative was strongly linked to social resentment of the austerity measures imposed in Greece.\textsuperscript{26} The applicant argued that the Commission could have registered his Initiative on the basis of 136, 122 and 222 TFEU. On the contrary, the Commission maintained that these legal bases did not allow for the registration of the applicant’s proposal to establish the ‘principle of the state of necessity’ as a measure applicable in relation to the economic situation of Member States.

The GC in \textit{Anagnostakis} relied heavily on the \textit{Pringle} judgment, where the CJEU mentioned that Article 122 TFEU empowers the Council to adopt measures appropriate to the economic situation of Member States but does not constitute a legal basis for financial assistance from the EU for Member States which are experiencing financing problems.\textsuperscript{27} Such legal basis is not provided by Article 136 TFEU either.\textsuperscript{28} Consequently, the GC ruled that neither Article 122 TFEU, nor Article 136 TFEU, could constitute a legal basis for the registration of the proposed Initiative, which essentially requested the establishment of the principle of necessity with a view to cancelling part of the Greek financial debt.\textsuperscript{29}

The Court also held that Article 222 TFEU (the principle of solidarity)\textsuperscript{30} should not be interpreted as primarily concerning economic and monetary policy, or the financial

\textsuperscript{24} ESM is a permanent crisis mechanism established by the Member States through Article 136(3) TFEU, a provision entered into the TFEU via Simplified Revision Procedure (Article 48(6) TEU); see European Council Decision 2011/199/EU amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro \cite{2011 OJ L 91/1}.

\textsuperscript{25} Council Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism \cite{OJ L 118/1}.

\textsuperscript{26} In fact, the proposed ECI was brought by Seisachtheia, a movement created to write off contents in the Loan Agreement for Greece which violate the Constitution, domestic, European and International law. <www.seisachtheia.gr/en/news-publications/view/eu-commission-denial-of-european-solidarity.html> An online petition created by this movement is supported by 87957 people at the time of writing <www.1millionsignatures.eu/> accessed 1 October 2015.

\textsuperscript{27} Case C-370/12 \textit{Pringle v Government of Ireland, Ireland and the Attorney General} [2012] ECR I–756 paras 115-116; Case T-450/12 paras 41,48,49,58.

\textsuperscript{28} Case T-450/12 para 58.

\textsuperscript{29} Case T-450/12 paras 43,50.

\textsuperscript{30} Article 222(1) TFEU states: ‘The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.’
difficulties faced by the Member States.\textsuperscript{31} In this way, although to a limited extent, the judgment of the GC put flesh on the bones of solidarity, a notion widely used in the TFEU\textsuperscript{32} but loosely defined.\textsuperscript{33} At the same time, the use of Article 222 TFEU in this particular case indicates that often the Treaties may give rise to unrealistic expectations. The location of Article 222 in Title V of the TFEU’s Part Five on the Union’s External action, and its implementing arrangements\textsuperscript{34} illustrate that the so-called solidarity clause in Article 222 TFEU relates to extreme crisis management and the prevention of threats such as terrorism.\textsuperscript{35} Contrary to what the applicant had expected, the GC did not interpret the consequences of the economic crisis in Greece as falling under the category of ‘man-made disasters’ capable of triggering Article 222 TFEU. The misplaced expectations of the applicant are of utmost relevance to the ECI considering that organisers are called to identify a legal basis for their proposed Initiative.

Notwithstanding the particulars of the Anagnostakis judgment, the Court has set a precedent for adjudicating the substance of proposed Initiatives that challenge the Commission’s admissibility decisions. Moreover, in light of the GC’s clarifications of TFEU provisions, judicial review of the Commission’s decisions on the admissibility of proposed ECIs could be seen as a platform for further claims in relation to obscure Treaty provisions.\textsuperscript{36} In the future, if the GC finds that the Commission’s interpretation of primary or secondary legislation diverged from its own, it could annul the Commission’s rejection of the proposed Initiative in question.\textsuperscript{37}

\begin{footnotesize}
\begin{enumerate}
\item Case T-450/12 paras 59-60.
\item See Article 67, 122, 194, 214,222 TFEU.
\item See Theodore Konstadinides and Anastasia Karatzia (n 33).
\item This possibility should not be overstated. More than three years after the establishment of the ECI, seven cases have been launched under Article 263 TFEU and only one has been decided so far.
\item For a thorough discussion of the intensity of CJEU’s judicial review and relevant case law see Paul Craig, EU Administrative Law (2nd edn OUP 2012), Chapter 15.
\end{enumerate}
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ii. Challenges on procedural grounds of review

In addition to bringing claims on substantive grounds of review, some of the cases also challenge the Commission’s decisions on procedural grounds; such claims on procedural grounds ‘fall *par excellence* in the judicial province’, since the CJEU ‘shall have jurisdiction on the grounds of infringement of an essential procedural requirement’ (Article 263(2) TFEU). The GC is asked to clarify a procedural aspect of the ECI legal admissibility test that is not clearly indicated in the ECI Regulation. The issue in question relates to the above-mentioned ‘Minority SafePack’ initiative, which proposed a combination of different acts to achieve its objectives. According to the Commission’s reply to the organisers of this initiative, some of the proposed acts could be registered for the purpose of an ECI while others could not, so the initiative as a whole could not be registered. Although the Commission comments in the letter that ‘the Regulation of the citizens’ initiative does not provide for the registration of part or parts of a proposed initiative’, this is neither explicitly stated in the ECI Regulation, nor further explained in the letter of reply, leaving the issue open to interpretation by the GC.

The organisers of ‘Minority SafePack’ are not only challenging the rejection of their Initiative on the above basis; they are also contesting the lack of an explanation by the Commission as to which of the eleven acts suggested by the Initiative failed to comply with Article 4(2)(b) of the ECI Regulation or why this was so. To that effect, they argue that the Commission infringed Article 296(2) TFEU, according to which EU Institutions are obliged to state the reasons behind their legal acts, and Article 4(3) of the ECI Regulation, which states that the Commission shall inform the ECI organisers of the reasons for refusal of their Initiative. Likewise, the organisers of ‘Right to Lifelong Care’ argue that the Commission failed to provide sufficient and adequate reasons for the rejection of their proposed Initiative.

The issue of reasons in the context of the ECI was discussed by the GC for the first time in *Anagnostakis*. One of the applicant’s claims was that the Commission did not provide adequate reasons for the rejection of his proposed Initiative. The Court first clarified that, according to established case law, the reasoning must be adjusted to the nature of the contested decision. Subsequently, it stated that ‘there is no doubt that the Commission justified the rejection of the ECI proposal on the basis that the proposal did not comply

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39 Case T-450/12 para 24; Case C-550/12 P J v Parliament ECR I-760/13 para 19.
with Article 4(2)(b) of Regulation 211/2011. It seems, therefore, that a simple statement by the Commission regarding the provision of Article 4 of the ECI Regulation on which the rejection was based can be perceived as sufficiently good indication that the Commission has fulfilled its obligation to give reasons.

The GC then explained that, in order to rule on the reasons given by the Commission, it should take into consideration the text of the proposed Initiative. In the proposal, the applicant mentioned Articles 119-144 TFEU without explaining how all 26 Articles could be linked or how they could be used as a legal basis for the proposed Initiative. Therefore, the Commission was not obliged to justify the rejection of all the proposed Articles. It sufficed in this case that the Commission explained why it could not use as a legal basis those provisions which it considered most relevant for the purposes of potentially registering the Initiative. According to the GC, the Commission fulfilled this obligation. The reasons given were adequate for the applicant to understand the rationale behind the rejection of the Initiative, and for the Court to exercise judicial review on the Commission’s reply. Lastly, the GC clarified that the quality of reasons given by the Commission is a matter of substance and thus cannot be examined as part of reviewing the obligation of the Commission to give reasons.

The judgment of the Court triggers two observations. On the one hand, the Court’s reference to the lack of explanation in the applicants’ original proposal is at odds with the fact that Initiative organisers have to describe the subject matter and the objectives of their Initiative in no more than 700 characters (approximately 100 words) in the application to register an ECI. Whilst accuracy of the proposed Initiative appears to be a basic consideration for the Court in deciding on the obligation to give reasons, it is questionable how accurate an organiser can be without exceeding the set limit of 100 words. On the other hand, the judgment chimes well with established case law on the obligation to give reasons. Although the CJEU has recognised the obligation of EU Institutions to give reasons for their decisions, it has also ruled that EU Institutions do not have to state all of the reasons for every choice made; it is adequate to point out the factual and legal

40 Case T-450/12 para 28, Researcher’s own translation from Greek.
42 Case T-450/12 para 33; Case C-413/06 P Bertelsmann and Sony Corporation of America v Impala [2008] ECR I-392 paras 166,181.
43 Case C-550/12 para 19; Case T-44/90 La Cinq v Commission [1992] ECR II-1 paras 40-44; Case C-122/00 Omega Air and Others [2002] ECR I-2569 para 47.
considerations that were the most influential in their decision.\textsuperscript{44} In recent judgments concerning petitions to the European Parliament (EU petitions), the CJEU ruled that the requirement to give reasons was satisfied by a summary statement of reasons, such as the one that was provided by the PETI Committee in its decision to reject the applicant’s EU petition.\textsuperscript{45} In this way, the CJEU overruled a previous judgment where the GC held that the reasons were not satisfactory if they were not specific enough to explain the inadmissibility of an EU petition.\textsuperscript{46} Drawing examples from \textit{Anagnostakis} and from EU petitions’ case law, it could be argued that the Initiative organisers’ reliance on the procedural claim of inadequate reasoning may prove futile.

In addition to challenges based on the Commission’s obligation to state reasons, the organisers of the ‘Right to Lifelong Care’ Initiative are also claiming that the Commission infringed the general principles of good administration\textsuperscript{47} by refusing to register their proposed Initiative whilst registering Initiatives with similar objectives. It is likely that the claim refers to the successfully registered ‘Right 2 Water’ ECI, considering that it is the only other Initiative that proposed Article 14 TFEU as its legal basis.\textsuperscript{48} A similar argument is submitted by the organisers of the ‘Stop TTIP’ Initiative in relation to the registration of the ‘Swissout’ ECI. Accordingly, the GC may consider any breach of procedural guarantees by the Commission and whether such a breach affected the organisers’ substantive right to bring an ECI, which could lead to the annulment of the Commission’s decisions to reject the two Initiatives.\textsuperscript{49}

On a concluding note, Initiative organisers could, in the future, attempt to bring claims on the ground that the Commission misused the powers conferred on it by the ECI Regulation for the purpose of conducting the ECI legal admissibility test. The ‘misuse of power’ basis

\textsuperscript{44} ibid
\textsuperscript{45} Case C-261/13 \textit{P Peter Schönberger v European Parliament}, judgment of 9 December 2014, not yet reported, para 23.
\textsuperscript{47} The Code of Good Administrative Behaviour [2000] OJ L 267, 4 provides that ‘differences in treatment of similar cases must be specifically warranted by the relevant features of the particular case in hand’ and that ‘the Commission shall be consistent in its administrative behaviour and shall follow its normal practice.’
\textsuperscript{48} ‘Right 2 Water’ invited the Commission to propose legislation under Article 14 TFEU to ensure the universal human right to water and sanitation, whilst ‘Right to Lifelong Care’ suggested the use of Article 14 TFEU to ensure the supply of long term care for the elderly.
is activated when the purpose for which an EU Institution has adopted a measure is not covered by the power vested on that Institution to achieve the purpose in question. An applicant who has substantial evidence to prove that the Commission’s decision at the admissibility stage was based on political rather than legal considerations contrary to Article 4(2)(b) of the ECI Regulation, could seek the annulment of the Commission’s decision on that ground. Misuse of power claims, however, are rarely successfully, mainly due to the difficulty in presenting sufficient evidence to prove the existence of the misuse to the CJEU.

By virtue of the six pending ECI cases, the GC is presented with compelling questions regarding the application of the ECI legal admissibility test by the Commission, the interpretation of the ECI Regulation (particularly Article 4(2)(b)), and the general purpose and objective of the ECI legal admissibility test. The Court’s rulings on such questions could be decisive in the course of the ECI’s development. The question of how the GC will deal with pending questions, and particularly with the Commission’s role in the process of an ECI, becomes pertinent as the analysis moves from cases concerning ECI legal admissibility to the case that currently challenges the Commission’s final Communications. The ‘One of Us’ case is all the more notable due to the discretion of the Commission to decide on the outcome of an ECI. The GC may thus find itself in a position where it will have to be faced with the Commission’s political considerations.

B. Judicial Review of the Commission’s final decision on an ECI

The case of One of Us and Others v Parliament and Others raises questions about the CJEU’s role in adjudicating issues concerning the final stage of the ECI and particularly the justiciability of the Commission’s replies to successfully submitted ECIs. Overall, the applicants are contesting the Commission’s refusal to act upon the ECI’s request ‘to end the financing of activities which destroy or presuppose the destruction of human

51 Indeed there have been accusations that the ECI legal admissibility test has been interpreted and applied by the Commission based on underlying political motives. See Chapter 4 of this thesis.
52 Alexander Türk (n 19) 142.
54 Case T-561/14 One of Us and others v Parliament and Others, action brought on 25 July 2014. The organisers’ arguments which are discussed in this section can be found at: European Centre for Law and Justice ‘Application to the General Court of the European Union in the case of European Citizens’ Initiative ONE OF US and others versus the European Commission, the Council of the EU and the European Parliament’ <http://eclj.org/> accessed 10 September 2015 (hereinafter ‘One Of Us’ application to the GC).
embryos in the areas of research, development aid, and public health. What is more, the ECI organisers explicitly doubt the purpose of the ECI as a participatory mechanism.

The challenge consists of two main claims. Firstly, the applicants request the annulment of the Commission’s Communication on the ‘One of US’ ECI. According to the applicants, the Commission infringed both Article 10(1)(c) of the ECI Regulation and Article 11(4) TEU by failing to submit a relevant proposal for a legal act. The Commission’s Communication is also being challenged on a procedural ground; it was submitted that the Commission did not adequately substantiate the reasons behind its final decision. As a result of this unsatisfactory response, it is claimed by the applicants that the Commission also infringed Article 10(1)(c) of the ECI Regulation, which requires the Commission to ‘set out in a communication its legal and political conclusions on the citizens’ initiative’, and Recital 20 of the Regulation, which requires the Commission to ‘examine a citizens’ initiative and set out its legal and political conclusions separately’.

The second claim is closely linked to the first. The applicants submit that, if Article 10(1)(c) is found not to oblige the Commission to submit a legislative proposal based on a successful ECI, then the ECI Regulation is incompatible with the Treaties and should be annulled. According to the applicants, the only way to ensure that the ECI is a meaningful instrument of citizens’ participation is to interpret Article 10(1)(c) of the ECI Regulation as obliging the Commission to transmit a successfully submitted ECI to the European Parliament and the Council by default.

It can be discerned from the above that the core of the applicants’ arguments concern the discretion of the Commission to decide the follow-up to an ECI. The applicants essentially claim that a wide margin of discretion, which would allow the Commission to reject an ECI based on purely political considerations, is contradictory to an appropriate interpretation of Article 11(4) TEU. In this regard, the case illustrates several matters of contention concerning the examination of successful ECIs. The factors to be taken into

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account by the Commission in its final decision; the purpose of the ECI in general; and, the quality of reasons given in the Commission’s Communication, are three of the most pertinent issues arising from the ‘One of Us’ case.

Provided that the case is found admissible, the GC may be placed in a predicament. On the one hand, it should protect the Commission’s capacity to take political decisions. On the other hand, it should ensure that the Commission has not exceeded the limits of its discretion beyond the purposes for which it has been entrusted with it. For the first time since the coming into force of the Treaty of Lisbon, the GC is called to decide on how to balance these two tasks in the context of an ECI-related challenge. Nevertheless, as mentioned previously, it is far from certain that the ‘One Of Us’ case will even be admitted to the Court. Contrary to a challenge on the basis of Article 4(2)(b) of the ECI Regulation, the potential for judicial review of the Commission’s final decision is not mentioned anywhere in the ECI legal framework. Therefore, it is pertinent to discuss the admissibility of such cases before commenting on the claims put forward by the ‘One of Us’ organisers.

Although there is no precedent to indicate whether the ‘One of Us’ case is admissible before the GC, there have been some recent, relevant CJEU judgments on the appropriate follow-up of petitions to the European Parliament under Article 227 TFEU (hereinafter EU petitions). Even though the cases concern the discretion of the European Parliament instead of the Commission, they are apposite to the current discussion for two reasons. Firstly, the ECI and EU petitions are very similar participatory mechanisms; as seen in previous chapters of this thesis, one of the initial criticisms of the ECI was that it had no additional value for EU citizens beyond that of EU petitions. Secondly, as seen above, the GC also drew an analogy between EU petitions and the ECI in the context of Anagnostakis.

Thirdly, the matter of the cases is comparable. ECI cases concern the Commission’s discretion to take action vis-à-vis an ECI proposal supported by one million signatories. In EU petition cases, the CJEU dealt with the admissibility of cases challenging an EU institution’s freedom of discretion (European Parliament) vis-à-vis EU citizens’ requests. It is, thus, instructive to draw some analogies between the EU petition cases and the ECI

58 See Chapter 2 of this thesis.
59 Case T-450/12 para 22.
cases as part of the subsequent discussion on the admissibility of cases challenging the Commission’s final decisions on an ECI.

i. **Admissibility of cases in Court**

The political discretion of the Commission at the final stages of an ECI suggests that the possibility for judicial review of the Commission’s decisions is questionable. It is well-established that an EU legal act can be subject to an action for annulment if it intends to produce legal effects vis-à-vis third parties (Article 263 TFEU), and if it is capable of changing the legal position of the applicant, regardless of the form of the contested act.\(^{60}\) According to the Commission, its ECI Communications are not intended to produce any legal effects towards ECI organisers. It argues that the ECI Communications do not have legal effect, because they are merely acts which express the Commission’s intentions to act in a certain way.\(^{61}\)

The Commission’s justification is further based on the scope of the rights bestowed on EU citizens by Article 11(4) TEU and the ECI Regulation. In this respect the Commission clarifies that the relevant ECI legal framework should not be interpreted as giving the organisers or signatories of an ECI a right to request the adoption of a legal act. The Commission’s decision would be amenable to judicial review if the act requested by the applicants also has legal effects.\(^{62}\) The Commission argues that this consideration is not fulfilled regarding the review of its final ECI decisions, because EU citizens are merely given a right to request the submission of a proposal for a legal act, which is a preliminary and preparatory act without any legal effects.\(^{63}\) Thus, the rejection of their request cannot produce legal effects vis-à-vis third parties. In contrast, the applicants argue that submitting a preliminary proposal for a legal act and deciding not to submit a proposal for a legal act

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\(^{60}\) Joined Cases C-463/10 P and C-475/10 P Deutsche Post and Germany v Commission [2011] ECR I-9639, para 36; Case 60/81 IBM v Commission [1981] ECR 2639 para 9; Only recommendations and opinions, which have no legally binding force, are automatically excluded from the scope of Article 263 TFEU, Case 22/70 Commission v Council (ERTA) [1971] ECR I-263, para 39.

\(^{61}\) Commission’s Defence (n 56) paras 18-20.

\(^{62}\) Commission’s Defence (n 56) para 20; Case T-369/03 Arizona Chemical BY a. o. v Commission [2005] ECR II-5839, paras 64 – 66.

\(^{63}\) Commission’s Defence (n 56) para 20.
are not the same. In their view, whilst the former is indeed preparatory, the latter has the legal effect of ending the ECI process.64

The case law on EU petitions sheds light on the possible outcome of the dispute about the admissibility of the ‘One of Us’ case, and, by extension, of future cases challenging the Commission’s final decisions on successfully submitted ECIs. The cases of Schönberger v Parliament65 and Tegebauer v Parliament66 are particularly illustrative in this respect. Similarly to the way the ‘One of Us’ applicants are challenging the Commission’s follow-up to their ECI, Mr. Schönberger challenged the European Parliament – particularly the PETI Committee – for its follow-up to his EU petition. The petition in question was declared admissible under the relevant Rules of Procedure but, instead of being dealt with by the PETI Committee, it was sent to a Commission Directorate General (DG) for further consideration.

The CJEU confirmed the finding of the GC that the case was inadmissible and repeated that the final conclusions of the PETI Committee are not reviewable under Article 263 TFEU.67 In doing so, both the GC and the CJEU distinguished the PETI Committee’s decisions on the admissibility of an EU petition, which are reviewable, from the decisions on the follow-up of petitions. According to the CJEU, the rationale behind the distinction is based on the extent of the European Parliament’s discretion in each of the two occasions. The distinction drawn is particularly notable in light of the current discussion of the ECI cases, considering the two groups of cases brought by ECI organisers: the six cases concerning the legal admissibility of an ECI, and the case challenging the Commission’s final decision.

With regard to judicial review of decisions on the admissibility of an EU petition, the CJEU in Schönberger followed the judgment in Tegebauer v Parliament. Tegebauer was the first case on EU petitions to ever reach the GC; it arose 15 years after the codification of the right to bring a petition in the Treaty of Maastricht (now Article 227 TFEU). The applicant, Mr. Tegebauer, had submitted a petition to the European Parliament, where he

65 Case T-186/11 P; C-261/13 P.
66 Case T-308/07; Also see Case T-280/09 Morte Navarro v Parliament, judgment of 30 May 2013, not yet reported.
67 Case C-261/13 P para 28.
complained that German authorities were acting in breach of EU legislation. His petition was examined by the PETI Committee, which decided that the petition was inadmissible because it did not fall within the areas of activity of the EU. The applicant primarily argued that the PETI Committee’s reasoning for its decision was inadequate.

The GC found the Tegebauer case admissible. It emphasised that judicial review proceedings were the only guarantee to the effectiveness of the right to petition enshrined in Article 227 TFEU; thus to reject such claim as inadmissible would leave matters to the discretion of the European Parliament and risk the essence of the right to petition. Similarly, according to the GC in Anagnostakis:

> It should be noted that the rejection of an ECI proposal may affect the actual effectiveness of the exercise of the right of citizens to submit proposed ECIs, which is guaranteed by Article 24(1) TFEU.

Conversely, in Schönberger it was highlighted that, since the PETI Committee retains full political discretion in its examination of an EU petition, its final conclusions are not reviewable. In this way, the CJEU confined the justiciable rights deriving from Article 227 TFEU to the rights to have a petition’s admissibility examined by the PETI Committee and to receive adequate reasoning about the Committee’s response.

The outcome of the EU petition cases indicates that the admissibility of the ‘One of Us’ case before the Court is uncertain, to say the least. The GC could find that the Commission has absolute political discretion in choosing its actions – or inaction – after the public hearing of a successfully submitted ECI, in the same way that the PETI Committee has discretion to act upon a petition submitted to it. Considering the ‘One of Us’ case in the light of the EU petition case law also tallies with the above-mentioned argument of the Commission regarding the scope of rights bestowed on EU citizens by the ECI legal framework. In this sense, it could be argued that after utilising their right to present their successful ECI at a public hearing and to receive the Commission’s Communication, the organisers of the ‘One of Us’ ECI do not have any other substantive legal rights to claim before the GC.

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69 Case C-261/13 P para 21.
70 Case T-450/12 para 25, Researcher’s own translation from Greek.
71 Case C-261/13 P para 22.
An additional factor which could matter in determining the admissibility of the ‘One of Us’ case is the perceived role of the Commission at the final stage of an ECI. Should the Commission be perceived as an administrator of the ECI or as a political body responsible for the follow-up of the initiatives? The role of the PETI Committee as a political body, for instance, was emphasised by Advocate General (AG) Jääskinen in his Opinion in Schönberger.72 AG Jääskinen pointed out that the PETI Committee, as a subdivision of the European Parliament, is part of a representative political body.73 Thus the control of the decisions of this Committee by EU citizens takes place indirectly, by voting at European Parliament elections, and not directly by way of a judicial challenge before the EU Courts. Instead, judicial challenges are reserved for reviewing actions of an administrative body, when that body allegedly exceeds the limits of its mandate.74 If this approach is followed, then the Commission’s role at each stage of an ECI could determine the admissibility of ECI cases before the CJEU. In particular, if the Commission is perceived as merely an administrator of the ECI,75 then all ECI cases, including ‘One of Us’, could be admissible. As will be seen thereafter, the function of the Commission in the ECI process is one of the points of contention between the applicants and the defendants in the ‘One of Us’ case.

Finally, the case law on the obligations of the European Ombudsman could also offer some indication of the admissibility of cases challenging the Commission’s ECI Communications. Similarly to the Commission, the Ombudsman also enjoys discretion in exercising his powers. The substance of the Ombudsman’s findings cannot be subject to judicial review under Article 263 TFEU, because they are not legally binding measures producing legal effects vis-à-vis third parties.76 In fact, the only instance where the CJEU can limit the discretion of the Ombudsman is in the context of an action for damages under Article 265 TFEU. To that effect, an applicant needs to prove not only that the Ombudsman made a manifest error in the performance of his duties, but also that the error was likely to cause damage.77 If the CJEU decides to draw a parallel between this test and the ECI cases, there seems to be little-if any-chance that the Commission’s final ECI decisions will be found justiciable.

72 Advocate General Jääskinen Opinion in Case C-261/13 P Schönberger v Parlament judgment of 7 March 2013, delivered on 17 July 2014.
73 AG Jääskinen Opinion (n 72) para 76.
74 AG Jääskinen Opinion (n 72) para 83.
75 ‘One of Us’ Application to the GC (n 54).
Having illustrated the issues with the admissibility of cases challenging the Commission’s final ECI Communications, and before moving to discuss the substance of the ‘One of Us’ case, a brief word on the admissibility of the applicants’ second claim is warranted. In their second claim, the applicants argue that Article 10(1)(c) of the ECI Regulation should be annulled. This claim is inadmissible because the deadline for challenging the ECI Regulation is long gone, and because of the difficulty with proving that the applicants have standing to challenge an EU Regulation. Nevertheless, the claim has been re-qualified as an exception of illegality under Article 277 TFEU, thus giving to the GC the opportunity to rule also on the validity of the ECI Regulation, if the case is found to be admissible in Court.

ii. Obligation of the Commission to act on an ECI?

The main argument of the applicants is that Article 10(1)(c) of the ECI Regulation should be interpreted so as to oblige the Commission to propose a legal act, based on the proposed ECI, to the European Parliament, and the Council, who should then decide whether or not to adopt the act. This approach should be followed by the Commission unless a legal restriction applies. In particular, the applicants suggest that an ECI that proposes specific legislative measures can only be refused further action by the Commission if the legal measure proposed is no longer necessary (for instance, if the proposed measure has been adopted since the registration of the ECI) or if the measure has become impossible to adopt at some point between the registration and the submission of a successful ECI. In other words, provided that the legal conclusions of the ECI legal admissibility test (Article 4(2)(b) of the ECI Regulation) remain unaltered by the time of the final stage of an ECI, the Commission should not be able to refuse further actions based only on its political unwillingness to take action.

78 According to Article 263(6) TFEU, the ECI Regulation was challengeable only for two months after its adoption in 2011.
80 Commission Defence (n 56) para 26; According to Article 277 TFEU: ‘Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.’
81 Rather arbitrarily, the applicants submit the view that the Commission should have absolute discretion for the follow-up of a successful ECI only if that ECI raises awareness of a problem but does not suggest specific proposals for action.
To support their argument, the applicants put forward several justifications. Inter alia, they claim that allowing the Commission absolute political discretion for the purposes of an ECI’s follow-up is out of proportion with the effort, time, and money spent by organisers collecting one million signatures.\(^\text{82}\) This is especially the case considering that the Commission is anyway obliged, under the code of good administrative conduct (Article 41 of the Charter) to reply to letters it receives from individuals and lobbies. Such letters already allow EU citizens to submit proposals similar to those submitted by ECI organisers. Therefore, the argument goes, there must be some sort of added value to the ECI Communications received by the ECI organisers.\(^\text{83}\) Unless that added value comes from a formal legislative proposal submitted by the Commission, the ECI is useless for EU citizens.\(^\text{84}\)

Contrary to the applicants’ assertions, it could be argued that both Article 11(4) TEU and the ECI Regulation can be easily interpreted as allowing greater political discretion to the Commission regarding the follow-up of an ECI.\(^\text{85}\) Article 11(4) TEU provides that an ECI merely invites the Commission to propose legislation, and Article 10 of the ECI Regulation does not denote any active role for the European Parliament and the Council. Although the applicants admit that this is a possible interpretation of the ECI Regulation, they claim that such a ‘very narrow, literal interpretation’\(^\text{86}\) is inappropriate in light of the ECI’s function as a citizens’ democratic participation mechanism. Therefore, they argue that the GC should find either that the Commission has misapplied Article 10(1)(c) of the ECI Regulation or annul Article 10(1)(c) as being inconsistent with the correct interpretation of Article 11(4) TEU. In its defence, the Commission rejects the interpretation suggested by the applicants, and promotes a more nuanced view of the purpose of the final ECI Communications: the Communications are issued to promote public debate on the successful ECIs.\(^\text{87}\) The added value of an ECI is that the Commission has to examine the relevant issues, and address these issues publicly, allowing for a debate among citizens and within the European Parliament and the Council.\(^\text{88}\)

\(^{82}\) ‘One of Us’ Reply to Commission Defence (n 64) paras 3,4.

\(^{83}\) ibid

\(^{84}\) ‘One of Us’ Reply to Commission Defence (n 64) paras 22 – 23.

\(^{85}\) Commission Defence (n 56) para 29.

\(^{86}\) One of Us Reply to Commission Defence (n 64) para 23.

\(^{87}\) Commission Defence (n 56) para 34.

\(^{88}\) Commission Defence (n 56) para 39.
To support their arguments, the applicants further submit that ‘it is unthinkable that an administrative body like the Commission should have the right to adopt a decision that, based on that body’s institutional self-interest rather than on sound legal reasons, supersedes a legislative proposal directly and explicitly endorsed by more than one million citizens’. 89 This statement appears to undermine the role of the Commission to that of a mere administrator of successful ECIs. An alternative view would point out the Commission’s monopoly of legislative initiative under the Treaties (Article 17 TEU). Even when the European Parliament or the Council suggest legislative proposals, it is the Commission that takes the final decision as to whether to proceed with these suggestions. 90 Since the Commission is not merely an administrator of the proposals of the European Parliament and the Council, why should it be perceived as such in relation to a successful ECI?

It remains to be seen whether the GC will side with the organisers of ‘One of Us’ or with the Commission on the obligations arising from the ECI Regulation and regarding the follow-up of an ECI. Even if the GC finds that the Commission indeed has the political discretion to act on an ECI, there is still a possibility – albeit a limited one – that it can set the limits of this discretion. The general apprehension about reviewing EU Institutions’ discretionary decisions is that the EU Court will intervene only if the applicant demonstrates ‘manifest error, misuse of power or clear excess in the boundaries of discretion’. 91 A relevant example is the case of *Gabi Thesing and Bloomberg Finance v ECB* 92, which concerned the refusal of access to documents requested by a journalist from the European Central Bank (ECB).

In *Gabi Thesing*, the GC acknowledged the ECB’s wide discretion to determine whether the disclosure of certain documents could undermine the public interest because the documents concerned Greece’s economic policy. 93 Subsequently, the GC clarified that, because of the ECB’s discretion, the GC’s role as a judicature in the review of the legality of the decision was limited. It consisted of verifying compliance with procedural rules, and deciding whether there had been a manifest error of assessment or misuse in the way the

89 ‘One of Us’ application to the GC (n 54) para 177.
90 See Chapter 2 of this thesis; Commission Defence (n 56) para 38, where the Commission mentions its own indirect legitimacy.
92 Case T-590/10 *Gabi Thesing and Bloomberg Finance LP v ECB* [2012] ECR I-00.
93 Case T-590/10 para 43.
ECB exercised its discretion. In order to respect the competences of another EU institution, the role of the Court did not extend to a review of the substance of the contested decision. Applying the same rationale to the ECI cases shows that the GC could examine whether there was a manifest error of assessment by the Commission in its reply to ‘One of Us’. It could be argued, nevertheless, that since the legislature accorded the Commission the choice as to its course of action for an ECI (Article 10(1)(c) of the ECI Regulation), it is not up to the CJEU to second-guess the decision of the Commission or to substitute its judgment with the judgement of the Commission. The claim on procedural grounds, which concerns the adequacy of the Commission’s reasoning, may stand a better chance of succeeding.

iii. Obligation of the Commission to give reasons?

In instances where EU Institutions enjoy substantial discretion, the inability of the CJEU to exercise a substantive review of the Institutions’ decisions can be compensated by placing a special emphasis on more procedural grounds for review, such as compliance with the duty to give reasons. One of the main arguments of the applicants in the case in hand is that the Commission’s reasons were insufficient. For instance, in their submission to the Court the applicants are particularly critical of the Commission’s reply, asking whether ‘necessity’ should be a decisive factor in accepting or rejecting the request to act on a successful ECI. As stated in their submission, the Commission’s Communication ‘represents an extreme case of manifest incorrectness both with regard to its factual assumptions and its legal interpretations; the Commission therefore must indeed be deemed not to have discharged its obligation under Article 10(1)(c) [of the ECI Regulation]’.

Although the Commission agrees that its obligations under Article 10(1)(c) would not be discharged in instances of the manifest incorrectness of factual assumptions or legal interpretations, it maintains that this is not the case regarding its Communication to the ‘One of Us’. Furthermore, it asserts that the evaluation of the quality of the reasons

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94 Alexander Fritzsche (n 22) 384.
95 Case T-590/10 para 43; also see Case C-266/05 P Sison v Council [2007] ECR I-1233 para 34.
96 See Paul Craig (n 37) 415.
97 Alexander Fritzsche (n 22) 379, 398.
98 ‘One of Us’ Application to the GC (n 54) paras 40-129.
99 ‘One of Us’ Application to the GC (n 54) para 50.
100 ‘One of Us’ Reply to the Commission Defence (n 64) para 62.
101 Commission Defence (n 56) paras 48-49.
given is not a task for the CJEU, as established in EU case law.\textsuperscript{102} Contrastingly, the evaluation of the reasons’ quality must take place through the political control exercised by the European Parliament and the Council over the Commission. In the view of the Commission, the purpose of giving reasons as part of the final ECI Communications is to enable a political debate. Therefore, any inconsistencies and misrepresentations which exist in the contested ‘One of Us’ Communication should not be discussed in the current case but should formulate the topic of political debate.\textsuperscript{103}

Despite the above-mentioned recourse to case law on the quality of given reasons, the basic premise behind the Commission’s assertions about the objectives of the final ECI Communications is debatable. In particular, it would appear that the Commission’s submission is at odds with the overall rationale of the obligation to give reasons which is set in EU law (Articles 296 TFEU and 41(2)(c) of the Charter). As the GC pointed out in \textit{Anagnostakis}, the obligation of EU Institutions to give reasons for their decisions has a twofold purpose.\textsuperscript{104} Firstly, it aims to provide the person concerned with sufficient information to determine whether the decision is well-founded. Secondly, it purports to enable the exercise of judicial review over the reasoning of the relevant decision by the EU Courts. It would appear that this test should be applied by the GC to rule on the adequacy of the reasons given by the Commission in its Communication to the ‘One of Us’. Instead, the Commission suggests that the GC is not the appropriate actor to evaluate the sufficiency of the given reasons.

There is little value in speculating further on the outcome of the ECI cases. The analysis so far has indicated a number of issues that are left to the decision of the EU Courts. At the same time, the uncertainties that pertain to the ECI’s institutional design justify its characterisation as a laboratory for citizens’ participation. What is certain is that the Court has been presented with an opportunity to make a valuable contribution to the development of the ECI as a participatory mechanism. If the GC takes advantage of this opportunity, the results will be beneficial both for citizens and for the Commission, as the judgment would delineate the obligations of the latter vis-à-vis the former.

\begin{flushright}
\textsuperscript{102} Case C-367/95 \textit{Commission v Sytraval and Brink's France} [1998] ECR 1-1719, paras 63, 67.
\textsuperscript{103} Commission Defence (n 56) para 51.
\textsuperscript{104} Case T-450/12 para 22; Case T-471/93 \textit{Tierce Ladbrooke v Commission} [1995] ECR II-2537 para 29; Case T-44/90.
\end{flushright}
Throughout the history of EU integration, the CJEU has been accredited with the enhancement of the democratic nature of the EU decision-making process.\textsuperscript{105} Either with regard to the European Parliament’s powers, citizens’ participation in the EU administrative process, or to openness and access to documents, the CJEU has taken several possibilities to contribute to the EU democratic mandate. The ECI cases constitute a whole new stream of case law in the CJEU’s line of judgments on democracy and citizens’ democratic participation. In this regard, it is worth changing the perspective of the current discussion to examine the ECI cases in a broader setting. What follows is an attempt to discuss the ECI cases in the context of the EU legal order, particularly in light of the CJEU’s general approach to democracy and its current perception of the notion of citizens’ democratic participation in EU decision-making.

II. ECI and judicial review in the context of the EU legal order

The seven ECI cases bring to the fore questions about the role of the CJEU both in the development of the ECI and as an institutional actor in the broader context of citizens’ participation at EU level. The unprecedented nature of the ECI cases is notable not only because this is the first time that the GC is presented with the opportunity to clarify certain aspects of the ECI. It is also the first time that the GC is asked to rule on one of the constitutional embodiments of participatory democracy introduced in Title II of the TEU, Article 11(4) TEU.

Traditionally, the role of the CJEU in safeguarding democracy at the EU level revolved around protecting the prerogatives held by the European Parliament as the only directly elected political institution in the EU. In \textit{Roquette Freres},\textsuperscript{106} the CJEU made it clear that citizens’ participation, together with the principle of institutional balance, are the driving notions of legitimacy at the EU level. Citizens’ participation was clearly perceived by the CJEU as deriving from citizens’ representation via the elected MEPs. According to the judgment:

\begin{quote}
[T]he effective participation of the European Parliament in the legislative process of the Community (...) reflects the fundamental democratic principle
\end{quote}

\textsuperscript{105} Koen Lenaerts and Tim Corthaut (n 57) 43.

that the people should take part in the exercise of power through the intermediary of a representative assembly.\textsuperscript{107}

In that case, as well as in the subsequent cases of \textit{Les Verts},\textsuperscript{108} Chernobyl,\textsuperscript{109} and Titanium Dioxide\textsuperscript{110}, the CJEU perceived the European Parliament as the principal channel for democratic input in the EU, and voting rights in European Parliament elections as the manifestation of the political dimension of citizenship.\textsuperscript{111}

Given the augmentation of the European Parliament’s powers in recent Treaty amendments – particularly in the Treaty of Lisbon – the number of cases where the European Parliament attempted to assert further powers has been decreasing.\textsuperscript{112} The CJEU has started to rule that the principle of democracy does not necessarily manifest through the participation of the European Parliament in decision-making processes, especially when the Treaties do not require such participation.\textsuperscript{113} What is more, the CJEU also took a stance on matters concerning ‘functional representation’, a term which defines an indirect form of citizens’ participation, particularly the representation of citizens by civil society organisations, interested parties, and stakeholders.\textsuperscript{114} Such associations and public interest groups assumed a representative role post-Maastricht in an attempt to complement the legitimacy of the EU decision-making system.\textsuperscript{115}

With regard to the CJEU’s contribution to ‘functional representation’, the judgment in \textit{UEAPME v Council}\textsuperscript{116} was said to signal the welcoming of ‘a new version of the principle of democracy’\textsuperscript{117} by the Court, one where the participation of representative organisations in the social dialogue process could compensate for the lack of democratic participation by

\textsuperscript{107} ibid
\textsuperscript{112} Koen Lenaerts, ‘The principle of democracy in the case law of the European Court of Justice’ (2013) 62(2) ICLQ 271, 284-286.
\textsuperscript{113} ibid; Case C-130/10 \textit{European Parliament v Council}, judgment of 19 July 2012, not yet reported.
\textsuperscript{114} Stijn Smismans (n 111) 126.
\textsuperscript{115} Beatte Kohler-Koch, ‘Post-Maastricht Civil Society and Participatory Democracy’ (2012) 34(7) JEI 809, 811; For a general discussion, see Chapter 1 of this thesis.
\textsuperscript{117} Koen Lenaerts (n 112) 300.
the European Parliament. The case concerned the claim of an association, which was representing the interests of small and medium-sized undertakings at EU level (UEAPME), for the annulment of a Directive on the ground that the association’s right to participate in the collective negotiations of the Directive was breached. The CJEU stated that ‘the principle of democracy on which the Union is founded requires - in the absence of the participation of the European Parliament in the legislative process - that the participation of the people be otherwise assured’. In the aftermath of the judgment, academic commentators adopted the view that participatory and representative democracy were seen by the CJEU as alternatives rather than complementary notions.

Despite the positive contribution of the CJEU in UEAPME, the case specifically concerned participation in social dialogue procedures. An attempt to extend the judgment to create rights of participation for citizens generally in the EU law-making process was dismissed in Atlanta. The CJEU held that, contrary to the right to participate in administrative hearings, and to be heard by the EU Institutions, there is no such right when it comes to the legislative process for the adoption of general laws. To the dismay of those who expected an extension of participatory rights, the judgment signified that participation by means of consultation practices, or the contribution of interested parties in Impact Assessments, was largely instrumental rather than rights-based. These participatory practices aimed to enhance the technical legitimacy of the Commission’s regulatory decisions without, however, providing any legally enforceable rights.

The above interpretation of participation in decision-making processes has become increasingly disputed post-Lisbon. Scholars have expressed the view that the CJEU’s approach cannot be reconciled with the ‘juridification’ of citizens’ participation in Article 11 TEU. At the core of these arguments is the view that Article 11 TEU has ‘elevated’ citizens’ democratic participation from being a way to improve policy quality and

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118 Case T-135/96 para 89.
119 Stefania Ninatti (n 116) 34.
122 Joana Mendes, Participation in EU rule-making: A rights-based approach (OUP 2011).
123 ibid; Alberto Alemanno (n 121).
legislative outcomes, to becoming one of the founding legal principles of the EU.\footnote{ibid} This begs the question of what implications, if any, this normative shift has with regards to the ECI, especially in the context of the pending cases. The answer to this question largely depends on the way the GC will interpret the scope of the rights that derive from the ECI’s legal framework. A narrow interpretation would mean that, under Article 11(4) TEU and the ECI Regulation, EU citizens have the right to bring an ECI, collect signatures of support, and, if successful, to present it in a public hearing. A broad interpretation could place some limits – procedural or otherwise - on the Commission’s discretion to decide the follow-up of an ECI.\footnote{For a distinction between ‘narrow’ and ‘broad’ interpretation see Paul Craig, The Lisbon Treaty: Law, politics and Treaty reform (OUP 2013) 70.} Either way, it will be beneficial for the purposes of clarity, if the GC sheds some light on the meaning of participatory democracy as a notion embodied in the Treaty, and thus on the purpose of the ECI as a mechanism for citizens’ participation in the EU.

Nonetheless, the possibility for bold declarations from the GC about the ECI and citizens’ participation should be also seen in light of the political nature of the issue, especially when discussing the potential for judicial review of the Commission’s final decisions. On the one hand, the Court should decide the limits of the powers conferred on the Commission, by interpreting the particular wording of Article 11(4) TEU and the ECI Regulation.\footnote{See AG Jääskinen Opinion (n 72) Council v European Commission., delivered on 18 December 2014, para 41.} On the other hand, the Court also has to respect the principle of institutional balance, according to which each institution has to act within the powers conferred on it by the Treaties.\footnote{Koen Lenaerts, ‘Institutional Balance in the EU’ in Christian Joerges and Renaud Dehousse, Good Governance in Europe's Integrated Market (OUP 2002) 46.} The adherence to the principle of institutional balance is all the more relevant regarding the admissibility of claims such as ‘One of Us’, which concern the Commission’s political decisions. Based on the Treaties, the Commission alone decides whether to submit a legislative initiative.

Even if the GC adopts an active role in the ECI cases, there is only so much it can do without interfering with the Commission’s monopoly of legislative initiative. The exclusive nature of the Commission’s initiative was recently confirmed in a case on the Commission’s right to withdraw a legislative proposal. As the CJEU stated:

\begin{quote}
124 ibid
125 For a distinction between ‘narrow’ and ‘broad’ interpretation see Paul Craig, The Lisbon Treaty: Law, politics and Treaty reform (OUP 2013) 70.
\end{quote}
[J]ust as it is, as a rule, for the Commission to decide whether or not to submit a legislative proposal and, as the case may be, to determine its subject-matter, objective and content, the Commission has the power, as long as the Council has not acted, to alter its proposal or even, if need be, withdraw it.\textsuperscript{128}

Moreover, even if the GC finds for the applicants in the pending ECI cases, the impact of its judgment will be limited; as highlighted in Anagnostakis, the GC cannot issue an order to the Commission obliging it to register an Initiative or to adopt a specific legal act.\textsuperscript{129}

Regardless of the actual outcome of the ECI cases, new possibilities have opened for the CJEU to rule on matters related to citizens’ participation at EU level. The ECI does not only give rise to a series of cases that are distinct from the well-established case law on the rights to participation in EU administrative law, which mainly consist of the right to be heard in relation to individually effective measures or transparency and the right of access to documents.\textsuperscript{130} It is also the only provision of Article 11 TEU which allows for some level of judicial review against the relevant decisions of an EU Institution.\textsuperscript{131} Although Article 11(1) – (3) TEU could potentially enhance citizens’ position against the EU Institutions, none provides for any obvious legal entitlements to individuals or representative associations to participate in the EU decision-making process. Therefore, the ECI cases could signal a move towards a more meaningful expression of citizens’ participation at the EU level. EU citizens now have the opportunity to challenge an EU Institution’s approach towards citizens’ participation in EU affairs, and to make the Commission accountable for decisions either to refuse Initiatives’ registration or (provided that the ‘One of Us’ is found inadmissible) decisions not to act upon a successful ECI.

**Conclusion**

The outcome of the pending cases will tell whether the first seven ECI cases have constituted an important juncture for EU citizens’ participatory rights, as suggested above. As demonstrated in this chapter, the GC has been given ample chance to set out the correct interpretation of Article 4(2)(b) regarding both substantive and procedural matters. The

\textsuperscript{128} Case C-409/13 Council v European Commission, judgment of 14 April 2015 not yet reported, para 74.


\textsuperscript{130} Alberto Alemanno (n 121); Joana Mendes (n 121).

\textsuperscript{131} There are currently no pending cases concerning Article 11(1), (2) or (3) TEU.
case of *Anagnostakis* has already showed that, according to the GC, Article 24 TFEU gives EU citizens the right to bring an ECI without being subject to the discretion of the Commission. It has also set a precedent on the obligation of the Commission to give reasons for its decisions in the context of the ECI. In addition, the future adjudication of claims such as the incompatibility of the ECI Regulation with Article 11(4) TEU or the importance of applying the ECI legal admissibility test in light of the underlying principles of the ECI Regulation could influence the Commission’s attitude at the ECI registration stage.

It should be noted, however, that the judgments in the pending cases will not necessarily provide answers to every contested aspect of the ECI’s functioning. The doubtful admissibility of the ‘One of Us’ case waters down hopes for substantial proclamations by the GC on the critical questions raised by the applicants – not least those about the usefulness of the ECI for EU citizens, who may have false expectations about the potential and the reach of the ECI. On the one hand, the applicants argue that if a successfully submitted ECI cannot oblige the Commission to propose legislation, then the ECI mechanism is pointless. On the other hand, the Commission maintains the view that its final decisions exist only to fuel debate on the topic of an ECI among the public and in the EU institutions. The most appropriate interpretation of the two could be pointed out by the GC if the ‘One of Us’ case is found admissible. If the case is found inadmissible, it is more likely that doubt will persist over the benefits and the added value of the ECI for EU citizens who put effort into completing a successful ECI campaign. With this argument in mind, and having observed the ECI in litigation, the next chapter will empirically observe the follow-up to the ECIs to date, in order to determine whether the ECI has provided tangible opportunities for citizen-driven legislation.
CHAPTER 6

INFLUENCING EU LAW-MAKING THROUGH AN ECI

Introduction

The preceding discussion of the ‘One of Us’ case prompts questions about the ECI’s potential to affect EU law-making. By exploring the legislative potential of the ECI, this chapter moves on from the ECI signature collection stage which was the main focus of this thesis so far. As such, the subsequent discussion focuses on the stage that comes after the end of the 12-month deadline for the collection of signature. For successfully submitted ECIs, this ‘follow-up stage’ entails a public hearing at the European Parliament and the response of the Commission to the ECI’s proposals. For ECIs that did not manage to collect the necessary signatures, the stage after the completion of the 12-month period for signature collection is the stage where organisers may decide to abandon or continue campaigning for their causes outside of the ECI regulatory framework.

This chapter begins by discussing the follow-up stage of the three successfully submitted ECIs (‘Right 2 Water’, ‘One of Us’, and ‘Stop Vivisection’). The outcome of these ECIs is studied in light of the public hearings of the initiatives, the Commission’s Communications, and the actions of the ECI organisers in the aftermath of the official campaigns. These three case studies serve as the basis to delineate the potential of successful campaigns to influence EU law-making given the Commission’s discretion at the final stage of an ECI. The analysis discerns a variety of reasons for the Commission’s responses, such as: the effectiveness of the existing legislative framework; the views and agendas of the two EU co-legislators; the EU legislative priorities; and, the Commission’s own agenda. In light of this discussion, initial hypotheses made by academic commentators during the early stages of the ECI regarding the ECI’s effect on the Commission’s monopoly of legislative initiatives are empirically tested.

In particular, the analysis looks at two hypotheses: first, whether the Commission was under pressure to act on the first wave of successfully submitted ECIs in order to maintain the credibility of the mechanism; second, at whether the European Parliament has actively
reacted to successful ECIs. The discussion places emphasis on the European Parliament’s follow-up actions in relation to the ‘Right 2 Water’ initiative, which shows that there is a possibility for the European Parliament to play a role in the promotion of successfully submitted ECIs. It is also shown that, contrary to the European Parliament’s supportive role in the ‘Right 2 Water’ example, the Commission’s response to ‘One of Us’ indicates that citizens’ participation and citizens’ representation in the EU do not always exist in parallel or in synergy. This is all the more so where the views of the European Parliament on the policy in question do not coincide with those of the ECI organisers. It is argued that this contrast between the two approaches of the European Parliament towards successful ECIs demonstrates the way in which Article 11(4) TEU (citizens’ participation via an ECI) complements Article 10(2) TEU (citizens’ representation via the European Parliament) in practice.

Subsequently, this chapter looks at the registered ECIs that did not gather the required signatures. It asks whether there has been any continuation of these campaigns after the end of their 12-month signature collection period and identifies the creation of new networks and organisations as one of the main gains of these actors from their engagement in the ECI. Overall, the exploration of the outcomes of successful and unsuccessful campaigns illustrates the factors that limit the potential of ECIs to penetrate the EU decision-making apparatus. Moreover, the discussion identifies a mismatch between, on the one hand, ECI organisers’ expectation from the ECI, and, on the other hand, the capacity of the ECI to produce legislative output.

With regard to this mismatch between expectations and output, the chapter concludes with an examination of the latest aspiration of the Commission to draw attention away from the legal outcomes of ECI campaigns, and focus it on the aspect of public debate and deliberation throughout the ECI process. It is argued that despite the rhetoric on ‘enhancing public debate’, the Commission has not specified how this is to be achieved. In this respect, this chapter recommends some improvements to the ECI procedure that could enhance the ECI process both in terms of the citizens’ perception of the mechanism and with a view to enhancing public debate, without taking away the Commission’s monopoly of legislative initiatives.
I. On realism and the possibilities of affecting EU law-making

Before examining the Commission’s responses to the successfully submitted ECIs, it is instructive to recall some statistics on the ECIs that managed to collect one million signatures and those which did not reach this required signature threshold. In the first three years of the ECI’s operation, three of the 28 registered ECIs managed to collect the minimum number of signatures required. Meanwhile, of the remaining ECIs that reported the number of signatures that they collected, none were even close to the one million threshold:

*Table 6.1*

**SIGNATURES COLLECTED FOR REGISTERED ECIS**

<table>
<thead>
<tr>
<th>1 – 50,000 signatures</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Teach for Youth (withdrawn)</td>
<td>563</td>
</tr>
<tr>
<td>Pour une gestion responsable des déchets, contre les incinérateurs</td>
<td>754</td>
</tr>
<tr>
<td>Act for Growth</td>
<td>1,052</td>
</tr>
<tr>
<td>Let Me Vote</td>
<td>3,604</td>
</tr>
<tr>
<td>30 km/h - making the streets liveable!</td>
<td>44,291</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>50,000 – 100,000 signatures</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Fraternité 2020</td>
<td>70,412</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>100,000 – 500,000 signatures</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>End Ecocide in Europe</td>
<td>114,927</td>
</tr>
<tr>
<td>Single Communication Tariff Act</td>
<td>145,000</td>
</tr>
<tr>
<td>Weed Like to Talk</td>
<td>172,959</td>
</tr>
<tr>
<td>European Free Vaping Initiative</td>
<td>185,367</td>
</tr>
</tbody>
</table>

1 A number of ECIs did not report the number of signatures they collected.
It is well-known by now that the ‘Right 2 Water’, ‘One of Us’, and ‘Stop Vivisection’ ECIs proceeded to the final stage of the ECI process and presented their initiatives to Commission representatives and MEPs at a public hearing at the premises of the European Parliament. ² In accordance with Article 10(1)(c) of the ECI Regulation, the Commission responded to the ECI organisers with Communications that were issued within three months of the public hearing dates. In each of the three Communications, the Commission set out its conclusions as to the follow-up actions that it would take based on the ECI; it did not commit to any binding legislative acts based on the submitted proposals.

As will be seen below, there is noticeable contrast between the three Communications of the Commission to the successful ECIs. While the Commission proposed some follow-up actions for the ‘Right 2 Water’ and the ‘Stop Vivisection’ ECIs, it rejected all of the proposals of ‘One of Us’ without even suggesting any alternatives or compromises. To an extent, the differences in the Commission’s responses can be attributed to the substantial

² Members of different Commission DGs attended the public hearings, depending on the topic of the ECIs. For the ‘Right 2 Water’, the Commission was represented by the Vice-President for Inter-Institutional Relations, who was then responsible for the implementation of the ECI Regulation. The public hearing of the ‘One of Us’ was attended by the Commissioner for Research, Innovation and Science and the Commissioner for Development. The public hearing of ‘Stop Vivisection’ was organised by the Committee on Agriculture and Rural Development together with the PETI Committee, the Committee on Environment, Public Health and Food Safety, and the Committee on Industry, Research and Energy. It was the only public hearing attended by two neutral experts: a representative of the Americans for Medical Advancement, Mr. Greek, a member of the Humane Society International, Ms McIvor, and a Nobel Prize virologist, Ms. Barré-Sinoussi. Study for the PETI Committee, Policy Department C: Citizens’ Rights and Constitutional Affairs, ‘Towards a revision of the European Citizens’ Initiative?’ PE 519.240 (July 2015) 41 (Hereinafter ‘Towards a revision of the ECI Study’)
divergence in the subject matters of these ECIs and to the antithesis of their overall objectives. The ECIs related to issues of water privatisation, animal experimentation, and destruction of human embryos\(^3\) respectively, and while ‘Right 2 Water’ mainly asked the Commission to take further action in an area that fell within its competences, ‘One of Us’ and ‘Stop Vivisection’ asked the Commission to make radical policy changes. Out of the three, the ‘Right 2 Water’ ECI, which was the least controversial, received the most affirmative response from the Commission.

**A. The follow-up of successfully submitted ECIs**

It should be recalled that the Commission retains the discretion to decide the outcome of an ECI, although the extent of that discretion is currently being challenged before the General Court (GC) by the organisers of ‘One of Us’.\(^4\) While the case pending before the GC was considered in the previous chapter of this thesis, the discussion below will present a case study of the final stage of each of the three successfully submitted ECIs. The public hearings of each ECI, as well as the responses from the Commission and the consequent actions of the ECI organisers, are analysed in an attempt to elucidate the process of an ECI’s follow-up and to identify the factors that determined the Commission’s responses. In this way, the analysis provides a realistic assessment of the potential of an ECI as a means of influencing EU policy and legislative outcomes, and demonstrates the position of the ECI within the EU institutional structure and particularly vis-à-vis the European Parliament as the main representative of EU citizens.

**i. Partially meeting the organisers’ requests: ‘Right 2 Water’ ECI**

‘Right 2 Water’ was the first ECI that managed to collect the necessary one million signatures. According to the Press Officer of the campaign, Mr. Cantellas, the aim of ECI organisers was clear from the beginning: to initiate legislation at EU level. He stated: ‘there have been people who have used the ECI to raise issues, and others who want to implement policy. We want legislation; we don’t just want agenda-setting.’\(^5\) Having

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\(^3\) Put briefly, the ‘Right 2 Water’ invited the Commission to propose legislation implementing the human right to water and sanitation and promoting the provision of water and sanitation as essential public services for all; ‘One Of Us’ asked for the termination of financing of activities which presuppose the destruction of human embryos, in particular in the areas of research and development aid; and, ‘Stop Vivisection’ requested the Commission to phase out animal experimentation by repealing Directive 2010/63/EU.

\(^4\) Case T-561/14 One of Us and others v Parliament and Others, action brought on 25 July 2014.

\(^5\) Interview with Mr. Cantellas, February 2014.
reached the signature thresholds in 15 Member States, the ECI was submitted to the Commission on 20 December 2013. Its public hearing took place on 17 February 2014; it was organised by the European Parliament Committee on the Environment, Public Health and Food Safety (ENVI Committee), and was attended by MEPs, the ECI’s citizens’ committee, and a large number of activists and members of the public.

The submitted ECI proposal comprised three requests. It primarily asked for the adoption of EU legislation that recognises water and sanitation as a human right in line with international law under the 2010 United Nations Resolution 64/292. In addition, it suggested that the provision of water and sanitation should be acknowledged as a public service for all EU citizens under Article 14 TFEU and thus that the Commission should abstain from proposing legislative initiatives for the liberalisation of water and sanitation services. Finally, the ECI urged the Commission to increase its efforts to achieve universal access to water and sanitation as part of the EU’s development policy (Articles 209 and 210 TFEU). The common rationale behind these three requests was that making the provision of water services a public good is the only way to establish the human right to water, and since the privatisation of water supply would conflict with this right, such privatisation should be prohibited. The bottom line is that the ECI aimed to prevent the privatisation of water services in the EU.

The Commission released its official response to the ‘Right 2 Water’ on 19 March 2014, in a Communication accompanied by a Press Release with an eye-catching title (‘Commission says yes to first successful European Citizens’ Initiative’), implying that the Commission decided to act on the ECI proposals. In its Communication, the Commission first described all the actions taken at the EU level regarding access to water

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6 Annex to the Communication from the Commission on the European Citizens’ Initiative “Water and sanitation are a human right! Water is a public good, not a commodity!” COM(2014) 177 final, 2-3.
7 United Nations, Resolution 64/292 adopted by the General Assembly on 28 July 2010, A/RES/64/292.
9 Manuel Schiffler (n 8) 116; A list of the ECI’s specific proposals is available at: <www.right2water.eu/about-our-campaign> accessed 10 August 2015.
10 Commission Communication on the European Citizens Initiative ‘Water and sanitation are a human right! Water is a public good, not a commodity!’ COM(2014) 177 final, Brussels, 19 March 2014 (Hereinafter Communication on ‘Right 2 Water’).
and sanitation, such as legal acts and actions under certain policy frameworks. The proposals of the ECI organisers were considered with the purpose of identifying ‘any remaining gaps and areas where more efforts – at EU or national level – needed to be made in order to address the concerns motivating the citizens’ call for action’. Increasing the transparency of the provision of water services, ensuring that the EU remains neutral with regards to national decisions for water undertakings, and prioritising attempts for universal access to water and sanitation in the context of the EU’s development policy were identified as some of the areas in which the Commission was prepared to act in order to meet the objectives of ‘Right 2 Water’. With respect to these areas, the Communication outlined a series of follow-up actions in response to the ECI.

Although the Press Release stated that ‘the Commission today decided to react positively to the first ever successful ECI’, it is more accurate to say that the Commission met the requests of the organisers somewhat halfway. For instance, even though the Commission acknowledged the human rights dimension of access to safe drinking water and sanitation, it did not suggest relevant legislation to make this a part of EU law under Article 14 TFEU as the ECI organisers had suggested. Furthermore, most of the actions proposed by the Commission built upon already existing EU efforts, thus making it unclear whether they were indeed measures tailored to the ECI or merely a continuation of the Commission’s current practice. As for the central objective of the ECI - to prevent the privatisation of water services - the Commission only mentioned the exclusion of water

14 Communication on ‘Right 2 Water’ (n 10) 7.
15 Communication on ‘Right 2 Water’ (n 10) 7-13.
16 Commission Press Release (n 11).
17 Communication on ‘Right 2 Water’ (n 10) 12.
18 For example, the Commission stated that it would build on the commitments presented in the 7th Environmental Action programme and the 2012 Water Blueprint in order to reinforce implementation of water quality legislation and advocate universal access to safe drinking water and sanitation. It also mentioned that it would cooperate with existing initiatives regarding the provision of a set of water services benchmarking; Communication on ‘Right 2 Water’(n 10) 13.
from the Concessions Directive and from legislation on public procurement where local authorities decide to provide the water services themselves.\textsuperscript{19}

With regard to the Concessions Directive, the Commission had shown willingness to act on the ECI close to the end of the signature collection stage. The organisers of ‘Right 2 Water’ were explicitly against the adoption of the Directive which they perceived at the time as the latest indirect attempt of the EU to privatise water services.\textsuperscript{20} In June 2013, the then Commissioner for Internal Market and Services, Michael Barnier, announced that water was removed from the scope of the Concessions Directive. Notably, Barnier explicitly referred to the ‘Right 2 Water’ ECI in his statement, commenting that it is the Commission’s duty ‘to take into account the concerns expressed by so many citizens’.\textsuperscript{21}

While the ECI organisers welcomed the exclusion of water from the Directive and from public procurement legislation, they criticised the fact that the Commission did not also exclude water services from other international negotiations, such as the negotiations over the Transatlantic Trade and Investment Partnership (TTIP).\textsuperscript{22} In addition, with regard to the absence of a commitment to a legislative proposal, the organisers stated that ‘the reaction of the European Commission lacks any real ambition to respond appropriately to the expectations of 1.9 million people’.\textsuperscript{23}

Notwithstanding the lack of a legislative proposal, it should be pointed out that the Commission has pursued some of its proposed follow-up actions since its reply to the

\textsuperscript{19} Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts [2014] OJ L 94/1, Article 12; The Commission defines concessions as ‘partnerships between the public sector and mostly private companies, where the latter exclusively operate, maintain and carry out the development of infrastructure (ports, water distribution, parking garages, toll roads) or provide services of general economic interest (energy, water distribution and waste disposal for example), see European Commission MEMO/14/19; Communication on ‘Right 2 Water’ (n 10) 9.


\textsuperscript{23} Jan Willem Goudriaan, member of the ‘Right 2 Water’ Citizens’ Committee in Press Release from ‘Right 2 Water’ Citizens’ Committee (n 22).
‘Right 2 Water’ organisers.\textsuperscript{24} For example, water and sanitation has now been identified as a priority area for the future development framework that will be discussed during UN negotiations. A stakeholder meeting on the benchmarking of water quality was also organised, and the ECI organisers were invited to participate.\textsuperscript{25} In addition, the ECI fed into the Commission’s 2015 Work Programme. Particularly, ‘Right 2 Water’ was linked to the evaluation of the Drinking Water Directive, which will take place this year as part of the Commission’s ‘Regulatory Fitness and Performance Programme’ (REFIT).\textsuperscript{26}

Despite the steps taken by the Commission in response to ‘Right 2 Water’, other actions mentioned in the ECI Communication, such as the proposed review of the Water Framework Directive, have not yet been followed through. Even so, the outcome of this ECI was the most positive out of the three successfully submitted ECIs. Not only was some action taken by the Commission as a response, but formal support was also received from the European Parliament. Specifically, an own-initiative resolution on the follow-up to the ‘Right 2 Water’ was prepared by the ENVI Committee, with Opinions from the PETI Committee and the Committee on Development (DEVE)\textsuperscript{27} and adopted by the European Parliament Plenary on 8 September 2015 (hereinafter European Parliament Resolution).\textsuperscript{28}

\begin{itemize}
\item[ii.] \textbf{The intervention of the European Parliament}
\end{itemize}

The starting point of the European Parliament Resolution is that the Commission’s reply to the ‘Right 2 Water’ was unsatisfactory because it did not introduce all the measures that were necessary to achieve the objectives of the ECI. On this premise, and motivated by two considerations, the European Parliament requested that the Commission takes further actions. The first consideration behind the Resolution relates to the topic of the particular ECI. The European Parliament shares the view and aspirations of the ECI organisers that water should be recognised as a human right at the EU level. To this end,

\begin{itemize}
\item[24] A summary of the actions is available at: \url{http://ec.europa.eu/dgs/secretariat_general/followup_actions/citizens_initiative_en.htm}
\item[26] More information available at: \url{http://ec.europa.eu/smart-regulation/refit/index_en.htm}
\end{itemize}
the Resolution asks the Commission to submit legislative proposals and consider revising the Water Framework Directive. This position is endorsed by the EESC, which has also issued an Own-Initiative Opinion urging the Commission to propose binding legislation.

The second motivation underlying the Resolution is more broadly linked to the functioning of the ECI as a mechanism for participatory democracy. In this regard, the European Parliament maintains the view that the credibility of the ECI is at risk unless the Commission comes up with relevant legislative proposals.

The position of the European Parliament on the follow-up of ‘Right 2 Water’ confirms a hypothesis made by academic commentators at the beginning of the ECI’s operation, according to which an ECI that has not been acted upon by the Commission could still have a chance of resulting in legislation if it is supported by the European Parliament or the Council. The adoption of the European Parliament Resolution in plenary confirms that EU Institutions could promote an ECI by putting pressure on the Commission to respond positively to the proposals of the organisers. Indeed, own-initiative resolutions are generally perceived by MEPs to be a credible way of requesting the Commission to submit legislative proposals.

Admittedly, it is unknown whether the Resolution will have any effect on the Commission’s follow-up actions to the ‘Right 2 Water’. Nevertheless, and almost irrespective of its actual influence, the European Parliament’s involvement in the continuation of the ECI in question sheds light on the interaction between participatory (Article 11(4) TEU) and representative (Article 10(2) TEU) avenues of citizens’ engagement in EU politics. In the context of the ‘Right 2 Water’, the political influence of the European Parliament (representative avenue) in promoting an ECI (participatory avenue) has a dual benefit.
Firstly, as discussed above, the said ECI could potentially benefit from an increased chance to result in a legislative proposal. Moreover, if the organisers decide to continue campaigning after the end of the ECI’s lifecycle, their campaign will benefit from the European Parliament’s support irrespective of whether or not the Commission acts upon the initiative. The ‘Right 2 Water’ organisers, for instance, are now able to claim not only that they have a mandate from their 1.9 million signatories to continue pushing for their objectives, but also that their attempts are reinforced by the only directly elected democratic institution of the EU. The European Parliament’s support to the ECI’s cause can only help with the visibility of the campaign. For example, Mr. Cantellas stated after the ECI’s public hearing, ‘the campaign isn’t finished. What is finished is the collection of signatures. Now we need to do things for the people who have supported us.’

Secondly, by promoting a successfully submitted ECI such as the ‘Right 2 Water’ for inclusion in the Commission’s legislative agenda, the European Parliament enhances its own image as a representative of EU citizens. In its Draft Report, the ENVI Committee referred to the ECI as ‘an excellent opportunity for the EU institutions to re-engage with citizens, as is imperative.’ In this way, the European Parliament promotes an image of itself as the defender of successfully submitted ECIs and as an institution that is ready to step up in support of EU citizens’ attempts to voice their collective aspirations.

This is not the first time that the European Parliament explicitly asserts such a role. The European Parliament’s willingness to make use of its powers and political influence for the purposes of protecting citizens’ rights and interests are evidenced in its rejection of the SWIFT Agreement and the Anti-Counterfeiting Trade Agreement (ACTA). The former was an agreement with the US on the transfer of citizens’ financial data in order to prevent terrorist attacks. The latter was a multilateral agreement concerning the enforcement of intellectual property rights. These were both formal agreements with third countries; hence, their conclusion required the consent of the European Parliament (Article 218 TFEU). In February 2010, the European Parliament refused to give its consent to the

34 Interview with Mr. Cantellas, February 2014.
37 More information available at: <www.ustr.gov/acta>
38 Except under Article 218(8) TFEU.
SWIFT interim agreement, rendering the text of the agreement void. In rejecting the agreement by an overwhelming majority of 378 to 196 votes, the European Parliament put forward concerns over inadequate data protection and the lack of opportunities for legal redress, arguing that the agreement did not respect basic civil liberties and fundamental rights.

The rejection of the SWIFT agreement is an example of the active role of the European Parliament in EU decision-making as the body representing EU citizens and defending their legal rights. The then European Parliament President Jerzy Buzek notably commented that the Member States’ governments need to accept that the European Parliament would use its powers ‘in a way which reflects its own assessment of the concerns of Europe’s citizens’. Nonetheless, the European Parliament’s intervention was depreciated when MEPs approved the text of a re-considered EU-US SWIFT Agreement, which left the main data protection concerns raised by the European Parliament largely unaddressed.

As a result of the final compromise on SWIFT, the original position of the European Parliament on the agreement appears to be more of an attempt for recognition by the Council than a manifestation of its policy priorities or of citizens’ concerns about data protection. Likewise, it can be argued that the involvement of the European Parliament in the follow-up of ECIs can be seen as a means for the European Parliament to assert its role

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39 The interim agreement had been approved by the Council and provisionally entered into force one day before the coming into effect of the Lisbon Treaty because, under the then effective Treaty of Nice, the consent of the European Parliament was not required. See ‘Council Decision on the signing, on behalf of the European Union, of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program’ (2010) OJ L 8/9, Preamble; Justice and Home Affairs Press Release ‘SWIFT: European Parliament votes down agreement with the US’ REF: 20100209IPR68674, 11 February 2010.

40 Article 8 (Protection of Personal Data) Charter of Fundamental Rights of the EU OJ C 364/01 , Justice and Home Affairs Press Release (n 146), European Parliament resolution of 5 May 2010 on the Recommendation from the Commission to the Council to authorise the opening of negotiations for an agreement between the European Union and the United States of America to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing (P7_TA(2010)0143).


43 Jorg Monar (n 42) 19.
vis-à-vis the Commission and, by extension, the Council.\textsuperscript{44} This is all the more notable in the case of ‘Right 2 Water’ given that the ECI related to a social matter - namely water privatisation - which is connected to the current climate of economic crisis in the EU and with austerity programmes\textsuperscript{45} that are often negotiated and adopted without the participation of the European Parliament in the negotiations.\textsuperscript{46}

The connection between the ECI’s objectives, austerity measures and, broadly speaking, the economic crisis was mentioned in the European Parliament Resolution, which criticised the Commission’s commitment to remain neutral on the issue of water ownership and management. According to the Resolution, this commitment contradicts the privatisation programmes imposed by Troika on some Member States.\textsuperscript{47} Expressing concerns over the provision of water services to citizens after the 2008 economic crisis, which increased the number of low-income households in the EU, the European Parliament called on the Commission to recognise water as a public good.\textsuperscript{48}

It can be argued on the above premise that the ‘Right 2 Water’ ECI was used by the European Parliament as a platform to express its views on the topic of water privatisation and austerity policies. This argument is all the more valid when seen in light of another recent Resolution of the European Parliament censuring the operations of the Troika with regard to countries in the Euro area programme.\textsuperscript{49} The Resolution explicitly stated that the European Parliament ‘deplores the fact that [it] has been completely marginalised in all phases of the programmes [as it] considers that only genuinely democratically accountable institutions should steer the political process of designing and implementing the adjustment

\textsuperscript{44} Beatte Kohler-Koch submitted a similar argument at the beginning of the ECI. She argued that the European Parliament may use the ECI to replace its limited agenda-setting powers under Article 225 TFEU: Beatte Kohler-Koch ‘Post-Maastricht Civil Society and Participatory Democracy’ (2012) 34(7) JEU 809, 821.

\textsuperscript{45} The ‘Right 2 Water’ campaign, for instance, had connections with anti-austerity movements in Greece that also advocated against the privatisation of water services. See for links with a referendum that took place in Greece: <www.epsu.org/a/10284> and links with ‘Soste to Nero’, a Greek initiative against water privatisation <www.savegreekwater.org/?page_id=29> both accessed 15 September 2015.

\textsuperscript{46} Water privatisation is likely to be imposed as part of austerity policies or as conditions for financial assistance by the so-called ‘Troika’ (European Commission, European Central Bank and the IMF). Whilst the Commission, as part of the Troika, has a central role to play in the provision of financial assistance programmes for troubled Member States, the European Parliament is largely left outside the negotiations and preparations of these programmes.

\textsuperscript{47} European Parliament Resolution on the ‘Right 2 Water’ (n 28) para 21.

\textsuperscript{48} European Parliament Resolution on the ‘Right 2 Water’ (n 28) para 18.

programmes for countries in severe financial difficulties. The Resolution on ‘Right 2 Water’ can thus be seen as an additional, indirect way for the European Parliament to express its views on crisis-related financial measures given the lack of an official platform for its views to be considered.

Beyond the use of the ECI as a platform for the European Parliament to increase its institutional presence vis-à-vis the Commission, the involvement of the European Parliament could also push the Commission to act on the proposals of ‘Right 2 Water’. This possibility is illustrated by the example of the ACTA negotiations, where the European Parliament was more assertive than it had been in the negotiation of the SWIFT Agreement. The European Parliament rejected ACTA on July 2012, by 478 to 39 votes, due to concerns about the inadequate protection of citizens’ intellectual rights and data privacy.

As with the intervention of the European Parliament in the follow-up of ‘Right 2 Water’, the European Parliament’s opposition to ACTA was also motivated by public opinion. During the debate on ACTA, the European Parliament received five formal petitions calling for the refusal of the agreement, one of which was signed by 2.8 million citizens. According to the PETI chair, the European Parliament was given the big responsibility of listening to the people who had expressed their thoughts to the EU institutions. Likewise, in the Report on the ‘Right 2 Water’ the European Parliament referred to the supporters of the ECI, as well as to the large number of petitions received by PETI from citizens expressing their concerns about water services, and urged the Commission to take these petitions seriously.

ACTA was eventually dropped from the legislative agenda. It remains to be seen whether the intervention of the European Parliament in support of ‘Right 2 Water’ will have a similar effect in influencing the future actions of the Commission. Whatever the outcome of this institutional crossing, the case of ‘Right 2 Water’ illustrates the synergy between

50 ibid
52 For more information on the petition see Avaaz Website: <http://secure.avaaz.org/en/eu_save_the_internet/>
citizens’ representative avenues and citizens’ participatory avenues in the context of the EU institutional order with respect to the ECI.\textsuperscript{55} This synergy lends support to the argument that the ECI is not detached from the rest of the EU’s legal and institutional fabric and should be seen as an opportunity for citizens’ participation that exists parallel to the functioning of the European Parliament as the main representative body for EU citizens. It can thus be argued that Article 10(2) TEU and Article 11(4) TEU reinforce each other both in theory and in practice, as opportunities for EU citizens to become involved in the EU decision-making process.

Leaving that to one side, the interplay between citizens’ representation by the European Parliament and citizens’ participation via an ECI should also be examined in light of the two other successfully submitted ECIs, as well as the ECIs that did not manage to collect the necessary number of signatures. Starting with the follow-up to the ‘One of Us’ and ‘Stop Vivisection’ Initiatives, the subsequent discussion reveals a different picture both with respect to the European Parliament’s receptiveness towards ECI proposals, and the institutional dynamics that come into play in the examination of a successfully submitted ECI.

\textbf{iii. Commission unwilling to act: ‘One of Us’}

In contrast to the Commission’s response to ‘Right 2 Water’, no legislative or non-legislative follow-up actions were proposed for the ‘One of Us’ ECI, even its proposals were more concrete than those of the former. ‘One of Us’ was broadly speaking concerned with the protection of human embryos. As such, it asked for an EU-wide ban and termination of ‘the financing of activities which presuppose the destruction of human embryos.’ In particular, the ECI’s proposals consisted of three legislative amendments to existing EU secondary legislation. According to the proposals: the Financial Regulation\textsuperscript{56}

\textsuperscript{55} At the early stages of the ECI’s operation, Michael Dougan wrote about the possibility of the European Parliament and the Council to call upon the Commission to act ‘thus combining the pressure of participatory with that of representative democracy upon the exercise of the Commission’s prerogative of legislative initiative’ (n 32) 1844.

Horizon 2020 which is the framework programme of the EU for the funding of research projects;\(^\text{57}\) and, the EU Development Cooperation policy\(^\text{58}\) should be modified in order to prohibit the allocation of EU funds to organisations that promote abortion directly or indirectly in third countries. Appropriate wording for the amended acts was submitted to the Commission in an elaborate Annex to the Initiative.

After collecting the largest number of validated signatures collected by an ECI to date (1,897,588), the ECI was presented to the European Parliament at a public hearing on 10 April 2014.\(^\text{59}\) During the hearing, which was organised jointly by the Committee on Development, the Committee on Legal Affairs, the Committee on Industry, Research and Energy, and the PETI Committee, an intense debate took place between MEPs and the ECI organisers.\(^\text{60}\) The ECI organisers blamed the EU for financing abortion through development aid, even in countries where abortion is illegal, and asked for transparency in the Commission’s funding practices. Although some MEPs supported the ECI, others criticised it on the basis that it could prohibit the EU from meeting its international commitments on development aid, family planning, and sexual and reproductive health.\(^\text{61}\) These concerns were later reflected in the Commission’s Communication, which was published on 28 May 2014.\(^\text{62}\)

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\(^\text{59}\) The hearing was preceded by a meeting with the Commissioner for Research, Innovation and Science, Mr. Geoghegan-Quinn, and the Deputy Director-General responsible for Development and Cooperation, Mr. Cornaro.

\(^\text{60}\) Members of the public that attended the hearing did not hesitate to show condemn for some MEPs’ positions, with the head of the panel intervening to bring the order back to the room.


\(^\text{62}\) Communication from the Commission on the European Citizens' Initiative "One of Us" COM(2014) 355 final, Brussels, 28 May 2014 (hereinafter Communication on ‘One of Us’).
Every single proposal of the ECI was rejected by the Commission in its Communication. The Commission primarily opposed the ECI organisers’ reading of the CJEU *Brüstle* judgment. The judgment was a leading point in the ECI’s campaign; the organisers used it to argue that the CJEU had acknowledged the human embryo as the first stage in the development of a human being. Contrary to the organisers’ interpretation, the Commission deemed the judgment to be limited to excluding the patentability of human embryos as biotechnological inventions. It thus became evident from early on that the Commission did not share the ECI organisers’ viewpoint on the issues in question.

For the purposes of the current discussion, it is striking that the main justification for the Commission’s decision to reject the ECI was based on the democratic procedure in which the currently applicable legislative framework was adopted. The Communication specifically emphasised that Horizon 2020 was drafted after taking into consideration vast public input, from stakeholders’ consultations to discussions with the two EU legislative institutions, and from recommendations of the European Group of Ethics to the findings of a Eurobarometer survey on the views of citizens on embryonic stem cell research. The financing instruments for Development Cooperation were drafted following a similarly thorough process, taking into account the outcomes of a public consultation and an impact assessment. The Commission particularly highlighted that both Horizon 2020 and the financing instruments were recently adopted by clear majorities in the European Parliament and the Council through the ordinary legislative procedure.

The justification of the Commission is of particular relevance to the examination of the ECI as a tool for influencing EU law-making, for two reasons. First, the Commission’s response refutes any expectations that the Commission would feel pressurised to act upon a successfully submitted ECI either as an attempt to safeguard the popularity and credibility of this novel mechanism, or because of an urgent need to show that the EU Institutions are receptive to the views of EU citizens. The Press Officer of ‘One of Us’, Ms. Del Pino, for example had expressed the view that, although the ECI Regulation does not guarantee any

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63 Case C-34/10, *Brüstle v Greenpeace* [2011] ECR-9821
64 Communication on ‘One of Us’ (n 62) 3-4.
65 Communication on ‘One of Us’ (n 62) 5-6.
66 Communication on ‘One of Us’ (n 62) 11.
67 Communication on ‘One of Us’ (n 62) 15.
68 See Chapter 2 (note 73) of this thesis for a discussion of these expectations by academic commentators.
change in legislation, it was unlikely that the Commission would ignore the nearly 2 million signatures collected by the campaign.\textsuperscript{69} It was also commented:

\begin{quote}
With [signatures collected from] 20 countries out of the 28 we are the first ones, so at least [the Commission] should take this into account. Because also, you know, this European instrument, the ECI, is supposed to be done to fight the democratic deficit in the EU. What will they say to European citizens, that they don’t care? [That] “you have signed but we can’t do anything”?”\textsuperscript{70}
\end{quote}

Notwithstanding the expectations of the organisers, the Commission has made full use of its discretion to decide on the future of the ECI based on political considerations. The outcome of ‘One of Us’ throws into sharp relief the inability of the ECI to exert strong pressure on the Commission in order to compel it to take action. In this respect, it is also relevant that the responsibility to respond to an ECI belongs to the Commission rather than an elected, representative institution. Research about national experiences of citizens’ initiatives indicates that the attitude of representative bodies to successful citizens’ initiatives can have direct impact on the chance of re-election of national parties.\textsuperscript{71} In Austria, for example, the lack of responsiveness to citizens’ initiatives has a negative effect on parties’ electoral performance.\textsuperscript{72} As the Commission is not elected by voters, it does not risk losing voters’ support as a result of its decisions, and thus has a weaker incentive to take action based on an ECI’s proposals.\textsuperscript{73}

The second observation from the Commission’s response to the ‘One of Us’ ECI concerns the limits to the ECI’s potential to result in legal acts or to amend existing EU law. Practice so far chimes well with the argument that the ECI is ‘a mechanism of participatory democracy fully subordinated to the political will of the representatives.’\textsuperscript{74} It was already argued at the start of the ECI that any legislative proposal resulting from a successfully submitted ECI would be filtered either by the Commission before being submitted to the

\begin{footnotes}
\item[69] Ana Del Pino, Interview in Carsten Berg, Janice Thomson, \textit{An ECI That Works!} (The ECI Campaign 2014).
\item[70] Interview with an organiser of the ‘One of Us’ ECI, February 2014.
\item[72] ibid
\item[73] Graham Smith (n 32) 285.
\end{footnotes}
European Parliament and the Council, or by the two EU co-legislators as part of the ordinary legislative process. The reply to the ‘One of Us’ further suggests that the positions, priorities, and activities of the European Parliament and the Council also have an indirect impact on the Commission’s reaction to a successfully submitted ECIs.

To be more precise, the Commission’s refusal to take any action in response to ‘One of Us’ was because the two EU co-legislators had only recently voted for the current legislation, and therefore strongly suggests that the views of the co-legislators are vital in the Commission’s decision to go through with the drafting of legislation and, by extension, with accepting or rejecting an ECI. After all, the process of determining the issues to be included on the EU agenda is equally political in nature as the process of deciding on those issues once they are on the agenda. It is not uncommon for the Commission to abstain from submitting proposals that are likely to be rejected by the two institutions. In the past, legislative proposals have even been withdrawn because the Commission recognised that they were unlikely to gather the necessary political support that would enable the adoption of those proposals.

Further evidence of this tactic can be seen in the Commission’s 2015 Work Programme. The Programme, which is based on President Juncker’s Political Guidelines, defines the strategic agenda of the Commission for 2015. According to the Programme, the Commission is working on the basis of ‘political discontinuity’, based on which a newly-structured Commission can review all the existing legislative proposals at the beginning of its term and decide which of those proposals it wants to pursue and which to withdraw. So

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75 ibid; Michael Dougan (n 32) 1843-1845; Nikos Vogiatzis, ‘Is the European Citizens’ Initiative a serious threat for the Community method?’ (2013) 6 (1) EJLS 91.
77 Sebastiaan Princen (n 76) 22.
78 Letter by Commission Vice President Maros Šefčovič sent to national parliaments and chambers on 12 September 2012 (Ares (2012) 1058907) with regards to the Monti II proposal.
81 Framework Agreement on relations between the European Parliament and the European Commission, point 39(2): ‘The Commission shall proceed with a review of all pending proposals at the beginning of the new Commission’s term of office, in order to politically confirm or withdraw them, taking due account of the view expressed by Parliament’.
far, 73 pending legislative proposals have been withdrawn by the Commission, following ‘constructive discussions with the other institutions in which the Commission has heard their views.’ Only legislative proposals with good chances of being adopted remain under discussion.

The Commission’s reply to ‘One of Us’ tallies well with the preceding description of the European Parliament and the Council’s indirect influence over the Commission’s prerogative of legislative initiative. Knowing that the European Parliament and the Council would not have voted for a proposal to modify the heavily-debated regulatory framework that they had adopted only a few months ago, the Commission did not proceed to undertake any legislative or other commitments based on the proposals of ‘One of Us’. This is not to say that the Commission’s decision was directed by the two institutions; the Commission has its own agenda as well, which does not always follow the agendas of the European Parliament or the Council. It is rather to suggest that, based the currently available evidence, an ECI has slim chances of resulting in a legislative proposal if its aims and objectives sharply contrast with the priorities and existing agenda of the Commission or the two co-legislators.

Although the ECI was launched and promoted as an indirect way to propose legislation analogous to the rights of the European Parliament (Article 225 TFEU) and the Council (Article 241 TFEU), the difference is apparent. Essentially, the comparison is between the weight of the influence exerted on the agenda by the two EU co-legislators and the influence imposed by a group of less than 2 million citizens. Even though the one million signatories of a successful ECI are supposed to represent the EU as a whole, they amount to little more than 0.2% of the entire EU citizenry. The Commission’s response to ‘One of Us’ strongly indicates that, so far, between the preferences of the Commission,

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82 By way of comparison, over the past 5 years on average 30 proposals were withdrawn annually. European Commission Press Release IP/15/4567 (n 79); European Commission ‘Questions and Answers: the 2015 Work Programme’ MEMO/14/2704 (14 December 2014).


85 Sebastiaan Princen (n 76) 28.

86 Chapter 2; Stijn Smismans (n 84) 92; See Paolo Ponzano, ‘A Million Citizens can Request European Legislation: A Sui Generis Right of Initiative’ [2011] <https://blogs.eui.eu/eudo-cafe/2011/04/13/a-million-citizens-can-request-european-legislation-a-sui-generis-right-of-initiative/> accessed 10 August 2015, who argued that citizens have been granted a right equivalent to the rights of the European Parliament and the Council and that this should not be underestimated.
European Parliament and Council, and those of one million ECI signatories, the former prevail in the Commission’s considerations about its reply to a successfully submitted ECI.

What is more, the follow-up of ‘One of Us’ reveals a different picture than that of ‘Right 2 Water’ regarding the interplay of citizens’ representation and citizens’ participation in the EU. In the context of the second successfully submitted ECI, the two forms of citizens’ civic engagement do not co-exist in synergy, but are rather juxtaposed in the EU decision-making apparatus. As submitted above, the inter-institutional dynamics appear to favour the position of the two co-legislators where these are opposed to the objectives of a successfully submitted ECI. This observation could even indicate that the more elaborate the legislation in a specific field (for instance in areas that are heavily regulated such as research funding and development aid), the more difficult it would be for an ECI to trigger a legislative change in that area.  

On a rather pessimistic note for future ECI organisers, the aforementioned Commission’s 2015 Work Programme makes it even more difficult for future ECIs to initiate legislation. Whilst in the past five years an average of 130 initiatives were proposed annually, the new Commission only presented 23 initiatives for 2015, and only on issues relevant to jobs and growth. At present, the argument remains speculative given that only four ECIs are currently open and that none of them are close to collecting one million signatures. It is, however, a telling example of the institutional dynamics that surround the operation of the ECI, as it shows the array of factors to be taken into account when deciding on the follow-up of an ECI.

One of these factors is also the effectiveness and efficiency of current legislation. In the ‘One of Us’ Communication, the Commission explained that the current state of play in the EU with regard to the policy areas in question was satisfactory. The financing of human embryonic stem cell research was adequately governed by an ethical framework and appropriate controls. Moreover, the EU was bound by a number of international obligations to use financing instruments to provide assistance to developing countries with regard Development Cooperation. The strict monitoring, evaluation, financial audits and verification which takes place to ensure the standard and quality of these financing programmes was emphasised throughout the Communication. According to the

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87 Stijn Smismans (n 84) 92.
88 Commission Communication on 2015 Work Programme (n 83).
Commission, there is no need to propose changes to the current legislation. A similar focus on the current legislative efficiency is observed with respect to the Commission’s follow-up to ‘Stop Vivisection’. As such, the third successfully submitted ECI serves as an example of additional considerations that limit the potential of an ECI to penetrate EU decision-making.

iv. Focus on current legislation’s efficiency: ‘Stop Vivisection’

In its reply to ‘One of Us’, the Commission drew attention to the benefits and the added value of Horizon 2020 and the financial instruments adopted under the Development Cooperation policies. Such an emphasis on the effectiveness of current legislation can also be observed in the Commission’s reply to ‘Stop Vivisection’. The ECI proposed the repeal of Directive 2001/63/EU in order to phase out the practice of animal experimentation. In its Communication, the Commission highlighted the twofold effectiveness of the Directive in allowing the use of animal models to test medicines that could be too dangerous for human trials and in ensuring the protection of such animals.

The main message of the Communication was that, although the Commission shared the position of the ECI organisers that animal experimentation should be abolished at some point in the future, the Directive remained ‘an indispensable tool at the EU level’ to protect animals that are still needed for experimentation. Animal experimentation has led to numerous advancements in medicine and rejecting it altogether was a premature objective. The repeal of Directive 2010/63/EU would only result in the deregulation of animal practices and thus in an inadequate standard of animal protection. According to the Commission, the Directive is currently the most efficient way to ensure the welfare of animals used in experiments. The efficiency of the current legislative framework in the

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89 Communication on ‘One of Us’ (n 62) 16.
90 According to the Europa website, ‘Horizon 2020 is the biggest EU Research and Innovation programme ever with nearly €80 billion of funding available over 7 years (2014 to 2020) – in addition to the private investment that this money will attract.’ <http://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020> accessed 10 September 2015; Communication on ‘One of Us’ (n 62) 6, 11, 16.
93 Communication on ‘Stop Vivisection’ (n 92) 10.
94 Communication on ‘Stop Vivisection’ (n 92) 7.
protection of those animals meant that the objectives of the ECI could not be met at this point in time.

Despite the similarities between the Commission’s responses to ‘Stop Vivisection’ and ‘One of Us’ regarding the lack of a legislative proposal, there are some differences between the two. In particular, contrary to the categorical rejection of the latter, some follow-up actions were proposed by the Commission in response to ‘Stop Vivisection’. Specifically, the Commission undertook some actions to accelerate the phasing out of animal-based research and proposed to organise a debate between the scientific community and relevant stakeholders, including the ECI organisers, on how to develop alternative methods of experimentation. Most of these actions, however, were either based on existing activities of the Commission or would have taken place anyway in the context of Directive 2010/63/EC.

The outcome of ‘Stop Vivisection’ can also be linked with the so-called trade-off between input and output legitimacy, whereby ‘good output policies are seen to make up for a lack of participatory input’. In a similar vein, it can be argued that the importance placed on the efficacy of current legislation (output legitimacy) is aimed at compensating organisers for the disregard of the concrete proposals of ‘Stop Vivisection’. All things considered, it can be concluded that the effectiveness and efficiency of current legislation are primary considerations for the Commission when deciding on how to reply to an ECI.

Unless one subscribes to the argument that the Commission should be obliged to initiate the legislative process for each successfully submitted ECI, it should be accepted that the Commission’s role is to assess each successful ECI by considering several factors, such as the effectiveness of the general legal framework, the view and agendas of the EU co-legislators, and the legislative and political priorities of the EU. This approach is evident from the first three successfully submitted ECIs; the ECI is, indeed, an instrument with weak potential to affect EU legislation and the monopoly of the Commission to initiate

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95 Communication on ‘Stop Vivisection’ (n 92) 8, Action 1 (‘Building on existing activities of the Commission’ to advance current practices) and Action 2 (‘The Commission will continue to support the development, validation and implementation of alternative approaches (…)’).

96 Communication on ‘Stop Vivisection’ (n 92) 9, Action 3 (‘The Commission will actively monitor compliance with the Directive (…) and will also actively monitor the correct enforcement by all Member States’).

legislation to any substantial degree. As for the European Parliament, it appears to be willing to take an active role in promoting successfully submitted ECIs. Although the Resolution on the ‘Right 2 Water’ could be seen as a self-promoting attempt to give visibility to the Parliament’s role as ‘the voice of citizens’, it could also have an impact on any future actions by the Commission in relation to that ECI. By way of comparison, the limited evidence from current practice shows that an ECI whose objectives clearly oppose the priorities of the EU institutions on a policy area has very slim chances of resulting in tangible effects.98

Before concluding the discussion on the successfully submitted ECIs, a brief insight should be provided on these campaigns’ aftermaths. In spite of the fact that none of the three ECIs had an effect on EU law-making, there has been some continuity in the campaigns after the conclusion of the examination stage by the Commission. For instance, the ‘Right 2 Water’ campaign has been organising and participating actively in a number of events, including the follow-up actions planned by the Commission.99 According to Mr. Cantellas, with the signature collection phase the Citizens’ Committee ‘managed to plant a seed into the EU’100 and the plan of the organisers is to ensure that their objectives become a priority for the EU institutions.

For the organisers of ‘One of Us’, the ECI campaign worked as a stepping stone to create a ‘non-profit, non-political federation legally registered under Belgian law’101 to promote the common purpose of the national entities that had worked together on the promotion of the ECI, and to continue lobbying for legislation, although it has been suggested that there is a

98 Stijn Smismans (n 84) 92 argues that a successfully submitted ECI is more likely to result to a gradual yet minor change of the existing regulatory framework.

99 The organisers participated in the Drinking Water Directive Expert Group in December 2014, organised a discussion with academics, activists and campaigners around their ECI, and, a number of protest activities on the occasion of World Water Day. All information available at: <www.right2water.eu/news> accessed 10 August 2015.

100 Interview with Mr. Cantellas, February 2014.

101 It is mentioned in the Federation’s website: ‘The titanic effort served not only to carry forward the laborious process, but has also been the starting point for a Federation that wishes to take on the urgent challenges Europe faces in the defense of human life and human dignity.(…) Despite being a newly formed federation, the founding associations represent amongst them entities of recent creation and many others with a long engagement history of service to human life research, education, assistance, public awareness campaigns and in other fields.’ <www.oneofus.eu/european-federation-one-of-us-for-life-and-human-dignity-historical-step-for-the-defense-of-the-life-in-europe/>; The creation of such an organisation appeared to have been one of the aims of the ECI. Ana Del Pino had stated in the past that she hoped for the creation of an EU-wide pro-life movement after the end of the ECI signature collection stage, in Carsten Berg and Janice Thomston An ECI That Works! (The ECI Campaign 2014).
well-organised religious lobby behind the campaign that is not a stranger to EU lobbying.\textsuperscript{102} The new ‘One of Us’ federation has already started a new petition, calling on doctors, lawyers, and politicians to support the main objectives of the Initiative and to put further pressure on EU authorities to act on the proposals of the ECI.\textsuperscript{103} Their aim is to submit the petition to the PETI Committee for consideration.

Although the focus of the discussion so far has been on the successfully submitted ECIs, the aftermath of the campaigns that did not manage to obtain one million signatures should also be considered. Lessons from experiences of citizens’ initiatives at national level indicate that such initiatives can affect political output even when they are unsuccessful in collecting signatures.\textsuperscript{104} It is thus worth exploring whether the unsuccessful ECIs have had any indirect effect on legislation or policy at the EU level, and whether the ECI legal framework provides organisers with any option to continue their attempts. One of the main arguments of participatory democracy theorists is that there are additional benefits deriving from civic participation other than influencing government output.\textsuperscript{105} A corollary question therefore concerns the benefits gained by these ECI organisers despite their unsuccessful efforts in bringing an ECI.

\textbf{B. ECI\textsc{s} with insufficient support: what happens following completion of the 12-month deadline?}

The majority of the ECIs that did not manage to collect the minimum number of necessary signatures did not show evidence of any plans to continue their campaigns outside the contours of the ECI regulatory framework. ‘Teach for Youth’, ‘Weed Like to Talk’, and ‘Turn me Off’ fall in this category. These ECIs were organised by students of Sciences-Po Paris as part of an experimental class on European Affairs, with the aim of testing the utility of the ECI as a tool for ordinary EU citizens, rather than changing legislation.\textsuperscript{106} As such, the organisers did not have any alternative plans in case they failed to collect one million signatures.\textsuperscript{107} Other ECI campaigns that were dissolved after the

\textsuperscript{102} See Chapter 2 of this thesis.
\textsuperscript{104} Graham Smith, \textit{Democratic Innovations: Designing Institutions for Citizen Participation} (Cambridge University Press 2009) 120.
\textsuperscript{106} Same with ‘Weed Like to Talk’ and ‘Turn me Off’.
\textsuperscript{107} Interview with Mr. Jean Sebastien Marre, representative of the ‘Teach for Youth’ ECI, June 2014.
signature collection deadline include ‘Single Communication Tariff Act’, and ‘Suspension of the EU Climate and Energy Package’.

Substantial factors determining whether an ECI campaign will continue outside the formal requirements of the ECI are the willingness of the ECI organisers to pursue the campaign, and also the reasons for starting an ECI in the first place. Not all ECIs start with the aim of reaching one million signatures; some are used to get media publicity on a particular topic. Others were more focused on creating networks and fostering public relations. For instance, Mr. Papadopoulos, the representative of ‘Education is an Investment’ commented: ‘we knew from the beginning that it’s really difficult to collect one million signatures, but I think that even as a way to meet people and to achieve something, that was really important’. The ‘High Quality Education for All’ ECI is an additional example. The representative of this ECI stated that the primary goal of the organisers was to raise awareness of their objectives, and that they would continue their efforts by launching projects and implementing workshops on the topic of their campaign. Another organiser commented: ‘[t]he signatures are one thing, but I think that’s missing the point, because for me a large chunk of it has been to start a discussion.’

Regarding the creation of networks, other ECI campaigns resulted in the formation of organisations that aim to keep the ECI movements active. For example, the organisers of ‘UBI’ recently established an international non-profit organisation under Belgian law named ‘Unconditional Basic Income Europe’ (UBIE). According to the constitution of the UBIE, this newly-established organisation will be lobbying politicians about the introduction of unconditional basic income in Europe. In the view of a ‘UBI’

109 Cora Pfafferott quoted in Luis Buza Garcia and Justin Greenwood (n 108).
110 Interview with Mr. Panos Papadopoulos, representative of the ‘Education is an Investment’ ECI, June 2014; An organiser of the ‘Let me Vote’ ECI also stated: ‘The signatures is one thing, but I think that it’s missing the point, because for me a large chunk of [the ECI] has been to start a discussion.’ Interview, March 2014.
112 Interview with an organiser of the ‘Let me Vote’ ECI, March 2014.
113 A description of the aims of the organisation is available at: <http://basicincome-europe.org/ubie/history-of-ubie/>
representative, the creation of this Europe-wide network was the biggest benefit deriving from their ECI.\textsuperscript{115} The organisers of ‘End Ecocide in Europe’ are also continuing their efforts. Although the original idea behind the ECI was simply ‘to get the Commission to listen’\textsuperscript{116} to the organisers, the campaign was recently re-launched with the name ‘End Ecocide on Earth’; it now promotes an international legal framework to criminalise ecocide.\textsuperscript{117} In addition, the ‘Let Me Vote’ ECI has maintained links with European organisations based in Member States and with national politicians, who even promoted the objectives of the ECI on Spanish and French national agendas.\textsuperscript{118} ‘UBI’, ‘End Ecocide in Europe’ and ‘Let Me Vote’ all show that new actors who engaged with the ECI have become institutionalised and are now continuing their dialogue with the EU institutions.\textsuperscript{119} The creation of networks and the continuous promotion of the campaigns’ objectives outside the contours of the ECI Regulation can thus be identified as a positive outcome for these campaigners.

Besides the autonomous attempts of the ECI organisers to continue their efforts after the signature collection deadline, there is also a role for the European Parliament in the continuation of ECIs that did not collect the minimum one million signatures. Rule 218 of the European Parliament Rules of Procedure allows the examination of such ECIs as petitions by the PETI Committee. Admittedly, this option could be perceived as a compromise for the ECI organisers. After going through one year of campaigning and signature collection, they would end up with only a petition that they could have brought in the first place without the need for adherence to the ECI Regulation’s requirements.

On a more positive note, the Rule should be seen as a second chance for the ECIs that were unsuccessful in collecting signatures, since it gives the organisers an alternative route to make their message known to the EU institutions. ‘End Ecocide’ was presented to the PETI Committee as a petition in February of this year. It had gathered 114,927 signatures

\textsuperscript{115} Interview with Mr. Klaus Sambor, February 2014.
\textsuperscript{116} Interview with an organiser of the ‘End Ecocide’ ECI, March 2014.
within the 12-months deadline and 70,000 more signatures after the end of the ECI process. Ms. Merz, an ECI’s representative, viewed this outcome positively:

For us, it was important to be able to say to our signatories that their efforts were not wasted, that at least our issue is being discussed at the European Parliament. We hope that dialogue with the institutions [will] continue.

In addition, there is a more indirect role for the European Parliament in the promotion of ECIs with insufficient statements of support. The European Parliament could bring an own-initiative report under Article 225 TFEU and request the Commission to consider initiating legislation, similar to the ENVI Report on the follow-up of ‘Right 2 Water’. Procedurally, there are no constraints that would prevent the European Parliament from supporting an ECI which did not manage to collect one million signatures. Practically, it is difficult to imagine the European Parliament plenary promoting an ECI with insufficient statements of support. MEPs do not get a chance to listen to the ECI organisers presenting their ECI prior to the public hearing of an ECI, which takes place after the validation of signatures. Unless an MEP personally supports an ECI and is willing to promote it within the European Parliament, the public hearing is the first stage of discussions between MEPs and ECI organisers. It would thus require extensive efforts by the ECI organisers to make a convincing case for their ECIs to the relevant European Parliament Committees and subsequently to the majority of the 750 MEPs.

The lack of signatures is another reason why it would be unlikely for the European Parliament plenary to declare support for such an unsuccessful ECI. Normatively speaking, an ECI with insufficient signatures lacks the legitimacy that allows it to claim further action from the EU institutions. To understand the argument better, it helps to think of an ECI as a campaign that targets EU decision-makers through the so-called access channel: campaigners seek access to the decision-making process by presenting themselves to the relevant institutions as credible and legitimate actors. An ECI is not legitimate as such; it becomes legitimate if and because it is supported by a substantial and representative

120 ‘Hearing of the ECI End Ecocide in Europe supported by over 182,000 citizens as petition in the European Parliament’ (26 February 2015)
121 Prisca Merz, statement at the European Parliament Public Hearing on the ECI, 26 February 2015.
number of EU citizens; hence the minimum threshold of Member States and signatories stipulated by the ECI Regulation. It is, therefore, unlikely that the European Parliament plenary would support an ECI which has not officially collected the necessary number of signatures, as that would be equivalent to the European Parliament plenary supporting a random idea coming from a random group of seven or more EU citizens. Notwithstanding this, and although none of the ECIs with insufficient support have been promoted through an Own-Initiative Report, this chapter has demonstrated the willingness of the European Parliament both to take on board successful ECIs (Right 2 Water) and to treat unsuccessful ECIs as petitions.

In an attempt to demonstrate the political aspect of the ECI vis-à-vis its actual legislative impact, the Commission Vice-President Frans Timmermans recently committed to increasing the capacity of the ECI to foster public debate. The expectation of the Commission seems to be that an ECI can foster a cross-border debate around European matters, in that the EU citizens will become more aware of the functioning of the EU when they sign an ECI. The extent to which the ECI fosters this kind of debate and has an educational effect on EU citizens is questionable. In particular, for signatories to gain the sense of engagement seemingly envisaged by the Commission, they would have to participate in a discussion on the topic, understand the legal basis of the proposal they have in front of them, and build on their existing knowledge of the EU system, all by signing an ECI. In reality, evidence from circulation of petitions does not support these assumptions. Research on petition circulation in the US indicates that the extent to which a signatory even knows what she is signing is dubious. Moreover, with respect to the ECI, the online collection of signatures does not expressly add a deliberative element to the process. Information which is added online is based on the idea that internet readers prefer short and concise content. The registration website, which one should visit to sign

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123 Council, ITEM NOTE 9832/15, INST 200, 11 June 2015, 15.
125 ibid
127 ibid
an ECI, includes all the relevant procedural information but does not provide any space for online dialogue. The opportunity for online deliberation and dialogue on the topic of an ECI is, thus, available primarily if its organisers add a forum to the initiative’s website. This opportunity also depends on the extent to which the organisers are actively promoting their initiative or if they take the time to discuss and debate with potential signatories. Moreover, signatories can remain informed on an ECI’s topic only if the ECI organisers provide for a way to communicate with their signatories and keep them engaged (for example by sending out newsletters or regular emails).129

Although Mr. Timmermans pledged to enhance public debate, neither he, nor the Commission’s 3-year Report on the ECI specified how this can be done. In fact, in the discourse of the EU Institutions on the ECI, the aspiration to ‘enhance public debate’ is unsupported by any suggestions for procedural changes and comes across as a vague notion.130 On this point, the Ombudsman has suggested that the Commission ‘articulate more clearly for citizens its understanding of the value of the public debate generated through the ECI procedure and of how this debate and irrespective of the individual outcome, gives the ECI process value and legitimacy’.131 In spite of this rhetoric, the Commission, European Parliament, and Council have not (yet) explained how public debate can be further promoted or supported in relation to an ECI. Along the same lines, there have also been suggestions to improve the communication channels between the Commission and ECI organisers, to which the Commission replied that it currently has ‘no plans for a new, formal and systematic form of dialogue with ECI organisers.’132

An improvement in the communication channels between the Commission and organisers of unsuccessful ECIs could accentuate the positive side of the ECI and address the organisers’ current feelings of alienation by illustrating that there are benefits to campaigning other than legislative output. By way of contrast, the Commission’s discretion to act on successfully submitted ECIs has so far had rather negative consequences for the credibility and the future development of the ECI. For instance, the organisers of ‘One of Us’ stated that the Commission’s reply was ‘hypocritical and

129 Luis Bouza Garcia (n 124) 142.
130 See Draft Opinion of the Committee on Petitions for the Committee on Constitutional Affairs on the European Citizens’ Initiative (2014/2257(INI)), 31 March 2015: ‘(…) believes that the instrument still has the potential to engage the public and to promote dialogue among citizens’.
disdainful as it pretends to not understand the purpose of the [ECI’s] demand and comprises of thirty pages of self-satisfaction of its own policy.\textsuperscript{133} In a similar manner, the organisers of ‘Stop Vivisection’ commented: ‘we feel that 1.2 million citizens and three years of intense campaigning deserve something better than a very superficial, generic reply’.\textsuperscript{134} Even the ‘Right 2 Water’ organisers, who received a relatively better response, commented: ‘[t]his is plain public manipulation. If the European Commission doesn’t want to satisfy our demands, it should just say it and provide reasons instead of pretending to do one thing and do the opposite’.\textsuperscript{135}

The statements by the organisers indicate dissatisfaction not only with the outcome of their ECIs, but also with the process by which the Commission reached and communicated its replies. The organisers’ reactions were neither unforeseen nor surprising. In the context of participatory mechanisms which grant the final say to representative institutions rather than citizens, actors who use these mechanisms may be left disappointed with the outcome if they perceive that their attempts were not at all influential.\textsuperscript{136} It also appears from the ECI organisers’ comments that they had certain expectations from the EU institutions, which were left unfulfilled.\textsuperscript{137} Although the Commission clarified from the beginning that the ECI is not a legally binding mechanism,\textsuperscript{138} the demanding nature of the ECI - with the detailed legal framework and all the procedural hurdles of the signature collection process – seems to have triggered expectations among the organisers that they would receive something more substantial than a Communication from the Commission at the end of their campaign.\textsuperscript{139}

\begin{footnotesize}
\textsuperscript{137} For a similar observation regarding UK petitions, see Jane Marriott (n 136) 768.
\textsuperscript{138} The ECI website states that: ‘The citizens’ initiative is an agenda-setting initiative which obliges the Commission to give serious consideration to requests made by citizens, but it is not obliged to act on them.’ <http://ec.europa.eu/citizens-initiative/public/faq#q5> accessed 15 September 2015.
\textsuperscript{139} See, for example, Case T-561/14, (discussed in Chapter 5) where the applicants argue that the Commission’s response is disproportionate to the effort needed to complete a successful ECI campaign.
\end{footnotesize}
The process by which the citizens’ participatory attempts are being evaluated is crucial as to whether the outcome of the evaluation will be perceived as satisfactory by the affected citizens. ‘Individuals are often willing to accept outcomes they do not prefer if they believe the outcomes were derived through a fair process.’¹⁴⁰ Hence, even though anything shy of a legislative proposal would probably not be satisfactory for the organisers of successful ECIs, procedural improvements to the follow-up of an ECI could address citizens’ frustration with the end result. Against this background, it is submitted that the ECI process should be modified in accordance with two objectives. On the one hand, future changes to the ECI examination stage should attempt to address the dissatisfaction of ECI organisers and signatories with the Commission’s replies. On the other hand, any such change should also increase the prospects of deliberation during each stage of the ECI process, thus adding flesh to the currently vague aim of enhancing public debate.

Emphasising the deliberative characteristics of the entire process would serve a dual purpose: it would highlight the deliberative benefits that result from an ECI campaign, even if the campaign did not reach the minimum signature threshold. In addition, it would demonstrate the receptiveness of the Commission to an array of interests during the legislative procedure. It should be noted that the two objectives are not always fully compatible. For instance, in order to highlight the different interests that come into play in the process of examining an ECI, the Commission would need to clarify the source of interests that are contrary to the interests promoted by an ECI. The positive side of this is that public debate would be enhanced because EU citizens would be exposed to both sides of the debate on the subject matter of the said ECI. The negative side is the risk of leaving ECI organisers even less satisfied with the final outcome, as emphasising the other side of the argument would undermine their signature collection efforts.

Taking into account the potential trade-off between satisfying ECI organisers and increasing public debate, the subsequent discussion presents two possible ways to accommodate the two potentially opposing objectives in the ECI process. The first option consists of changes that would divide the responsibility for an ECI’s follow-up among the Commission, the European Parliament, and the Council. The second is less far-reaching, as it concerns procedural modifications to the ECI process. Both will now be explored in light of the current review process of the ECI Regulation, and taking into account the need to

¹⁴⁰ Christopher Carman (n 136) 736.
strike a balance between the Commission’s prerogative of legislative initiative and the need to maintain citizens’ interest in the use of the ECI.

II. Revisiting the follow-up stage and fostering debate: Some procedural suggestions

It has been argued that a successfully submitted ECI should automatically lead to a legislative proposal by the Commission, which would be immediately transmitted to the European Parliament and the Council for voting. A vote by the European Parliament and the Council in favour of the ECI would oblige the Commission to submit a formal proposal for a legal act. This appears to be the central argument of the organisers of ‘One of Us’ in their pending judicial challenge against the Commission. According to this position, adjusting the Commission’s obligations with encompassing the drafting of a legislative proposal, would tally with the Commission’s increased exposure to citizens’ participation and would ensure that the ECI is a meaningful and rewarding participatory mechanism.

Creating an obligation for the Commission to submit a legislative proposal for each successfully submitted ECI is feasible in logistical terms. In the past three years there have only been three successfully submitted ECIs, and the currently demanding nature of transnational campaigning indicates that a flood of successfully ECIs in the future is highly unlikely to take place. At the same time, the creation of a formal and binding obligation on the Commission to submit a legislative initiative based on an ECI is rather unrealistic. There has been no indication by the Commission of any formal or informal move towards a more binding character for the ECI. In its three year Report on the ECI, the Commission merely referred to the need for a more structured examination of a

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142 Case T-561/14; See Chapter 5 of this thesis. As argued in the previous chapter, however, it is highly unlikely that the case will even be found admissible by the Court.
143 Luis Bouza Garcia ‘How could the new Article 11 TEU contribute to reduce the EU’s democratic malaise?’ in Michael Dougan, Niamh Nic Shuibhne, Eleanor Spaventa (eds), Empowerment and Disempowerment of the European Citizen (Hart 2012) 273.
144 See discussion in Chapter 2 of this thesis.
successfully submitted ECI and more extensive involvement of the ECI organisers in the follow-up of their initiative.146

Compared to the Commission, the European Parliament seems more eager to revisit the follow-up stage of the ECI. György Schöpflin, the AFCO Rapporteur for the ECI, recently commented that ‘[t]he object of the [ECI] exercise is to change EU law, because that was the radical, original dimension that the ECI was supposed to bring about. That there is to be another body - citizens - that can initiate legislation in the EU’.147 The AFCO Draft Report on the ECI calls for a revision of Article 10(1)(c) of the ECI Regulation to make a successfully submitted ECI the subject of a parliamentary debate, followed by a vote in the European Parliament plenary. Provided that the proposal gains the majority of MEP’s votes, it could oblige the Commission to draft a corresponding legal proposal within 12 months.148 A role for the European Parliament in the follow-up to an ECI is also envisaged by the Commission in its defence to One of Us, albeit in a much more unstructured way than the one proposed by AFCO. According to the Commission’s defence:

The function of a communication presented by the Commission after receiving a citizens’ initiative - including and notably where such a communication does not announce a proposal for a legal act - is to allow for a possible political debate both publicly, among citizens, and within the institutions including, notably, those entitled to request themselves that the Commission submit a proposal, i.e. the European Parliament and the Council.149

The AFCO Draft Report on the ECI has not yet been adopted, so the future response of the European Parliament plenary to Mr. Schöpflin’s proposal is currently unknown. Nevertheless, opening up the examination stage of an ECI to the European Parliament for voting could indeed increase the credibility of the ECI, as it could ensure that the reply to an ECI is not perceived by ECI organisers and signatories as an arbitrary Commission decision. Given that the Commission already seems to be taking the views of the EU

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149 Commission Defence (n 145) para 39.
institutions into account, as seen in its reply to ‘One of Us’, extending the examination stage to include a debate in the European Parliament would only mean more transparency for the benefit of ECI organisers, signatories, and citizens alike.

Under these proposals, the examination of an ECI would be separated into two stages: the current public hearing, and the examination by the European Parliament. Whilst the former would inform MEPs about the ECI and allow them to discuss the topic with the ECI organisers, the latter would give the relevant European Parliament Committees the opportunity to debate the proposal and draft own-initiative reports or opinions which would be put before the plenary for voting. In this way, the ECI would not only become more visible to the wider EU citizenry, but it would also increase contention within the European Parliament. This is particularly likely to have been the case for the three successfully submitted ECIs today, given their highly controversial nature: privatisation, abortion and animal experimentation.

Despite the positive aspects of such a modification for the ECI examination stage, an amendment of the ECI Regulation would be necessary for its realisation, even if only to extent the legally prescribed timeframe for the reply to a successfully submitted ECI. Alternatively, the examination stage of an ECI could be opened up to input from the European Parliament in a less formalistic way. In line with the Ombudsman’s suggestion, the Commission could consult the European Parliament and the Council as to the existence of political support for the ECI before drafting its final communication.150 Taking the Ombudsman’s suggestion one step further, it is equally important that any consultations with the two co-legislators are published. This practice would bring the EU decision-making process closer to the public, as it would expose citizens to the fact that the Commission does not decide matters in isolation but that its decisions respect the views of the citizens’ democratically elected representatives. In this way, it would become apparent to citizens that the final decision on ECI-related issues are not taken solely by the Commission.151

On a similar note, it is submitted that the final stage of an ECI should also be more exposed to a plurality of interests and views. In the follow-up to successful ECIs, a number of groups condemned the proposals of the ‘One of Us’ and ‘Stop Vivisection.’ These

150 Decision of the European Ombudsman on the ECI (n 131) para 17.
151 Luis Buza Garcia (n 124) 141.
groups included organisations that receive funding for stem cell research under Horizon 2020\textsuperscript{152} and groups of scientists that support the utility of animal experimentation.\textsuperscript{153} In an attempt to affect the outcome of the ECIs, these actors published their views online and communicated them to the Commission and the European Parliament.\textsuperscript{154} At present, actors that oppose an ECI are not given an official platform to make their views known to the public.

Allowing for more actors to vocalise their viewpoints on successfully submitted ECIs is in consonance with the aspiration of the Commission and the Ombudsman that the ECI should be an instrument for fostering public debate in addition to being an agenda-setting tool.\textsuperscript{155} The Ombudsman has suggested that the Commission explores, together with the European Parliament, how to ensure that interested stakeholders are present at an ECI’s public hearing.\textsuperscript{156} Despite the merits of this recommendation for encouraging public debate, it is submitted that the EU institutions should also be attentive to the unwillingness of the ECI organisers to give their ‘moment of glory’\textsuperscript{157} (the public hearing) to those who challenge their proposals.

\textsuperscript{152} Wellcome Trust, ‘Statement supporting funding for stem cell and reproductive health research in Europe 2014’ [www.wellcome.ac.uk/About-us/Policy/Spotlight-issues/EU-affairs/Stem-cell/index.htm] accessed 10 August 2015; For opposition to ‘One of Us’ also see: European Women Lobby ‘MEPs and NGOs sound the alarm on anti-choice threat to maternal health’ 14 April 2014 [www.dsw.org/press/releases/details/show/detail/News/meps-and-ngos-sound-the-alarm-on-anti-choice-threat-to-maternal-health.html] accessed on 10 August 2015; Marie Stopes International and International Planned Parenthood Federation, both of which receive funding by the Commission even submitted requests to interfere in the judicial proceedings in the One of Us case, claiming that a finding for the applicants would threaten the organisations' legal or economic situation.


\textsuperscript{156} European Ombudsman Decision on the ECI (n 131) para 22.

\textsuperscript{157} Interview with Mr. Cantellas, February 2014.
With the above sentiment in mind, other ways to foster debate should be explored. For example, it could be made obligatory for the Commission to initiate a public consultation on a successfully submitted ECI, although this option would require a review of the ECI Regulation to extend the evaluation period, which is currently set as three months following the public hearing. An alternative suggestion, which would not necessarily require a revision of the ECI Regulation, involves the creation of a website or an electronic platform by the Commission. The website would publish the letters received from organisations or groups of citizens who either support or contest the objectives of an ECI. It could also be expanded to include a deliberative platform for all ECIs, such as allowing website visitors to comment on ECI proposals, thus enhancing the ECI campaigns’ presence on social media; in this sense the website would go beyond the remit of the current official ECI website that only presents information for each ECI but does not provide any way for users to engage in a discussion or debate.

In addition to supporting public debate, providing a structured platform for stakeholders that contest the objectives of an ECI - although not of the same calibre as the ECI public hearing – would make EU citizens aware of the multiplicity of actors and interests that should be weighed up by the Commission when deciding on the follow-up actions to an ECI. The underlying argument here is that, in order ‘to evaluate decision makers’ performance, citizens need to know the working properties of alternative rules.’ Moreover, such a platform could partly compensate for the lack of any voting procedure at the end of an ECI. Since there is no way for the EU citizenry to vote for or against an ECI, there should be a chance for supporters of both sides of the debate to be heard. Finally, for these procedural changes to have any positive effect on fostering dialogue, it is also necessary to raise awareness of the ECI among EU citizens. ECI stakeholders argue that

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158 Under the inter-institutional agreement for better law-making (2003), para 26, 26, ‘During the period preceding the submission of legislative proposals, the Commission will, having informed the European Parliament and the Council, conduct the widest possible consultations, the results of which will be made public. In certain cases, where the Commission deems it appropriate, the Commission may submit a pre-legislative consultation document on which the European Parliament and the Council may choose to deliver an opinion.’ Interinstitutional agreement on better law-making [2003] OJ C 321/01.

159 Decision of the European Ombudsman on the ECI (n 131) paras 17-24.


161 Smith even suggested the establishment of transnational deliberative polls to deliberate on submitted ECIs. Graham Smith (n 32) 289.
awareness of the ECI is ‘practically non-existent’ and have urged the Commission to promote the ECI to the public as an official EU instrument. Similar suggestions were submitted by Council delegates, but the Commission limited its response to arguing that it ‘had made considerable efforts to provide information to citizens’.

The above suggestions would not take away the Commission’s discretion to decide whether or not to initiate legislation based on the proposals of an ECI. They would, however, make the follow-up process more transparent for ECI organisers, signatories, and EU citizens, as they would illustrate the complexity of the EU institutional structure and the diversity of factors to be taken into account when the Commission and the two co-legislators decide on whether to proceed with a legislative proposal on a particular topic. The upcoming vote on the AFCO Draft Report on the ECI, as well as the GC’s judgment in the case of One of Us, are likely to provide further indications of any modifications to the ECI process.

Conclusion

This chapter has illustrated the weak potential of the ECI to affect legislative output. Although the Commission sees value in issuing a Communication regardless of the actual outcome of an ECI, the ECI organisers do not seem to share the same view. Based on the Commission’s reaction to successfully submitted ECIs so far, it cannot be realistically expected that an ECI, which has the support of a small minority of EU citizens, can surpass the multiple considerations to be taken into account by the Commission in proposing and drafting legislation. As seen from the discussion on the follow-up to the ‘Right 2 Water’, an ECI can pressurise the Commission to act only up to a certain extent. An ECI with objectives that are directly opposed to the agenda of the European Parliament and the Council, like those of the ‘One of Us’ initiative, has even fewer chances of resulting in legislative measures. These are telling conclusions not only about the ECI itself, but also about the ECI’s position within the EU institutional triangle (Commission - European Parliament - Council). On paper, the ECI may have given EU citizens a right to propose legislation analogous to that of the European Parliament and the Council but, in practice,
where the wishes of the two co-legislators clashed with those of a successfully submitted ECI, the former took priority over the latter in the considerations of the Commission.
CONCLUSION

It has been argued in this study of the ECI’s legal framework vis-à-vis its operation in practice, that the ECI does not offer a strong potential to EU citizens to affect the EU’s legislative output. The reasons behind this conclusion are threefold, and they derive both from the legal design and the development of the ECI so far. Firstly, an ECI’s scope to affect legislation is limited by virtue of the ECI legal admissibility test (Chapters 4 and 5). Secondly, the successful completion of the signature collection process, which is a precondition for the examination of an ECI by the Commission, is a demanding task even for well-organised groups of actors (Chapters 2 and 3). Thirdly, even after the collection of one million signatures, it is not at all certain that the proposals of an ECI will be turned into legislation, especially given the manifold factors that need to be considered by the Commission in the exercise of its legislative initiative monopoly (Chapter 6). These three reasons merit some further consideration for the purposes of concluding this study.

With respect to the limited scope of the ECI, it was demonstrated that EU citizens can only submit certain types of proposals for the purposes of registering an ECI. By virtue of its interpretation of Article 4(2)(b) of the ECI Regulation, the Commission has determined the range of matters that can be submitted as Initiative proposals. The analysis of the Commission’s interpretation and application of the ECI Regulation demonstrated the two main limitations to the scope of the ECI: Initiative proposals for Treaty modifications and proposals for actions that do not require the adoption of a legal act, will fail the ECI legal admissibility test. Consequently, the ECI has so far offered a restricted channel for access to the EU agenda; in that respect it has been an ‘avenue of participation, not a freeway’.¹

The second reason behind the limited access to the EU law-making process offered by the ECI is the arduous process of collecting one million signatures from seven Member States within 12 months. The examination of the first few completed ECI campaigns indicates that some factors that were decisive for the three successfully submitted ECIs - including financial resources, networks, and good campaign organisation - were absent from the unsuccessful campaigns. With these indications in mind, it was argued that the ECI has led to a form of ‘two-speed participation’: organisations that were supported by extensive

networks and which devoted extensive resources to their campaign achieved the necessary number of signatures in the given timeframe, whilst campaigns launched by grassroots movements or individuals did not reach even half of the required statements of support.

Lastly, this study concluded that the discretion of the Commission during the final stage of an ECI has played a critical role in the potential of the ECI to influence EU law-making. By looking at the follow-up to the three successfully submitted ECIs, the study demonstrated that ECIs have been rejected either because the Commission considered that there was no need to propose legislative instruments (‘Right 2 Water’, ‘Stop Vivisection’), or because the ECI’s proposals contradicted the objectives and purpose of legislation that was recently adopted by the European Parliament and the Council (‘One of Us’).

The above findings are also telling with regard to the ECI’s position within the EU institutional triangle, especially with respect to the relationship between the notions of citizens’ representation and citizens’ participation in the EU or, put differently, the connection between Article 10(2) TEU and Article 11(4) TEU. The link between the two EU democratic notions has manifested itself in two different ways. On the one hand, the follow-up to the ‘One of Us’ has demonstrated the priority of the EU co-legislators’ wishes over a proposal submitted by a successful ECI. On the other hand, the European Parliament has also acted as an ally to ECI organisers, as seen in the follow-up to the ‘Right 2 Water’.

In this respect, the ECI was used by the European Parliament as a platform to showcase the latter EU institution’s democratic credentials.

Indeed, the European Parliament has been playing the role of facilitator in the overall ECI process since the adoption of this new participatory mechanism. From its role in the drafting of the ECI Regulation to MEPs attending the three ECI public hearings, and from allowing the hearing of ECIs as petitions to advocating procedural changes to the ECI Regulation, the European Parliament has attempted to present itself as a supporter of ECI organisers and as a defender of EU citizens’ direct input in the EU decision-making process. The close link that is being developed between the European Parliament and ECI organisers, as well as the facilitating role of the European Parliament with regard to the ECI as a participatory mechanism, reveals the way in which citizens’ participation via the
ECI indeed complements representative democracy as a source of citizens’ input in the decision-making system of the EU.²

Notwithstanding the above conclusions regarding the hitherto weak potential of the ECI to affect EU legislative output, the Commission’s statement that ‘it is still too early to assess the long-term impacts of the ECI on the EU institutional and legislative process’³ retains some traction. This is especially the case given that the Commission has not yet responded to the European Parliament’s Resolution on the follow-up to the ‘Right 2 Water’ ECI, there are on-going actions by the Commission with regard to ‘Stop Vivisection’, and a case brought by the organisers of ‘One of Us’ is still pending before the General Court (GC). Moreover, some of the unsuccessful ECIs, such as ‘End Ecocide’ and ‘UBI’, are continuing their campaigns by registering as federations, NGOs, or other forms of organised entities which could eventually have an indirect impact on EU policy or even EU law-making. Future research would be able to identify the lasting effect of these first few ECIs on the EU’s legislative landscape.

The ECI’s long-term impact is not the only aspect that currently remains unspecified. As this study argued, there are still unsettled issues pertaining to the ECI’s function as a form of citizens’ participation. For instance, there are pending questions that have been posed before the GC in litigation. These questions concern both procedural and substantive aspects of the ECI’s legal design, and particularly the ECI legal admissibility test. The first judgment of the GC in the case of Anagnostakis⁴ revealed that the Court is ready to adjudicate the cases both on procedural grounds (concerning the obligation of the Commission to give reasons) and on substantive grounds (regarding the Commission’s interpretation of EU for the purposes of registering an ECI). In the context of the other six cases, the GC may yet clarify additional aspects of the legal admissibility test, thus contributing to the delineation of the ECI’s scope for proposing legislative actions, or even regarding the obligations of the Commission in the ECI follow-up stage, if the ‘One of Us’ case is found admissible.


⁴ Case T-450/12 Anagnostakis v Commission, judgment of 30 September 2015.
As for the ECI Regulation, the process of its review is still on-going. According to the 3-year Commission Report on the ECI Regulation, ‘the Commission attaches utmost importance to the ECI and is fully committed to making this instrument work’. The findings of the Report, which are perceived by the Commission as a starting point for dialogue between the EU institutions and the ECI stakeholders, will soon be complemented by the proposals of the European Parliament’s Own-Initiative Report on the ECI Regulation. Currently, the focus is placed on making the ECI procedure easier for citizens. Some of the suggestions put forward are more technical (for instance, a more user-friendly signature collection system), others more practical (for example, better support infrastructure for ECI organisers), and others require a review of the ECI Regulation (for example, to extend the 12-month deadline in order to facilitate the signature collection process).

Notably, in relation to other changes to the ECI Regulation there seems to be a mismatch between the views of the Commission and that of other EU institutions and ECI stakeholders. As discussed in Chapter 4 of this study, such a discrepancy is evident in the issue of the interpretation of the legal admissibility test by the Commission, and with regard to the extent to which the Commission should give detailed reasons for its rejection of a proposed Initiative. In this respect, future decisions of the GC could be instructive. So far, the GC in Anagnostakis appeared willing to rule on the Commission’s obligation to give reasons based on the initial Initiative proposals submitted by the applicants. It should also be noted that some of the measures that are needed to address various ECI’s limitations do not depend solely on the powers of the Commission. For instance, it was demonstrated that the ECI signature requirements have resulted in the exclusion of some EU citizens from signing an ECI. These requirements constitute a constraint to any potentially reinforced concept of EU citizens’ political participation rights, which could have expanded the notion of EU citizenship. Nonetheless, without an amendment of the ECI Regulation, the exclusion of EU citizens (and to a lesser degree of 3rd country nationals - long-term residents) from signing an ECI, which was examined in Chapter 3 of

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5 Commission 3-year Report on the ECI (n 3) 2.
6 See Annex IV to this thesis for the positions of main actors on the review of the ECI Regulation; The Commission has submitted to the Council an indicative table with the actions that are needed to address the main issues of the ECI Regulation. The table is attached in Annex V ‘Indicative table setting out the means by which issues discussed could be addressed’.
7 Ibid
the study, can only be resolved if the Member States modify their signature requirements accordingly.

On a different note, the Commission has expressed its plans to promote the ECI as an instrument for dialogue, thus emphasising the deliberative nature of the mechanism rather than promoting its potential to influence EU legislation. In that respect, it was argued in Chapter 6 that certain procedural changes could be adopted with a view to enhancing the deliberative character of the examination stage of a successfully submitted ECI and of the ECI campaigns in general. Such proposals range from simply setting up spaces for deliberation on the official ECI website, to inviting stakeholders who hold views contrary to those of ECI organisers to the public hearings. Taking such steps could both facilitate public debate and communicate to EU citizens the different interests that come into play when deciding on the follow-up to an ECI. As such, they could give EU citizens a more accurate impression of what should be expected from launching an ECI and of how ECIs will eventually be treated by the EU institutions. They could therefore adjust the expectations of citizens to the realities of the ECI’s potential and to the fact that a successfully submitted ECI is only one of multiple considerations that the ECI needs to take into account in the exercise of its legislative initiative powers.

It was recently argued by the AFCO Chairwoman that the ECI has brought a ‘Copernican revolution in the European institutional landscape’. Contrary to such political rhetoric, this thesis has argued that participation through the ECI has so far been too weak to influence EU law-making or to shift the EU’s institutional dynamics towards an enhanced position in EU agenda-setting for the organisers and supporters of ECIs. The frustration and disaffection of citizens with the EU Institutions – and particularly with the European Commission – have been some of the side-effects of this participatory experiment. The organisers of ECIs that did not succeed in collecting signatures are calling for changes to the procedural framework, including a better avenue for dialogue with the Commission and more support for future ECI campaigns. Those who did succeed were likewise left unsatisfied with the Commission’s approach to the follow-up of their ECIs.

Yet, the ECI - in its short life and notwithstanding its limitations – has managed to impact positively on those groups of citizens who formulated networks and attracted attention to

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their causes. In order for these positive effects to continue, it would be beneficial to promote a level-playing field in terms of organising an ECI. This would in turn address the ‘two-speed participation’ that has been shaped partly due to the ECI’s regulatory framework.

This thesis attempted to contribute to the understanding of the ECI as a way to give life to the principle of democracy in the EU. In doing so, it analysed the ECI’s legal framework in light of the ways in which the ECI has been used by EU citizens, and the reception of the ECI campaigns by EU Institutions so far. Through an analysis of the outcomes of successful ECIs, an account was also given of the interactions between the notions of representative and participatory democracy at the EU level. By examining the ECI as a small aspect of the on-going debate on the democratic character of the EU, this thesis has lent a legal perspective to the topics of citizens’ democratic participation and the Commission’s legislative initiative powers which are often monopolised in literature by political scientists.

At the same time, this thesis calls for a realistic approach to expectations surrounding the ECI. The ECI is certainly not adequate on its own to address the feelings of alienation and euroscepticism that have been fostered among EU citizens in the aftermath of the latest political challenges facing the EU. For the time being, the ECI is little more than a modest way to contribute to input legitimacy in the EU by making citizens’ opinions known to the EU institutions. Prospective modifications in the ECI’s legal framework could drive its future development towards a different and, perhaps, more significant path than the current one examined in this study.

To conclude, any future changes to the ECI regulatory framework should be designed so as to give EU citizens a stronger incentive to make the effort to organise and promote ECIs. The initial attention attracted by the ECI has faded; interest in the participatory mechanism has decreased since 2012, with only four ECIs currently collecting signatures. If the aim is to avoid letting the ECI turn into an unused instrument, ultimately the Commission will have to find a balance between keeping intact its monopoly of legislative initiative, and communicating the message to EU citizens that their ECIs have had some, however marginal, impact at the EU level or at least that their objectives have been heard and given some serious consideration.
APPENDICES

Appendix I: Registered ECIs and their proposed legal bases

<table>
<thead>
<tr>
<th>REGISTERED ECIs</th>
<th>SUBJECT MATTER &amp; OBJECTIVES</th>
<th>LEGAL BASES MENTIONED IN THE ECI PROPOSAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Fraternité 2020 - Mobility.</td>
<td>Fraternité 2020 suggests three measures to increase mobility: 1) The Commission shall use existing EU funds more consistently to encourage mobility. Also, it shall promote more funds for exchange programmes in the future. Eventually, 10% of the EU budget shall be used on these programmes. 2) Increased efforts shall be made for participants to develop intercultural skills, e.g. by offering language classes and classes about the host country's traditions, history, society etc. 3) Progress in the field of mobility shall be better monitored.</td>
<td>Article 17 TEU; Articles 145, 162, 165-167, 174, 175, 180, 312, 337 and 338 TFEU</td>
</tr>
<tr>
<td>Progress. Europe. (Fraternité 2020)</td>
<td>To enhance EU exchange programmes – like Erasmus or the European Voluntary Service (EVS) – in order to contribute to a united Europe based on solidarity among citizens</td>
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<tr>
<td>2. Water and sanitation are a human right (Right 2 Water)</td>
<td>We invite the European Commission to propose legislation implementing the human right to water and sanitation as recognised by the United Nations, and promoting the provision</td>
<td>Articles 14, 209 and 210 TFEU</td>
</tr>
</tbody>
</table>

1 Information as presented in the official ECI registry and uploaded on the ECI website. Authors’ own translation (Appendix I and II) when the information was presented in a language other than English.
of water and sanitation as essential public services for all.

The EU legislation should require governments to ensure, and to provide all citizens with sufficient and clean drinking water and sanitation. We urge that:

1) The EU institutions and Member States are obliged to ensure that all inhabitants enjoy the right to water and sanitation.
2) Water supply and management of water resources not be subject to ‘internal market rules’ and that water services are excluded from liberalisation.
3) The EU increases its efforts to achieve universal access to water and sanitation.

3. One of Us

Juridical protection of the dignity, the right to life and of the integrity of every human being from conception in the areas of EU competence in which such protection is of particular importance.

The human embryo deserves respect to its dignity and integrity. This is enounced by the ECJ in the Brüstle case, which defines the human embryo as the beginning of the development of the human being. To ensure consistency in areas of its competence where the life of the human embryo is at stake, the EU should establish a ban and end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health. The initiative suggest legislative amendments to:

1) The Financial Regulation applicable to the general budget of the European Communities;
2) The Horizon 2020 Framework Programme for Research and

Articles 2 and 17 TEU;
Articles 4(3), Art 4(4), 168, 180, 182, 209, 210 and 322 TFEU;
Article 1 of the Charter of Fundamental Rights.
4. **Stop Vivisection**

Proposing an European legislative framework aimed at phasing out animal experiments.

Considering clear ethical objections to animal experiments and solid scientific principles that invalidate the “animal model” for predicting human response, we urge the European Commission to abrogate Directive 2010/63/EU on the protection of animals used for scientific purposes and to present a new proposal that does away with animal experimentation and instead makes compulsory the use - in biomedical and toxicological research - of data directly relevant for the human species.

5. **High Quality European Education for All**

Europe’s future depends on Education, how to educate citizens, how they learn. Common education goals reflecting EU basic values should be at the heart of a solution to today’s challenges.

Proposes to establish a multi-stakeholder discussion/collaboration platform where parents, teachers, students, social partners, educators and decision-makers will propose, debate and formulate a European policy for a quality, pluralistic and EU 2020-oriented educational model at primary and secondary level for all Europeans. Establish a roadmap to implement the above educational model, possibly culminating in a European Baccalaureate, for the benefit of future generations, as foreseen by the Lisbon Treaty.

| Article 13 TFEU | Article 165, 166 and 167 TFEU |
6. **Pour une gestion responsable des déchets, contre les incinérateurs**

Proposes framework principles to ensure responsible management and treatment of waste by all Member States of the EU.

Proposes to the European Commission a Directive applicable in all Member States. Inter alia, the Directive is based on the following principles:

1) Strengthening the sorting of household waste;
2) The obligation to use recyclable packaging;
3) Banning waste incinicators

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7. **Suspension of the EU climate and energy package**

Suspend the 2009 EU Climate & Energy Package (excluding energy efficiency clauses) and further climate regulations until a climate agreement is signed by major CO2 emitters - China, USA, and India.

Four objectives:

1) To stop EU climate policy wasting hundreds of billions of euros on ineffective unilateral action on the climate at a time of economic crisis.
2) To stop carbon leakage - export of jobs and businesses to developing countries without climate legislation.
3) To make fuel and energy cheaper, increase employment and reduce fuel poverty. This will increase social cohesion and reduce social exclusion.
4) To increase energy security by allowing member states to use their own natural energy resources.

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Articles 3(3) TEU, 147, 173 (1), 173 (3) and 174 TFEU
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<tr>
<td>8.</td>
<td><strong>Central public online collection platform for the European Citizen Initiative</strong></td>
<td>We want to enable all European Citizens to participate in the European politics. Therefore, we have to provide a low barrier tool which works instantly and without technical expertise. Provide an Online European Initiatives’ Platform where you can register new initiatives and collect signatures. Show an overview of all initiatives which can be broken down by topic, country and popularity. Allow originators of an initiative to get in contact with their supporters and allow all citizens to discuss and argue initiatives. Show transparently the stage of the initiatives at any given time and the next steps until a final decision has been made.</td>
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<tr>
<td>9.</td>
<td><strong>European Initiative for Media Pluralism</strong></td>
<td>Protecting media pluralism through partial harmonisation of: national rules on media ownership and transparency, conflicts of interest with political office, and independence of media supervisory bodies. We demand amendments to the Audiovisual Media Services Directive (or the endorsement of a new Directive) aiming at introducing harmonised rules with regard to the protection of media pluralism as necessary step towards the correct functioning of the internal market. Such legislation, in accordance with the EU Charter of Fundamental Rights, will also meet the public interest objective of maintaining a pluralist democratic debate through free exchange of ideas and information in the European Union.</td>
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<tr>
<td>10.</td>
<td><strong>30 km/h making the streets</strong></td>
<td>We suggest a 30km/h (20mph) EU-wide default speed limit for Articles 24 TFEU</td>
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**Article 24 TFEU**

**Articles 22, 26, 49, 50, 55 and 114 TFEU; Art 11 of the EU Charter of Fundamental Rights**

**Articles 91(1)(c) and 191 TFEU**
liveable urban/residential areas. Local authorities may set other speed limits if they can show how environmental and safety needs of the most vulnerable road users are met.

The EU has clear road safety and environmental goals but these are not met yet. A 30km/h (20mph) standard speed limit would help to implement them more efficiently as it has proven successful in reducing injuries and fatalities, noise, air pollution and CO2 emissions, and improving the traffic flow. People can travel with less fear. Environmentally friendlier modes become more attractive. To meet the subsidiarity principle, the local authorities must have the final decision to set other speed limits on their roads and implement equivalent alternatives to meet the goals.

11. Single Communication Tariff Act

One unique all-inclusive, monthly flat-rate communication tariff within the boundaries of the European Union.

Proposes to end roaming fees across Europe now, completing the European common market for all mobile phone customers.

12. Unconditional Basic Income - Exploring a pathway towards emancipatory welfare conditions in the EU

Asking the Commission to encourage cooperation between the Member States, aiming to explore the Unconditional Basic Income (UBI) as a tool to improve their respective social security systems.

In the long run the objective is to offer to each person in the EU the unconditional right as an individual, to having his/her material needs met to ensure a life of dignity as stated by the EU treaties, and to empower participation in society supported by the
introduction of the UBI. In the short term, initiatives such as “pilot-studies” (Art 156 TFEU) and examination of different models of UBI should be promoted by the EU.

13. **End Ecocide in Europe: A Citizens’ Initiative to give the Earth Rights**

   We invite the European Commission to adopt legislation to prohibit, prevent and pre-empt Ecocide, the extensive damage to, destruction of or loss of ecosystems.

   Three main objectives:
   1) Criminalise Ecocide and ensure that natural and legal persons can be held responsible for committing Ecocide according to the principle of superior responsibility.
   2) Prohibit and prevent any Ecocide on European territories or maritime territories falling under EU legislation, as well as acts outside the EU committed by EU registered legal persons or EU nationals.
   3) Provide for a period of transition to facilitate a sustainable economy.


14. **Let me Vote**

   To strengthen the rights listed in article 20(2) TFEU by granting EU citizens residing in another Member State the right to vote in all political elections in their country of residence, on the same conditions as the nationals of that State.

   Articles 25 TFEU and 20(2) TFEU
The goal of the initiative is to develop the political dimension of the European project by reinforcing citizens' awareness that they share a common destiny. It would have the following effects: to enhance the concept of European Citizenship; to facilitate freedom of movement within the EU; to contribute to remedying the loss of voting rights presently experienced by a significant number of EU citizens who are long-term residents of other Member States.

15. Act 4 Growth

Proposes policy intervention to develop female entrepreneurship as a strategy for sustainable economic growth in Europe. Four proposals:
1) Create an office of European Women's Business Ownership;
2) Appoint a Women’s Enterprise Director;
3) Collect data, produce annual policy and research updates;
4) Enforce current gender equality legislation.
These policies replicate those put in place in 1988 in USA who then doubled the number of female entrepreneurs and increased jobs created. The mandatory element of data collection and procurement policy had the greatest effect.

16. Teach for Youth Upgrade to Erasmus 2.0

To eliminate educational inequity within the EU by enrolling highly motivated and high-achieving recent EU college graduates and postgraduates to teach for one to two years in urban and rural low-income communities throughout the EU.

The objective is threefold:
1) To enable recent college graduates and postgraduates to gain a
real-life experience and the self-confidence that comes with it, thus making their later insertion on the job market easier; 2) To enable EU pupils who do not have access to equitable educational opportunities, notably learning another official language of the EU, to do so; 3) To enable those pupils who live in low-income areas to develop a real European sense of belonging – or *affectio societatis* – through contact between them and other EU citizens during their childhood and teen years.

### 17. Do not count education spending as part of the deficit! Education is an investment.

*Education is an investment*

To exclude from the calculation of each country's public spending deficit that part of Government spending for education that is lower than the last 5-year Eurozone average.

Three objectives:
1) Combat inequality by providing equal opportunities for education and training to all young people in Europe;
2) Ensure adequate and appropriate infrastructures and tools for high quality education in Europe in times of crisis;
3) Enhance and safeguard growth, development and democratic institutions; ensure the employability of younger generations through investment in education;
4) Support European policy Horizon 2020

### 18. Weed like to talk

A European solution to a European issue: legalizing cannabis.

The ECI aims to make the EU adopt a common policy on the control and regulation of cannabis production, use and sale.

There is currently a heterogeneous legal map as regards cannabis policies in the EU. A common policy on the control and

Articles 121, 126, 136, 165, 166 and 338 TFEU; Protocol (No 12) to the TFEU on the excessive deficit procedure

Articles 67, 168 and 169 TFEU; Articles 20 and 38 Charter of Fundamental Rights
regulation of cannabis production, use and sale would: (a) ensure equality before the law and non-discrimination of all EU citizens; (b) protect consumers and monitor health security; (c) end cannabis trafficking.

19. European Free Vaping Initiative
   Classification of electronic cigarettes and related products through legislation as general purpose recreational products, and not as medicinal, tobacco or similar products, regardless of nicotine content.
   Allow all vapers of Europe to keep on vaping, like vapers in member states where vaping is unregulated, without inflicting any significant negative impact on the availability and diversity of vaping products. Allow all future vapers to experience the rich culture of vaping that we now enjoy in member states where vaping is not regulated. Allow affected manufacturers and vendors to stay in business, without being crippled or burdened with time and money consuming licensing procedures.

Articles 67, 191, 168, 173 and 179 of TFEU; Articles 2, 3 and 7 Charter of Fundamental Rights

20. Turn me Off!
   Prohibit the practice of leaving the lights on in shops and offices when unoccupied.
   We seek to:
   1) Save energy;
   2) Limit light pollution;
   3) Stop invasive advertising across the whole of the EU

   Article 191 and 194 TFEU

21. New Deal 4 Europe - For a European Special Plan for
   A public investment plan to help Europe get out of the crisis through the development of knowledge society and the creation

   Article 3 TEU;
   Articles 38, 39, 145, 170, 171, 173,
Sustainable Development and Employment

Proposes to:
1) Set up an EU special program of public investments for the production and financing of European public goods (renewable energy, research and innovation, infrastructural networks, ecological agriculture, protection of the environment and cultural heritage);
2) Set up a special European Solidarity Fund to create new jobs especially for young people;
3) Increase the own resources of the European budget through a financial transactions tax and a carbon tax.

22. MOVEUROPE (withdrawn)

Creation of MOVEUROPE CARD. A card reducing transport and accommodation costs on the weekend of May 9th in order to celebrate the European Union in a European city (on an annual rotating basis).

The objective is threefold:
1) Enhancement of the European identity through a popular-based event;
2) Promotion of the European mobility throughout the EU;
3) Creation of new economic and social transnational networks promoting the event and gathering the Peoples of Europe. In addition to transport and accommodation, the card would facilitate the access to artistic attractions, performances, public European debates and other cultural events.

23. EU Directive on Dairy Cow

Proposes an EU Directive to improve welfare of the EU’s 23
Welfare (withdrawn)

million dairy cows, create a level playing field and guarantee minimum standards enable improvements as seen with legislation for pigs and poultry.

We seek to inspire and mobilise European citizens to call for a specific directive that guarantees improved animal welfare for dairy cows. By petitioning the Commission through the ECI, we can convey citizens’ desire for policy change around dairy cow welfare. Our petition focuses on bringing targeted legislation that covers four key areas of cow’s welfare based on the EU Welfare Quality® principles: Good housing; Good health; Good feeding; Appropriate behaviour

24.  Kündigung
Peronenfreizügigkeit Schweiz (Exclude Switzerland from the free movement principle)
(withdrawn)

Termination of the bilateral agreement between the EU and Switzerland on the free movement of persons.

Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, 30 April 2002

25.  An end to front companies in order to secure a fairer Europe

Introduction, in a legal instrument in the company law area, of measures to ensure the transparency of legal persons and legal arrangements.

The infiltration into the legitimate economy of financial flows from criminal sources threatens the stability of the financial sector and the internal market. To counter this, it is essential that information is available on the actual beneficiaries of legal persons and legal arrangements. The transparency of legal entities and legal arrangements must therefore be organised in a

Articles 26 and 114(1) TFEU
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</table>
| 26. | **For a socially fair Europe!**<br>Encouraging a stronger cooperation between EU Member States to fight poverty in Europe | Encouraging cooperation between Member States in fighting social exclusion through the common aim of ensuring that less than 3% of people live below the poverty line in the EU.  
We want the European Commission to be more assertive in forging a genuine 'social Europe' by proposing the following: encouraging cooperation between EU member states in fighting social exclusion through the common aim of insuring that less than 3% of people live below the poverty line in the EU (the current rate is 16%). | Article 4(2)(b), 151 and 153 TFEU |
| 27. | **On the Wire** | Strengthening communication privacy between private individuals by law and namely wiretapping of lawyer-client communications. A pre-requisite for the rights of defence.  
Developing a legislative framework governing communications between private individuals and identifying the right solution to protect the fundamental rights of defendants. To regulate lawyer-client wiretapping to strike a fair balance between the requirements of investigation and professional secrecy when using either direct or indirect wiretaps or drift net type wiretaps. | Articles 2, 4, 7, 10, 15, 16 and 218 TEU;  
Articles 1, 6, 7, 8, 10, 11, 20 and 21 Charter of Fundamental Rights;  
Articles 6 and 8 of the European Human Rights Convention |
| 28. | **Fair Transport Europe – equal treatment for all transport workers** | Legislative and non-legislative proposals for ensuring fair competition and equal treatment of workers in the different transport modes. | Articles 45, 53, 56, 62, 95, 96, 152, 153 TFEU;  
Articles 1, 31 Charter of Fundamental Rights |
The objective of the “Fair Transport Europe” ECI is to end unacceptable business practices, which result in social and wage dumping practices. We call on the European Commission to ensure fair competition in the different transport modes and to guarantee equal treatment of workers (in respect of the principle of equal pay and working conditions), independently of the country of origin.
<table>
<thead>
<tr>
<th>REJECTED ECIs &amp; THEIR OBJECTIVES</th>
<th>PROPOSED LEGAL BASES AND REASONS FOR REFUSAL GIVEN BY THE COMMISSION</th>
</tr>
</thead>
</table>
| **1. Enforcing self-determination Human Right in the EU**
To accommodate the self-determination human right in the EU legal order. *Note: United Nations Charter/Article 1 International Covenants on economic social and cultural rights 'All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'* | Proposed legal basis:
Articles 1,2,3 (1), 3 (5), 3(6), 11(1), 21, 48 (2) TEU

Abstract from COM’s reply:
Amending the Treaties, as implicitly suggested by your reference to Article 48 (2) TEU (OLP), falls outside the scope of the citizens’ initiative, as the latter may only be used to request the Commission to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

Moreover, the Commission has no power to submit a proposal for a legal act of the Union on the basis of Article 21 TEU, which sets out the principles and objectives of the Union’s external action.

Reason for Rejection:
Amending the Treaties falls outside the scope of the ECI. |
| **2. Unconditional Basic Income**
To introduce an individual, unconditional basic income in all Member States of the EU. | Proposed legal basis:
Article 151, 153, 156 TFEU

Abstract from COM’s letter:

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1 Information as presented in the official ECI registry and from the letters of reply of the Commission, which are uploaded on the ECI website.
Although Art 153 (2) TFEU could be used as a possible legal basis for this Article’s anchored purpose of combating the social exclusion of the letter in paragraph 1, it should be noted that this provision excludes any harmonization of the laws and administrative provisions of the MS. The provision only intends to require the cooperation between MS through initiatives aimed initially to improve the level of knowledge, develop exchanges of information and preserved method, demand innovative approaches and evaluating targets. Your request for a legislative act is incompatible with this provision.

Although under Article 153 (2) (b) TFEU common minimum rules can be adopted by EU directives, the proposed initiative is not in the list of fields. Therefore, Article 153 cannot be regarded as an appropriate legal basis for the proposed citizens’ initiative.

Among the other provisions of primary Union law, which are mentioned in your application, it should be noted that Article 151 TFEU, which sets the general objectives of Social Policy, as such, cannot be used as a legal basis for a legislative proposal, and also Article 156 TFEU does not allow harmonising legislation. Furthermore, neither Article 2, 3 of the EU Treaty nor Article 5 TFEU or Article 1,2,5,6,8,15 and 34 of the Charter of Fundamental Rights offer an appropriate legal basis for legislative proposals.

Reason for Rejection:
The proposed citizens’ initiative falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

3. Création d’une Banque publique européenne axée sur le développement social, écologique et solidaire

Proposed legal basis:
Article 3(3) TEU
To allow Member States to borrow funds at very low rates in order to use them for creating jobs and for the development of public services.

Abstract from COM’s letter:
The primary objective of your initiative is the creation of a bank that would facilitate public spending in some areas, allowing member states to borrow necessary funds at very low rates. The proposal also envisages a goal “to support a sense of solidarity to member countries in trouble and allow the concerned states not having to comply with the requirements of profitability of the steps.”

As the legal basis of your initiative, you suggest Article 3(3) TEU. In this respect, it should be clearly noted that this legal provision in itself, does not confer powers to the institutions to adopt legal acts.

Moreover, after careful consideration, we do not see any other provision that could serve as a legal basis for the adoption of a legal act of the Union whose main purpose would be the one that you specify.

Reason for Rejection:
There is no legal basis on which the Commission could present a proposal for a legal act to establish such body.

Proposed legal basis:
Articles 119-144 TFEU

Abstract from COM’s reply:
Article 136 (1) TFEU can be used as a legal basis only if the measure concerns the strengthening of budgetary discipline in Member States and are limited to it, and where their purpose is to ensure the proper functioning of economic and monetary union.

In any case, Article 136 does not authorize the Union to substitute the Member States in the conduct of their fiscal sovereignty and functions related to the

4. One million signatures for A Europe of solidarity
To establish the principle of the 'state of necessity' when the financial and political existence of a State is in danger due to abhorrent debt.

Proposed legal basis:
Articles 119-144 TFEU

Abstract from COM’s reply:
Article 136 (1) TFEU can be used as a legal basis only if the measure concerns the strengthening of budgetary discipline in Member States and are limited to it, and where their purpose is to ensure the proper functioning of economic and monetary union.

In any case, Article 136 does not authorize the Union to substitute the Member States in the conduct of their fiscal sovereignty and functions related to the
5. **Abolición en Europa de la tauromaquia y la utilización de toros en fiestas de crueldad y tortura por diversión.**

*To abolish bullfighting.*

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<thead>
<tr>
<th>Reason for Rejection:</th>
<th>The proposed citizens’ initiative falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.</th>
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<tbody>
<tr>
<td>Proposed legal basis:</td>
<td>Articles 7, 13, 38, 114 TFEU; Articles 2, 7 TEU; Article 3 Charter of Fundamental Rights</td>
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<tr>
<td>Abstract from the COM’s reply:</td>
<td>The main objective of this proposal is to prohibit bullfighting and mistreatment and torture of bulls for fun in Europe. You consider that the initiative would apply and would specify Art 13 TFEU and the legal basis is Article 114 TFEU, pursuant to Article 38 TFEU. Also, possible legal bases of this citizens’ initiative you mention Article 7, Articles 2 and 6 of the TEU and Article 3 of the Charter of Fundamental Rights.</td>
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<tr>
<td>Before turning to a consideration of possible legal bases, we should remind that the Court in C-189/01 <em>Jippes</em> [2001] ECR-5689, paragraph 71, ruled that ensuring animal welfare is not part of the objectives of the Treaty as defined in Art 2 of the Treaty establishing the European Community and article 33 of the EC Treaty, which sets out the objectives of the Common Agricultural policy, does not mention any requirement in that sense.</td>
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<td>The Court issued this interpretation in the context of the Protocol on the protection and welfare of animals annexed to the EC by the Treaty of Amsterdam. It is still valid since the Protocol is not Article 13 TFEU. Ensuring</td>
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the welfare of animals is not an objective of the current treaties and Article 13 TFEU is not in itself a legal basis for the legislature in the Union.

The regulations of the Union in the field of animal welfare were therefore adopted so far on the basis of what is now Article 114 TFEU on the internal market and of the current Article 192 TFEU on the protection of environment, since it has contributed to the development of specific policies of their respective objectives.

Regarding Article 43 common agricultural policy and acts adopted on this legal basis must be for the purpose of achieving one of the CAP objectives contained in article 39 TFEU:
(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; to stabilise markets; to assure the availability of supplies; to ensure that supplies reach consumers at reasonable prices.

The prohibition of bullfighting cannot progress towards any of the objectives of CAP and it specifically does not contribute to the rational development of production. Similarly, given the lack of evidence to that effect, it cannot be said that such prohibition improves the functioning of the common market for agricultural products.

In order to refer to the internal market and Article 114 TFEU, it would be necessary to establish the existence of different rules may affect trade in bulls or distort competition in some other way, but there is no evidence to that effect. Even if it could be established that the existence of different rules has an impact on the internal market, it is difficult to see how the prohibition of bullfighting
would improve the functioning of the internal market.

On the other hand, in the case of Article 43, as in Article 114 TFEU, the Union legislature must take into account Article 13 TFEU, according to which, when formulating and implementing the policy of the Union in the fields of agriculture, fisheries, transport, internal market, research and development and technological space, the Union and the Member States shall take into account fully the welfare of animals as sentient beings, while respect the legislative or administrative provisions and customs of Member States, particularly with regard to religious rites, cultural traditions and regional heritage.

Accordingly, the Union legislature, acting on the basis of these legal foundations in any case, would have to recognize and the use of bullfighting bulls at parties as a part of cultural tradition and regional parcel of some Member States.

In terms of environmental protection and Article 192 TFEU, whether the prohibition of bullfighting would improve or would maintain biodiversity cannot invoke any other policy objective of a Union in the environment to justify the proposed ban.

Article 352 TFEU is also inadequate as a legal basis. This article allows Union act only within the framework of the policies defined in the Treaties to attain one of the objectives set out in them. Despite the importance conferred to Article 13 TFEU, the welfare of the animals is not per se a definite policy of the Union in the Treaties nor belongs explicitly to the objectives set out in them. Therefore, Article 352 TFEU does not allow the Union to adopt legislation with the only objective to promote the welfare of animals.

As regards the other legislative provisions of the Union referred in your request, Article 39 TFEU as it has already been analysed above is in the content of the PAC and Article 43, paragraph 2 TFEU. For the rest, Article 7 TFEU and
Articles 2 and 6 of the TEU and Article 3 of the Charter of Fundamental Rights cannot serve as a legal basis for proposing legislation to the desired goal.

Reason for Rejection:
The proposed citizens’ initiative falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

6. **Recommend singing the European Anthem in Esperanto**

   *To establish singing the European Anthem using specially adapted lyrics in the neutral pan-European language, Esperanto, in order for citizens to express their common European identity.*

   No proposed legal basis.

   **Abstract from the COM’s reply:**
   In regard to a legal basis under the title of the Treaty relating to culture (note: Article 3(3) TEU), its overall objective is to contribute to the flowering of the cultures of the Member States. Up to the present, it would appear that no Member State has made the promotion of Esperanto part of its cultural heritage policies nor can it be considered

   **Reason for Rejection:**
The proposed citizens’ initiative falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

7. **My voice against nuclear power**

   *To shut down all high risk nuclear power plants and make phase-out plans for all nuclear power plants in the EU mandatory.*

   **Abstract from the COM’s reply:**
The main objective of your proposed initiative is to eliminate nuclear power. It is composed of two main aspects:
- the elaboration and implementation of phase-out plans for all nuclear power plants in the EU; and
- the development of renewable energy sources and the reinforcement of energy efficiency in order to substitute the use of nuclear material and fossil fuels.
The measures necessary to attain this main objective fall within the competence of the Euratom Treaty. However, the Euratom Treaty does not include any provision on the citizens’ initiative. Article 11 TEU and 24 TFEU are not among the provisions of the TEU and the TFEU that are applicable in accordance with Article 106a of the Euratom Treaty. A citizens’ initiative cannot be based on the Euratom Treaty.

The TEU and TFEU cannot provide any appropriate legal bases as the proposed legal act would be manifestly contrary to the objectives of the Euratom Treaty, namely the establishment and growth of the nuclear industries.

The legal bases of the TEU and TFEU cannot be interpreted as giving the Commission the possibility to propose a legal act that would have the effect of modifying/ repealing provisions of primary law, namely the Euratom Treaty.

**Reason for Rejection:**
The proposed citizens’ initiative falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

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8. **Stop cruelty for animals**  
*To introduce an EU Directive for the uniform treatment of companion animals*

**Proposed legal basis:**  
Article 13 TFEU;  
European Convention for the Protection of Pet Animals

**Abstract from COM’s letter:**
The main objective of your proposed initiative is to establish rules in all Member States for the uniform treatment of companion animals, introducing their personal rights. As possible legal bases for your initiative, you propose Article 13 TFEU and the European Convention for the Protection of Pet Animals.
The European Convention for the Protection of Pet Animals does not constitute a legal basis for the operations of the Union.

With regard to Article 13 TFEU, in formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Ensuring the welfare of animals is not in itself an objective of the Treaties in force.

In this regard, it is appropriate to recall that, in Case C-189/01 Jippes [2001] ECR I-5689, paragraph 71 the Court held that ensuring the welfare of animals is not one of the objectives of the Treaty as they are defined in Article 2 of the Treaty establishing the European Community (TEC), and that this is not mentioned in Article 33 of the EC Treaty which describes the purposes of the common agricultural policy (CAP).

The Court of Justice has delivered such interpretation in the light of the Protocol on protection and welfare of animals annexed to the Treaty of Amsterdam to the Treaty establishing the European Community. It remains valid under the Treaties in force since the protocol was essentially taken over by ‘current Article 13 of the TFEU.

The regulations of the Union in the field of animal welfare were therefore adopted so far on the basis of what is now Article 114 TFEU on the internal market and of the current Article 192 TFEU on the protection of environment,
since it has contributed to the development of specific policies of their respective objectives.

The proposed rule, however, does not contribute to any of the objectives of these policies laid down by the Treaties.

The Commission considers that there is no legal basis in the Treaties which would allow a proposal for a legal act with the content you envisage.

**Reason for Rejection:**
The proposed citizens’ initiative falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

9. **Cohesion policy for the equality of the regions and sustainability of the regional cultures**
   *Special attention to be paid by the cohesion policy of the EU to regions with distinct national, ethnic, cultural, religious or linguistic characteristics.*

**Proposed legal basis:**
Articles 2, 3 TEU;
Articles 153,167,170, 174,176,177,178 TFEU

**Abstract from COM’s letter:**
The main objective of your proposed initiative is to ensure the ‘equality of the regions and sustainability of the regional cultures’ by paying ‘special attention to regions with national, ethnic, cultural, religious or linguistic characteristics that are different from those of the surrounding regions.’ (...) You propose that the requested legal act includes three precise points aimed at:
- ensuring that MS entirely fulfill their international commitments regarding national minorities;
- defining the concept of national regions
- identifying the national regions name-by-name, taking into account the criteria in the listed international documents, and the will of the relevant communities.
Regarding the first point, neither the TEU nor the TFEU provide a legal basis for adopting a legal act to ensure that Member States fulfill their international commitments regarding national minorities.

About the second and third points, any measure adopted under the cohesion policy legal bases of Art 177 and 178 TFEU is limited to achieving the objective of strengthening economic, social and territorial cohesion as referred to in Art 174 TFEU. Promoting the conditions of national minorities cannot be understood as helping to reduce ‘disparities as to the level of development between regions’ and underdevelopment of certain regions, as set out in Article 174 (2) TFEU. The list of ‘disadvantages’ set out in Article 174 (3) TFEU that trigger an obligation to pay ‘particular attention’ to a given region is exhaustive. Therefore Articles 174, 176, 177, 178 TFEU cannot constitute legal bases to adopt the proposed legal act.

Irrespective of their field of action (thus including that of cohesion policy) the Union Institutions are bound to respect “cultural and linguistic diversity (Article 3(3) TEU) and to refrain from discrimination based on membership of a national minority (Article 21(2) Charter). However, none of these provisions constitutes a legal basis for whatever action by the institutions.

In addition, Article 2 TEU cannot be a legal basis for proposing legislation. Articles 153, 167, 170 TFEU cannot either constitute legal bases for the proposed legislation as it would not contribute to any of the objectives of the policies set out in these provisions.

The Commission considers that there is no legal basis in the Treaties which would allow a proposal for a legal act with the content you envisage.

Reason for Rejection: The proposed citizens’ initiative falls manifestly outside the framework of the
Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

10. Ensemble pour une Europe sans prostitution légalisée (Together for a Europe without legalised prostitution)
To forbid the legalisation of prostitution in Member States.

Proposed legal basis:
Article 83(1) and 84 TFEU.

Abstract from COM’s reply:
The objective of the initiative you have proposed is the prohibition of legalization of prostitution. You present several objectives that the prohibition of the legalization of prostitution would achieve.

You propose Article 83(1) and Article 84 TFEU as legal basis for your proposed citizens’ initiative.

Article 83 TFEU allows the Union to adopt minimum rules relating to the definition of criminal offenses and sanctions in certain areas of crime that are clearly set out in paragraph 2 of the same article: terrorism, trafficking in beings humans and the sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

Some of the objectives mentioned in your proposal, including those that are relevant to trafficking in human beings, are part of these areas of crime and are covered by various legislations at the EU. Similarly the operation of the prostitution others into these areas. However, prostitution as such does not belong into these areas; it is a matter that falls within the competence of member states.

In addition, with regard to Article 84 TFEU on crime prevention, it excludes any harmonization of laws and regulations of the member states.
Moreover, after careful consideration, we see no other provision which could serve as a legal basis for the adoption of a legal act of the Union whose main purpose would be the one that you specify.

Reason for Rejection:
The Commission refuses the registration of this proposed initiative on the grounds that it falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

11. **Fortalecimiento de la participación ciudadana en la toma de decisiones sobre la soberanía colectiva.** (Strengthening citizen participation in decision-making about collective sovereignty)

*Ensuring European citizen sovereignty acts of recognition of succession as a member of the European Union of a new state emerged from democratic secession of another member state of the European Union*

No proposed legal basis.

Abstract from the COM’s reply:
Your proposed citizens’ initiative aims to ensure that the citizens of a new state resulting from a secession of a Member State to the EU remain citizens of the Union. According to Art 20 TFEU, only persons with the nationality of a Member State are EU citizens. EU citizenship complements but does not replace, national citizenship.

There is no legal basis in the EU treaties to allow for secondary legislation to address the consequences of secession of a part of a Member State. In case of secession of a part of a Member State, the solution would have to be found and negotiated within the international legal system.

Reason for Rejection:
The Commission refuses the registration of this proposed initiative on the grounds that it falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.
12. Minority SafePack – one million signatures for diversity in Europe
To improve the protection of persons belonging to national and linguistic diversity in the Union.

Proposed legal bases:
TFEU
Articles 2, 3 TEU
Articles 21, 22 Charter of Fundamental Rights

Abstract from the COM’s reply:
The main objective of your proposed initiative is the adoption by the EU of a set of legal acts to improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union.

The respect of rights of persons belonging to minorities is one of the values of the Union referred to in Article 2 TEU but neither the TEU nor the TFEU provide for a legal base as regards the adoption of legal acts aiming at promoting the rights of persons belonging to minorities.

Neither Article 3(3) TEU nor Article 21(1) of the Charter constitute a legal basis for whatever action by the institutions.

Reason for Rejection:
The Commission refuses the registration of this proposed initiative on the grounds that it falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.
Although some of the acts requested in the Annex might individually fall within the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties, the ECI Regulation does not provide for the registration of part or parts of a proposed ECI.
13. To hold an immediate EU Referendum on public confidence in European Government’s (EG) competence. The EU referendum question should be: “Should the current failing form of EG be replaced by one without democratic deficit?” A new democratic EU structure must be created according to the will of the people not faceless bureaucrats.

Proposed legal basis:
Article 11(4) TEU.

Abstract from the COM’s reply:
The Treaty provision you propose constitutes an explicit legal basis for a European Citizens’ Initiative. (…) However, a citizens’ initiative and a referendum have completely distinct objectives and they can embrace different types of actions. (…) Although the EU legal system confers great importance to different forms of citizens’ participation, it does not provide any legal basis for a referendum mechanism.

The Commission considers that there is no legal basis in the Treaties which would allow the Commission to present a proposal as defined in your application.

Reason for Rejection:
The proposed Initiative falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

14. Right to Lifelong Care: Leading a life of dignity and independence is a fundamental right! To adopt legislation that ensures the fundamental right to human dignity by guaranteeing on a lifelong basis adequate social protection and access to quality, sustainable long-term care above and beyond health care.

Proposed legal bases:
Article 14 TFEU, Article 153 --TFEU

Abstract from the COM’s reply:
The legal act of the Union which constitutes the object of your proposed citizens’ initiative means that the health care of long duration should be characterised as services of general economic interest (SGEI) and aims, inter alia, to oblige Member States to provide such services.

As the legal basis of your proposed initiative you suggest in particular Articles 153 and 14 of the TFEU.
First, regarding Art 153 TFEU, it must be clearly noted that this legal provision cannot constitute a valid legal basis for a legal act whose main purpose is the one under consideration. Indeed, with regard to social security, Article 153 TFEU covers only the adoption of minimum requirements for workers. In contrast, the health care of non-workers, including long-term care for the elderly, that is the subject of your proposed citizens’ initiative, is not covered.

Regarding Article 14 TFEU, this provision does not constitute a valid legal basis for a legal act for the subject of this proposed citizens’ initiative. Indeed, on the one hand, the legislature of the Union has no jurisdiction to impose an obligation on the Member States to provide an SGEI but only to define the principles and conditions that Member States must then meet in case they decide (autonomously, as confirmed by Article 14 TFEU) to provide the said SGEI.

Moreover, after careful consideration, we see no other legal provision which could serve as a legal basis for the adoption of a legal act of the Union whose main purpose would be the one that you specify.

Reason for Rejection:
In conclusion, the Commission considers that there is no legal basis in the Treaties that would allow a legal proposal aimed to oblige Member States to ensure that every citizen has a social welfare service against dependence and long-term care.

15. **Our concern for insufficient help to pet and stray animals in the European Union.**
   *To establish a common regulatory framework that harmonizes Member States welfare and protection*

   Proposed legal bases:
of pet and stray animals.

Abstract from the COM’s letter:
The main objective of the initiative is to establish a common regulatory framework that would harmonise the well-being and protection of pet and stray animals in the EU. The ‘draft instrument’ attached to your proposal includes a list over a series of actions with a focus on the regulation of breeding, trade and registration of dogs and cats, protection of stray animals and compulsory sterilization of pets in some cases.

The Commission considers that the present proposed legislation cannot be based upon those provisions, as its power to improve the welfare of animals through legislation and enforcement is limited to those policies which are counted in Article 13 TFEU (i.e. agriculture, fisheries, transport, internal market, research and technological development and space).

In that respect, it should be reiterated that the ECJ in case C-189/01 Jippes [2001] REG I-5689, para 71, saw no entries in the claim’s (...) as defined in Article 2 of the EC Treaty to monitor animal welfare and that no such requirements are outlined in Article 33 of the EC Treaty which contains the ground for the CAP. The Court gave this interpretation in light of the Protocol on protection and welfare of animals annexed to the EU Treaty (Amsterdam). This protocol has been taken over as the current Article 13 TFEU so such interpretation remains valid under the current treaties.

EU legislation on animal welfare has therefore been adopted on the basis of what is today Art 43(2) TFEU- Common Agricultural Policy, 114 TFEU- Internal Market, 192 TFEU- Environmental Protection, as the acts contribute to the development of specific (...) in these respective areas. The present proposed legislation would not contribute to any of these policies as laid down in the Treaties.
16. The Supreme Legislative & Executive Power in the EU must be the EU Referendum as an expression of direct democracy. The EU legal system must immediately provide the legal basis for a referendum mechanism independent of member countries’ current constitutions. All EU Referendum decisions must be binding on every branch of the EU power structure. No possible legal basis for the ECI.

Abstract from Com’s letter:
The main objective of your proposed initiative is to introduce a legal basis for a referendum mechanism at EU level. It follows from Article 4(2)(b) read in conjunction with Article 2(1) of the ECI Regulation that any legal act for which the Commission is invited to submit a proposal by means of a citizens’ initiative must be ‘for the purpose of implementing the Treaties.’ However, there is no legal basis in the Treaties for a legal act of the Union which would cover the subject matter of your proposed citizens’ initiative. Indeed, the proposed initiative could only be implemented by a revision of the Treaties.

Reason for Rejection:
No proposals for revision of the Treaties are accepted.

17. A new EU legal norm, self-abolition of the European Parliament and its structures, must be immediately adopted. The EU legal system must immediately provide a legal basis for self-abolition of No article of the Treaties was proposed as a possible legal basis for the ECI.

Abstract from COM’s letter:
It follows from Art 4(2)(b) read in conjunction with Article 2(1) of the ECI Regulation that any legal act for which the Commission is invited to submit a
the European Parliament and its structures if it does not fulfil key EU Treaty regulations.

Proposal by means of a citizens’ initiative must be ‘for the purpose of implementing the Treaties.’ However, there is no legal basis in the Treaties for a legal act of the Union which would cover the subject matter of your proposed citizens’ initiative. Indeed, the proposed initiative could only be implemented by a revision of the Treaties.

Reason for Rejection:
No proposals for revision of the Treaties are accepted. There is no legal basis in the Treaties to introduce a legal basis for the self-abolition of the European Parliament.

18. Ethics for Animals and Kids
To establish minimum ethics in dealing with vulnerable individuals in national economic advantage which is of different religions and cultures.

Proposed legal basis:
Article 2 TEU,
Articles 11, 13, 168, 21, 45 49, 151/156 TFEU
Charter of Fundamental Rights

Abstract from COM’s letter:
Your planned initiative aims mainly to the submission of a proposal for legislation on the protection of stray animals. As a possible legal basis for the initiative you propose Article 2 TEU, Articles 11, 13, 168, 21, 45 49, 151/156 TFEU and the Charter of Fundamental Rights

It is clear from Article 4(2)(b) in conjunction with Article 2(1) of the Regulation No 211/2011 that any act the Commission is invited to propose, must fulfil the purpose of ‘implementing the Treaties.’ There is, however, in the Treaties, no legal basis for an act of the Union which would cover the subject matter of your proposed initiative, which proposes measures from the EU to ensure the protection and welfare of homeless animals.

The power of the Union to improve animal welfare through legislation and enforcement is limited to the exhaustive list of Article 13 TFEU policy areas, for
example agriculture, fisheries, transport, internal market, research and technological development and space.

In this context, it should be reiterated that the Court in C-189/01 Jippes [2001] ECR I-5689, para 71, ruled that ensuring animal welfare is not part of the objectives of the Treaty as defined in Art 2 of the Treaty establishing the European Community and that article 33 of the EC Treaty, which sets out the objectives of the Common Agricultural policy, does not mention any requirement in that sense.

The Court issued this interpretation in the context of the Protocol on the protection and welfare of animals annexed to the EC by the Treaty of Amsterdam. It is still valid since the Protocol is not Article 13 TFEU. Ensuring the welfare of animals is not an objective of the current treaties and Article 13 TFEU is not in itself a legal basis for the legislature in the Union.

The rules of the Union in the field of animal welfare are therefore so far established on the basis of today’s Article 43 (2) TFEU, (CAP), on Article 114 TFEU (Internal Market) and Article 192 TFEU (Environmental), assumed that they promote the relevant objectives in the policy areas mentioned above. The legislation related with your planned initiative, however, would not be one that would contribute to the Treaties’ objectives.

The objectives of the environmental policy are listed exhaustively in Article 191(1) TFEU. These are the conservation and protection of the environment and the improvement of its quality, the protection of human health, the prudent and rational use of national resources and the promotion of measures at international level to deal with regional or worldwide environmental problems and particularly in combatting climate change. Measures to ensure the well-being and protection of homeless animals in the EU are not covered by these goals. For the same reasons, Article 11 TFEU and Article 37 of the Charter of Fundamental Rights in
the present context is irrelevant, in addition to the fact that none of the provisions constitutes a legal basis.

According to Article 156 and 151 TFEU, the Union shall pursue in the field of social policy the following objectives: the promotion of employment, improved living and working conditions, so as its approximation to the way of the progress allows for proper social protection, social dialogue and development of human resources with a view to lasting high employment levels and the combating of exclusion. Measures to ensure the well-being and protection of homeless animals in the EU are excluded from these goals.

In summary, it can be stated that the Union is not entitled to take measures for the protection of stray animals based on grounds of animal welfare. These policies remain exclusively within the jurisdiction of the Member States.

**Reason for Rejection:**
The proposed Initiative falls outside the scope in which the Commission is entitled to submit a proposal to the Union for the implementation of the Treaties.

**Proposed legal bases:**
Articles 4(2)(b), 151 TFEU
Articles 2, 3 TEU

**Abstract from COM’s letter:**
The only conceivable legal basis for your proposal is Article 153 (1)(j) TFEU (fighting against social exclusion). However, under Article 153 (a) TFEU, the European Parliament and the Council are empowered to adopt to this end, measures to ‘encourage cooperation among Member States through initiatives aimed at improving knowledge, exchange of information and best practices, promoting innovative approaches and evaluating experiences, excluding any
harmonisation of laws and regulations of the Member State.’

However, you clearly propose a measure of harmonisation of laws and regulations of the Member States and not simply ‘measures to encourage cooperation between Member States’ available under Article 153 (2)(a) TFEU.

**Reason for Rejection:**
The Commission must refuse the registration of the proposed ECI on the grounds that it falls clearly outside the scope in which the Commission is entitled to submit a proposal to the Union for the implementation of the Treaties.

**STOP TTIP**  
*To repeal the negotiating mandate for the Transatlantic Trade and Investment Partnership (TTIP) and not to conclude the Comprehensive Economic and Trade Agreement (CETA).*

**Proposed legal bases:**
Articles 207 and 218 TFEU as legal bases for such Council decisions.

**Abstract from COM’s letter:**
**About TTIP:**
(1) The Council decision authorising the opening of negotiations is a preparatory act for the negotiation of international agreements and with respect to the Council decisions authorising the signature and conclusion of an international agreement, which are adopted on the basis of Commission proposals. A modification of EU law occurs only when the international agreement is signed and concluded.

As a matter of principle, the signature and conclusion of an international agreement with a given subject and content may be requested by a citizens’ initiative.

Conversely, the preparatory Council decisions authorising the opening of international negotiations or repealing such authorisation do not fall within the scope of the Regulation.
The Council decision authorising the opening of negotiations is not “a legal act of the Union” and the Commission recommendation for such a Council decision does not constitute an "appropriate proposal" within the meaning of Article 11(4) TEU and Article 2, point 1 and Article 4 (2)(b) of the Regulation.

(2) Pursuant to Article 2, point 1 of the Regulation a citizens' initiative may only invite the Commission, within the framework of its powers, to submit an appropriate proposal for a legal act considered necessary by the citizens for the purpose of implementing the Treaties.

Reason for Rejection:
Your proposed citizens' initiative falls outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties, within the meaning of Article 4(2)(b) of the Regulation, read in conjunction with Article 2, point 1 insofar as it invites the Commission to:
- submit a recommendation to the Council on the repeal of the Council decision authorising the opening of the TTIP negotiations; or
- not to submit proposals for Council decisions on the signature and/or conclusion of TTIP; or
- to submit proposals for ‘decisions’ not to authorise the signature of or not to conclude TTIP.

About CETA:
(2) As a matter of principle, the signature and conclusion of an international agreement with a given subject and content may be requested by a citizens' initiative.

However, a citizens' initiative inviting the Commission not to propose a legal act or to propose a "decision" not to adopt a legal act is not admissible under the Regulation.
Reason for Rejection:
This part of the proposed citizens' initiative also falls outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties, within the meaning of Article 4(2)(b) of the Regulation, read in conjunction with Article 2, point 1.
### Appendix III: Minimum number of signatures per Member State

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<th>SIGNATURES PER COUNTRY</th>
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<td></td>
<td>Ireland, Croatia, Lithuania</td>
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<td></td>
<td>Denmark, Slovakia, Finland</td>
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## Appendix IV: Country-by-country signature thresholds met by ECIs

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Appendix V: Observations from the ECI’s first years of operation

Screenshots from the ECI registry as presented in the official ECI website (as of 29 September 2015):
Example of a registered ECI’s presentation in the official ECI website:

Examples of ECIs’ own campaign websites:
Examples of ECI campaigns’ presence in social media
Example of the updated ECI online signature collection system (as of 28 September 2015):

**Step 1**

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Please select language

Click here to support this initiative

Subject matter:
**Introduction in a legal instrument in the company law area, of measures to ensure the transparency of legal persons and legal arrangements.**

Main objectives:
**The infiltration into the legitimate economy of financial flows from criminal sources threatens the stability of the financial sector and the internal market. To counter this, it is essential that information is available on the actual beneficiaries of legal persons and legal arrangements. The transparency of legal entities and legal arrangements must therefore be organised in a uniform manner across the EU in a legal instrument in the company law area.**

Information on this proposed initiative is available in the following languages:

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European Commission registration number:

**ECI(2014)000004**

Date of registration:

01/10/2014

Web address of this proposed citizens’ initiative in the European Commission’s register:


Names of registered contact persons:

Morisset Benoît Jean François, Cutajar Chantal Anne Marie

E-mail addresses of registered contact persons:

morisset@pt.lu, cutajar.chantal@bbox.fr

Names of the other registered organisers:

Rodriguez Rivas Ana Maria, Kastner Philipp, Koprolin Kurt, Mainardi cantoni Chiara, Cherchi mariapaola

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Website of this proposed citizens’ initiative (if any): 
http://www.transparencyforall.org

To support a European Citizens' Initiative, you must be an EU citizen (national of an EU member state) and be old enough to vote in European Parliament elections (18 except Austria where the voting age is 16).

For more information on the rules and conditions for the European Citizens' Initiative: http://ec.europa.eu/citizens-initiative

Click here to support this initiative

Step 2
Step 3

An end to front companies in order to secure a fairer Europe

Online Collection System
Support the proposed European Citizens' Initiative: An end to front companies in order to secure a fairer Europe

Statement of Support Form
Please select your country, complete the required information below, and submit.

You should select the member state you come from. The data you will be asked to fill in will depend on the country you select.

The requirements for each country can be found here:
For further information on signing up to a European Citizens' Initiative go to:

Selected country
Change

Cyprus
In accordance with Annex III – Part C of Regulation (EU) No 211/2011 on the citizens' initiative, by selecting this country you have to provide one of the following personal identification document numbers issued by Cyprus:

Document/Number type *

Number *

Full first names *

Family names *

Nationality *

I hereby certify that the information that I have provided in this form is correct and that I have not already supported this proposed citizens' initiative.

I have read the privacy statement.

Enter the characters you see in the picture:
## Appendix VI: The positions of the main actors in the review of the ECI Regulation

| COMMISSION | EUROPEAN PARLIAMENT | JURI & PETI COMMITTEES | COUNCIL | EU OMBUDSMAN | ECI Campaign
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<td>3-YEAR Report on the ECI Regulation(^1)</td>
<td>AFCO Committee Draft Report on the Reform on the ECI(^3)</td>
<td>Opinions on AFCO Draft Report on the ECI(^4)</td>
<td>Summary of discussions within the Working Party on General Affairs on the ECI(^5)</td>
<td>Decision closing its own- inquiry on the Commission(^6)</td>
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<td>Contribution to the discussions of the Council Working Party on General Affairs on the ECI(^2)</td>
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### General Comments/Conclusions
- ‘The Commission considers that the ECI has been fully implemented. At the same time, the Commission is aware that there is still room’
- ‘The ECI is an extraordinary and innovative tool of participatory democracy in the European Union, whose potential must be fully exploited’

**JURI:** ‘The ECI is the first tool of participatory democracy that confers the right for EU citizens, to take the initiative –

‘Delegations agreed that the instrument played an important role in strengthening participatory democracy, it was acknowledged that

‘In reality, the ECI is so hard to use and its impact so limited that it creates great citizen frustration. The Commission’s review ignores the damage caused’

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\(^2\) Council of the European Union, ITEM NOTE 9832/15, INST 200, 11 June 2015, ‘Information provided by the Commission’, 6-10
\(^5\) Council of the European Union, ITEM NOTE 9832/15, INST 200, 11 June 2015
\(^6\) Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2013/TN concerning the European Commission, 4 March 2015
\(^7\) The ECI Campaign, ‘Recommendations from ECI campaigns and stakeholders for how to change the ECI’s governing rules’ <http://www.citizens-initiative.eu/an-eci-that-works/> accessed 19 September 2015
to improve.’

- ‘The Commission is committed to continue monitoring and discussing a range of ECI issues, and namely those identified above, in close cooperation and coordination between the various stakeholders and institutions and with a view to improving the instrument.’

From the Council Note:
- ‘The European Parliament welcomes the Commission’s report of 1 April 2015 on the ECI and calls on it to ensure that, in its revision of this instrument, all the appropriate legal measures are implemented when an ECI is deemed to have been completed successfully’

thereby underpinning their new political prerogative.’

‘JURI calls on the Commission to submit an appropriate and timely proposal for the revision of the Regulation on the Citizen’s Initiative and Commission Implementing Regulation (EU) No 1179/2011, with a view to meeting the expectations of European citizens, and making the CI easier to use in order to enable it to fully unfold its potential.’

‘PETI considers the ECI to be the first direct democratic instrument to enable citizens to become actively involved in thereby underpinning their new political prerogative.’

‘Indeed, the potential of the ECI was not to be overshadowed by some of its shortcomings, which risked creating false expectations for citizens and triggering a backlash against the EU.’

there was room to improve its functioning and user-friendliness’

indeed, the potential of the ECI was not to be overshadowed by some of its shortcomings, which risked creating false expectations for citizens and triggering a backlash against the EU.’

From the Council Note: ‘The Commission clarified that, contrary to some expectations, it did not plan to present a proposal to review the ECI Regulation by the end of the year - that decision had not been taken, although the

there was room to improve its functioning and user-friendliness’

indeed, the potential of the ECI was not to be overshadowed by some of its shortcomings, which risked creating false expectations for citizens and triggering a backlash against the EU.’

Commission would not exclude the option. It first wished to have feedback from the EP and the Council before deciding what steps to take. The risk of reviewing the ECI Regulation too early, given that it has been in force for three years only, was to improve things only partially and not to address all aspects of the instrument.

The framing of European policies and legislation

‘PETI considers that the review of the ECI regulation should be used as an opportunity to enhance awareness of the petitions process, explain the distinction between ECIs and petitions and promote a link between them, harmonised information on the European institutions’ websites and in their advertisement policies.’

‘JURI calls on the Commission to ensure comprehensive support, including providing better advice to promoters: delegations also raised the issue of the

‘Providing better infrastructure for ECIs with legal advice, translation and

Issues

Practical/Logistic and Administrative problems, -‘The lack of legal personality of the citizens’ committees: several committees -‘The European Parliament welcomes the EESC’s proposal to provide free

‘JURI calls on the Commission to ensure comprehensive support, including providing better advice to promoters: delegations also raised the issue of the

‘The Commission should provide as much guidance as possible to staff in

‘Provide a support infrastructure for ECIs with legal advice, translation and
such as funding, translations, issues with citizens’ committee have reported concerns about liability and obstacles e.g. to raise funds (FUNDING) and manage data protection (DATA PROTECTION) especially in view of the fact that they reside in at least seven different countries.’

- ‘The verification of the translations of the proposed initiatives provided by its organisers has proved to be a cumbersome process.’

- ‘The Commission is invited to explore the possibility of funding ECIs through the EU budget, via European programmes such as the Europe for Citizens programme and the Rights, Equality and Citizenship programme, given that there is a real need for financial support for the organisation of ECIs and that numerous amendments to the EU budget have been submitted to this end.’

translations of ECI texts so as to reduce the cost of organising an ECI, and invites it to set up the necessary operational framework’

- ‘The Commission should come forward with ideas on the two important aspects of translation and funding. As a democratic tool, the ECI is a public good and should benefit from public financial support. ECI campaigns need an official support infrastructure that offers legal advice, translation services and practical campaigning guidance. Grassroots ECIs should ideally also have access to public funding or at least European foundation funding.’

non-binding legal advice – for example, by creating a clearly identified point of contact responsible for the Citizens’ Initiative in the Commission representations and Europe Direct information centres in all Member States with the task of providing information and the necessary advice and assistance for ECIs.’

-JURI: ‘Liability issues have arisen for the organisers of Citizens’ Initiatives owing to the fact that citizens’ committees lack legal personality and that this problem could only be solved by revising the regulation; calls on the Commission to explore the possibility of giving legal Commission providing better legal advice to promoters or exploring the option of appointing a special assistant to support ECI organisers’

the Europe Direct Contact Centre so that they can exercise reasonable judgment in striking the delicate balance between supplying helpful advice and being seen to steer a particular ECI.’

‘The Commission should draw on the example of the Transparency Register's quality checks and its alerts and complaints system to ensure that funding and sponsorship information provided by ECI organisers reflects reality and that any issues are brought to its attention.’

‘Provide an EU legal status for ECI citizens’ committees. Entities also lack a legal basis for fundraising or even opening a bank account. Their only options now are national organisational structures, which are contrary to the
PETI calls for enhanced inter-institutional cooperation when dealing with ECIs in providing information and support to ECI organisers.

-‘PETI calls for risk reduction measures to be taken in order to encourage ECI committee members to take concrete initiatives.’

funding of ECIs and, if necessary, proposes relevant provisions in a revised ECI Regulation.’

transnational nature of the ECI. Therefore, an EU legal status is needed for citizens’ committees to shield their members from liability and facilitate fundraising. The inclusion of organisations on citizens’ committees could also be considered.’

Registration of proposed ECIs / Legal Admissibility Test

-‘Registration remains a major challenge for the organisers as an important number of proposed ECIs are manifestly outside the scope of the Commission's competences.’

-‘The European Parliament calls on the Commission to provide as much guidance as possible – especially of a legal nature – to organisers of ECIs via the Europe

-JURI: ‘Taking into account the difficulty faced by organisers in identifying the relevant treaty and legal provisions on which to base a valid initiative; stresses, however, that in the

‘It was also suggested that the Commission, where possible, could provide advice to organisers of an ECI as to how to take their initiative forward if it relates to an area which falls outside the

‘The Commission should endeavour to provide reasoning for rejecting ECIs that is more robust, consistent and comprehensible to the citizen.’

‘Modify the first legal admissibility check. Although the ECI has no direct legal impact (the Commission can refuse to act), it has generated public debate and created new pan-European
From the Council

Note: ‘The Commission stressed the difficulty of it providing more guidance and legal advice, given that it could not be both the drafter and the addressee of an ECI. Legal advice on the EU and Commission competences is already provided by teams in the Europe Direct Contact Centre with the support of the Commission services. However, such advice remains informal - it is without prejudice to the formal reply that is given to a request to register an ECI and does not include advice on the concrete drafting of a proposal.’

-‘With regard to calls

Direct Contact Centre, so that they are aware of the possibilities open to them and will not fail by proposing an ECI that is outside the Commission’s powers, or else to assign the task of giving advice to another independent company or body so as to avoid a possible conflict of interest within the Commission itself; notes, however, that under the Treaty of Lisbon the issues raised by ECIs may not correspond entirely to the Commission’s jurisdiction; takes the view that the Commission should consider setting up a dedicated ECI office in each Member State’

-‘There is need to

case of rejection the Commission should explain its political choices to the public in a detailed, transparent and comprehensible manner, and at the same time inform the organisers of the relevant legal considerations’

-JURI: ‘calls on the Commission to consider the possibility of registering only part of an initiative where an ECI does not fall entirely within the COM’s remit; considers that, for such a registration, a prior consultation with the applicant CC would be appropriate.’

-JURI: ‘The Commission should, in addition to providing a clear list

Commission’s field of competence.’

‘Providing better reasons for rejecting an ECI - a few delegations called for the Commission to provide clearer and more extensive reasons when rejecting ECIs’

alliances. Perhaps the pre-registration legal admissibility check should be removed entirely so as not to artificially restrict topics of public debate. At a minimum, ECIs refused registration should be helped to reformulate their requests so they may qualify for registration.’
provide more detailed guidelines on the interpretation of legal bases.’

-‘The European Parliament acknowledges the many complaints from organisers about not receiving detailed and exhaustive reasons for the rejection of their ECIs, and invites the Commission to provide as many elements as possible in order to explain the reasons and guide organisers to a possible solution’;

-‘The European Parliament invites the Commission to consider the possibility of registering only part of an initiative and to give the organisers, of its competences, clarifying the registration procedure, given that the registration of a large number of the submitted CIs was rejected; calls on the Commission to engage actively, providing the ECI organisers with detailed guidelines on the interpretation of the relevant legal provisions’;

-‘PETI calls on the COM to ensure transparency in the decision-making process and clarify the procedure for legal admissibility.’

-‘PETI invites the Commission to consider in the future revision of the regulation the proposal for allowing ECIs that require
at the time of registration, an indication as to which part they could register.’

treaty amendments according to Article 48 TFEU.’

Signature Requirements / Exclusion of citizens from signing

‘Divergences between the conditions and personal data required from signatories by the different Member States remain an issue of concern, especially in the cases where citizens are as a result excluded from their right to support an initiative.’

-‘The Commission welcomes the constructive approach of those Member States who so far have responded positively to the Commission’s calls to make uniform and simplify their (data) requirements, but there is need for further efforts to

‘Deems it too complicated for organisers to provide different personal data in support of ECIs in the 28 Member States, as laid down in Regulation 211/2011 on the basis of the various national provisions, and suggests that consideration be given to establishing an EU digital citizenship;
calls on the Commission, therefore, to explore this issue in its digital agenda’

-‘JURI stresses the need to explore the possibility of a harmonised and more efficient procedure for submitting signatures, as it is unacceptable that EU citizens should be excluded from supporting ECIs owing to differing personal data submission requirements in the Member States; calls, therefore, on the Commission to propose simpler data submission requirements across all Member States in order to make it easier to sign an ECI, irrespective of the country of residence’

‘Addressing the exclusion of some citizens from their right to support an initiative: a further issue raised was that divergences between the conditions and personal data required from signatories in the different Member States could result in citizens being excluded from supporting an ECI when they are nationals of one Member State and resident in another Member State’

‘In order to facilitate EU citizens wishing to sign an ECI, and irrespective of in which Member State they are currently residing, the Commission should propose once again to the legislature simpler and uniform requirements for all Member States in terms of the personal data to be provided when signing a statement of support.’

‘Ensure that all EU citizens can support an ECI – wherever they live. Another unfortunate consequence of having 28 different sets of personal data requirements – some based on citizenship and others on residence – has been to strip many expatriate EU citizens of their legal right to use the ECI. The Finnish approach, which allows both Finnish citizens (regardless of where they live) and Finnish residents (with EU nationality) to support an ECI, is the ideal. Alternatively, preference should be
make the ECI tool
more accessible.’

‘Lower the age of
ECI support to 16.
Engaging youth in EU
affairs while still in
high school can
support future EU
involvement and help
develop a European
identity.’

‘Reduce and
harmonise personal
data requirements
across member states.
Data protection
requirements for the
ECI should likewise
be harmonised across
all member states and
ideally coordinated
by a central EU
body. Similarly, while
member states must

Data
Protection

-‘There is a need to
provide more
information on data
protection
obligations in each
Member State in
which the organisers
run their campaigns,
and on the possibility
for organisers to take
out Insurance’

-‘The European

-JURI ‘Bearing in
mind also the needs of
persons with
disabilities; calls on
the Member States,
as a matter of urgency,
to review the
requirement of
providing a personal
ID number for a
statement of support,
with a view to the
possible removal of

‘Simplifying data
requirements:
divergences between
the conditions and
personal data required
from ECI signatories
was an issue raised by
some delegations.’

‘Addressing the legal
liability of organisers -
an issue of concern for
some delegations was
given to citizenship
rather than residence,
so as to ensure that all
EU citizens may
support an ECI,
regardless of where
they live.’
Parliament acknowledges the delicate problem of organisers’ personal liability with regard to data protection when collecting signatories’ personal data, and proposes that the range of data required be reduced, or liability extended to volunteer campaigners, and that the wording of Article 13 of Regulation 211/2011, on liability, be changed to make it clear that personal liability is not unlimited (...) with a view to establishing that organisers are responsible for acts which are ‘unlawful and committed intentionally or with at least serious negligence.’

This requirement, as such a requirement could represent an unnecessary bureaucratic burden for the collection of statements of support and also an unnecessary way of checking the identity of a signatory’;

‘PETI calls for simplified and harmonised personal data requirements and procedures.’

the fact that under the current ECI Regulation, promoters of an ECI are personally legally liable for the campaign’s actions. In addition, promoters have no legal personality and thus, as natural persons, they receive and manage a wide range of personal data, without being subject to the same data protection rules as legal persons.’

verify signatures, a central body (or database) could be established to coordinate between campaigns and national authorities. This would relieve campaigns of the complex, time-consuming logistics of working with 28 different national authorities.’

‘Eliminate ID requirements.

Among the personal data requirements, identity document numbers have clearly created the most problems. ECI organisers noted that requirements for citizens to share ID numbers, as well as birth dates and places, to support an ECI raised serious privacy concerns and deterred citizens in several
Timeline of an ECI’s lifecycle

- ‘Organisers have indicated that the time needed to set up their online collection system means that in most cases, they have less than 12 months to collect and this should be remedied.

- ‘The lack of a specific time limit for the submission of a successful initiative to the Commission is also a potential source for confusion and uncertainty both for the institutions and the public.’

From the Council Note:
- ‘On the suggestions to extend the deadlines, the Commission replied

- ‘Invites the Commission to reconsider the automatic start of the signature collection period following the registration of an ECI and to allow the organisers to decide when it should begin.’

- ‘Proposes that the period for Member States to certify the online collection system be extended to two months (instead of one month) and the collection period for statements of support for organisers to 18 months.’

- ‘JURI underlines its position that the automatic link between the registration of an ECI and the starting date of the 12-month period for the collection of statements of support should be removed and that the ECI organisers should have a chance to determine the date for the launch of their ECI, within three months of its registration by the Commission.’

- ‘JURI: ‘The collection period could be extended to 18 months.’

- ‘A number of delegations were of the opinion that the 12 months deadline is too short and should be extended. Alternatively, the period should remain the same but organisers should be given the opportunity to decide when that period starts (potentially two months). An assessment of the whole deadline regime within the Regulation was also advocated.’

- ‘Lengthen the signature collection time to 18 months. It is recommended to lengthen the signature collection time to at least 18 months. A longer collection period would also help smaller and volunteer-run initiatives. More time is needed particularly for ECIs on novel or complex topics. They need more time than simpler ECIs on well-known topics just to explain their goals.’

- ‘Give ECI campaigns time to prepare: let them choose their launch date.

countries from supporting an ECI.’
that this would require a revision of the Regulation.’

Technical Problems with Online Signature Collection System and verification of signatures -‘The Commission's hosting offer managed to remove the biggest obstacle. However, the stakeholders remain critical with regard to the complexity of the current certification procedure and are not fully satisfied with the features offered by the Commission software.’

-‘Several Member States’ competent authorities are uncomfortable with the possibility for organisers to request the certification of their system before the registration of their proposed initiative with the Commission.’

-‘Calls on the Commission to improve the user-friendly character of its software for the online collection of signatures and to offer its servers for the storage of online signatures for free on a permanent basis’

-‘Invites the Member States to be flexible in their verification when they receive statements of support for an ECI which are just above the threshold of 1 million signatures, with a view to allowing its submission.’

-JURI ‘Consideration must be given to the redesigning of the Online Collection Software.’

-‘PETI calls on the Commission to improve the online collection system (OCS) software and make it accessible to persons with disabilities, allow for electronic signatures and for the collection of e-mail addresses, and include the most up-to-date online campaigning features, following the example of other successful online campaigning platforms; calls on the Commission to support the creation of a public ECI

‘Improving the online collection system - delegations acknowledged improvements being made to the online collection system, but considered that its persistent shortcomings was an issue to address.’

‘Introducing electronic signatures: one delegation also made reference to the possibility of establishing electronic signatures so as to facilitate the collection of signatures and the identification of ECI signatories.’

‘The Commission should duly follow-up on its commitment to analyse the suggestions made in contributions to the Ombudsman’s consultation aimed at improving the online collection system (OCS) software.’

‘The Commission should be mindful in improving the OCS software, of the needs of persons with disabilities who wish to submit statements of support of ECIs online.’

‘Redesign the online signature collection system (OCS). Online campaigning experts insist that the current OCS is so defective, and Commission repair efforts so slow and inadequate, that it needs to be scrapped and rebuilt from scratch – this time with the active participation of campaigners, EU and national stakeholders and civic coders. It should be user-friendly and allow standard online campaigning practices. Many ECI campaigns and stakeholders advocated for the temporary system of hosting ECIs on the Commission’s own
From the Council
Note:
- ‘The Commission would continue hosting servers if no better solution could be found. In terms of software, it was regularly updating it to overcome practical obstacles which were flagged to it by organisers.’

application for mobile devices’

‘PETI invites the Commission to examine proposals relating to the creation of a European identity card, which should also meet the requirements of the regulation on the citizens’ initiative for gathering signatures’

‘PETI calls on the Commission to come forward with proposals concerning the establishment of a complete electoral list of its citizens.’

server to become a permanent option for all ECIs. An extension of this idea, itself the subject of an ECI, could be a single centralised online signature collection platform where signatures for all ECIs are safely stored while front-end campaigning materials reside on individual ECI campaign websites.’

‘Allow to collect e-mail address within the main ECI support form. Online campaign experts insist this is technically possible while also respecting data protection rules.’

Follow-up stage/Outcome of successfully submitted
- ‘No stakeholders or experts other than the ECI organisers themselves were invited to actively
- ‘Calls on the Commission to revise the wording of Article 10(c) of Regulation 211/2011 to allow
- ‘JURI considers it essential that citizens can contribute to the exercise of the legislative
‘Some delegations suggested that the Commission should launch a political debate on the topic of
‘The Commission should explore with Parliament, the latter being responsible for organising public
ECIs participate. Attempts should be made to organise the public hearing in such a manner as to ensure that stakeholders representing different views and perspectives are heard. This is all the more important given that the 3-month period foreseen by the ECI Regulation for the preparation of the Commission reply to a successful initiative is extremely short and leaves little time to organise a formal stakeholders consultation.

-‘It is still too early to assess the long-term impacts of the ECI on the EU institutional and legislative process.’

proper follow-up to a successful ECI, including a parliamentary debate in plenary followed by a vote on the ECI; urges the Commission to start preparing a legal act on successful ECIs within 12 months of their acceptance.’

-‘In order to emphasise the political dimension of ECIs, a public hearing held under the terms of Article 11 of Regulation 211/2011 should be structured in such a way as to allow organisers to engage in a dialogue with Members of the European Parliament; stresses that hearings on ECIs should be organised by a neutral committee that does not have the main prerogatives of the Union and be involved directly in the initiation of legislative proposals.’

-JURI ‘calls for a review of the dual role of the Commission which could give rise to a conflict of interest, bearing in mind that a number of ECI organisers acknowledge the significance and value of its input; calls, in this connection, on the Commission to consider Parliament also as a decision maker, particularly since it is the only institution whose members are directly elected by EU citizens.’

-JURI underlines the importance of the institutional balance hearings, how to ensure that the two arms of the legislature, Parliament and Council, as well as interested stakeholders (for and against the initiative) are present at the public hearing.’

‘The Commission, in its formal response to an ECI that has obtained one million signatures, should explain its political choices to the public in a detailed and transparent manner.’

hearings, how to ensure that the two arms of the legislature, Parliament and Council, as well as interested stakeholders (for and against the initiative) are present at the public hearing.’

‘Broadening European Parliament public hearings: one delegation suggested that the EP invite a wider range of experts to its public hearings, in order to receive more diverse opinions on an ECI, and that a 'mid-term hearing' could be organised after the collection of 500,000 signatures, in order to promote initiatives and to allow them to garner political support.’
responsibility for their subject-matter in the process of evaluation of applications after registration, following the submission of an ECI to the Commission as provided for in Article 9 of the Regulation; calls on the Commission, therefore, to explore the possibility of involving the relevant European institutions and bodies, such as the European Parliament, the European Ombudsman, the ECOSOC and the CoR.’

‘PETI expresses its concern about the low percentage of successful initiatives and the dramatic decrease in the number of new initiatives; believes that the
instrument still has the potential to engage the public and to promote dialogue among citizens and between citizens and EU institutions; welcomes the fact that some ECIs have managed to have an impact at local level’

‘PETI regrets the lack of clear information on the ECI instrument at the early stages, which led to a general misconception about its nature and generated some frustration when the first ECIs were rejected by the Commission; recalls that the instrument should be simple, clear and user-friendly

‘PETI invites the Commission to
respond to successful ECI with more concrete actions.’

‘The Commission should articulate more clearly for citizens its understanding of the value of the public debate generated through the ECI procedure and of how this debate, in its own right and irrespective of the individual outcome, gives the ECI process value and legitimacy.’

‘The Commission should do all in its power to see to it that, throughout the ECI procedure, the public debate ensuing from a registered ECI is as inclusive and transparent as possible.’

**Deliberation Dialogue with EU institutions**

- ‘Some stakeholders consider that there is insufficient dialogue and interaction with the Commission at different stages of the ECI’s lifecycle and in particular after the adoption of the Commission’s Communication on the citizens’ initiative. They would like to see the examination and follow-up process more structured and to be more extensively involved therein.’

**From the Council Note:**

- ‘With regard to the political debate referred to by Commission Vice-
President Timmermans, the Commission did not intend to establish a new, formal and systematic form of dialogue with ECI organisers. It was however looking at ways to improve communication within the current framework.

Public Awareness

‘On awareness-raising, the Commission had made considerable efforts to provide information to citizens (including publishing a guide on ECIs which it sent to all Commission Representations and Member States who requested it, creating a website and posters, and organising a conference in 2012) and highlighted the

‘JURI calls on the Commission to use all public communication channels to raise awareness. emphasises that active popular participation in European citizens’ initiatives also crucially depends on their being publicised in the Member States, and therefore suggests that Member States’ national parliaments should mention the ECI on their websites’

‘Increasing awareness of the ECI: several delegations suggested improving information campaigns on the ECI, including by modern and interactive means of communication, to increase general awareness of the instrument and to encourage citizens to make use of it’

‘Increase public and media awareness of the ECI. Public awareness of the ECI is practically non-existent. Mainstream media tends to be either unaware or misinformed, often equating the ECI with a simple petition. This creates unfair burdens on ECI campaigns to both educate the public about the ECI instrument and convince them of the
contribution of the European Parliament and the EESC.’

merits of their own topic. They further have to overcome citizen suspicion and reluctance to share personal data for an unknown EU tool.’

‘As a tool for developing a “European public space”, the ECI should be aggressively publicised as an “official” EU instrument. Actions should be taken both at a European and national level to raise public awareness and comprehension of, as well as trust in, this new tool of participatory democracy.’
### Appendix VII: Indicative table by the European Commission

setting out the means by which issues with the ECI Regulation could be addressed\(^1\)

<table>
<thead>
<tr>
<th>Issue</th>
<th>Practical arrangements</th>
<th>Commission Delegated/Implementing Acts</th>
<th>Revision of the Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Increasing awareness</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Providing better advice to promoters</td>
<td>x</td>
<td></td>
<td></td>
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<tr>
<td>3. Addressing the short deadlines</td>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Possibility for the organisers to choose the starting date of their collection period</td>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>4. Improving the online collection system:</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>- improvements in the Commission software</td>
<td>x</td>
<td></td>
<td></td>
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<tr>
<td>- improvements in the technical specifications for online collection systems</td>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>- improvements in the online collection process as defined in Art. 6 of Regulation (EU) No 211/2011 (certification, timeline, etc.)</td>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>5. Simplifying data requirements</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Addressing the exclusion of citizens from</td>
<td>x</td>
<td></td>
<td></td>
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</tbody>
</table>

\(^1\) Source: Appendix to the Council of the European Union, ITEM NOTE 9832/15, INST 200, 11 June 2015
<p>| | |</p>
<table>
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<tbody>
<tr>
<td>7.</td>
<td>Launching a political debate</td>
</tr>
<tr>
<td>8.</td>
<td>Addressing the legal liability of organisers</td>
</tr>
<tr>
<td>9.</td>
<td>Providing better reasons for rejecting an ECI</td>
</tr>
<tr>
<td>10.</td>
<td>Broadening EP public hearings</td>
</tr>
<tr>
<td>11.</td>
<td>Introducing electronic signatures</td>
</tr>
</tbody>
</table>
Appendix VIII: Copies of interview schedules

INTERVIEWS WITH ORGANISERS OF REGISTERED ECIS

A. REASONS BEHIND THE DECISION TO BRING AN ECI

1. Why have you decided to bring an ECI?
   
   Prompts: Why an ECI instead of other means? (i.e. a petition or a letter to the institutions)
   
   Choice of topic?

2. What is the goal of your ECI?
   
   Prompts: To introduce/ change legislation?
   
   To create/ stir up the debate on the topic?

B. CITIZENS’ COMMITTEE AND SUPPORT FROM OTHER ACTORS

3. Can you talk to me about who is behind the Citizens’ Committee of this ECI?
   
   Prompts: Are you working together with any interest groups?
   
   How was the Citizens’ Committee assembled?
   
   How often do you meet/ discuss the ECI with the other organisers?

C. DRAFTING/ PREPARING THE ECI, ORGANISERS’ KNOWLEDGE OF THE REGULATION & LEGAL ADVICE/ LEGAL REPRESENTATIVE

4. Can you describe the process of preparing your ECI?
   
   Prompts: Time? Resources? Translation?

5. What type of legal advice did you have whilst drafting your ECI?
   
   Prompt: Could you have drafted your ECI without legal advice?

6. What is your opinion on the legal requirements of the Regulation?
   
   Prompts: Competences
   
   Data Protection

D. CHALLENGES OF SIGNATURE COLLECTION

7. What challenges have you faced in the process of organising your ECI?
   
   Prompts: Financial Resources?
Certification of online signatures collection system?
Promotion of your ECI?
Approx. total cost of your ECI?

8. How do you collect statements of support?
   Prompts: Volunteers?

   How many signatures has your ECI collected so far?

E. PUBLIC DELIBERATION & DIALOGUE

9. What kind of opportunities do you provide for public discussion and debate on the topic of your ECI?
   Prompts: Do volunteers discuss the ECI with potential signatories?
   Keeping in touch with signatories?

F. SUPPORT FROM EU INSTITUTIONS

10. How would you characterise the attitude of the Commission towards your ECI?
    Prompts: During the organisation of the ECI?
    Open to questions?

11. What do you think will be the reaction of the Commission to your ECI?

12. How would you characterise the Commission’s responses to calls for reform of the ECI Regulation?

13. Is your ECI supported by any Members of the European Parliament?
    Prompt: Are these MEPs likely to push for the legislation you are proposing?

15. Have you contacted/presented your ECI to other EU institutions? (i.e EESC)

16. What are your expectations from these institutions?
    Prompts: Suggestions?
    Publish an Opinion?

17. Do you have an alternative plan in case your ECI does not manage to collect one million signatures?

18. Would you consider instigating proceedings with the European Court or with the Ombudsman in case your ECI was refused registration?
G. THE FUTURE OF THE ECI

19. Do you think that there is a need to reform Regulation 211/2011?
   Prompt: In what way?

20. Are you influenced by the results of the existing ECIs?
   Prompt: Does the rejection of other ECIs influence you?

21. What is your opinion on the future development of ECI?
   Prompts: Abandoned?
   More ECIs?
   Legislation will pass as a result of successfully submitted ECIs?

INTERVIEW WITH EUROPEAN COMMISSION OFFICIAL

A. DRAFTING REGULATION 211/2011

How would you describe the process of drafting the Regulation 211/2011?
   Prompt: Attention to detail?
   Sufficiently debated between EU Institutions?

How would you characterise the provisions and requirements of Regulation 211/2011?
   Prompt: User-friendly?
   Burdensome?

B. SUPPORT FOR ECI ORGANISERS

In what ways can the ECI Organisers ask the Commission for help and support?

How does the Commission deal with complaints regarding the functioning of the ECI?
   Prompts: What sort of complaints?
   Designated team of officials?

How does the Commission respond to calls for reforms of the Regulation?

C. REJECTION OF ECIs

Can you describe the process of examining the admissibility of an ECI?

What are the most important criteria for deciding on admissibility?
What sort of legal advice do you employ for the admissibility process?

D. REGISTERED ECIs

What is your opinion on the subject-matters of the currently registered ECIs?

Prompts: Sensitive topics?

Likely to succeed?

How will the Commission make its final decision on an ECI?

Prompt: Is there a team working on that?

E. REFORM OF THE REGULATION

There is a planned reform of Regulation 211/2011 for 2015. How is the Commission approaching it?

INFORMAL QUESTIONS FOR THE APPLICANT OF THE FIRST ECI CASE

1. Why did you decide to propose an ECI instead of approaching the Commission via other means?

2. What was the original goal of your ECI?

3. What is your opinion about the legal admissibility test of proposed ECIs? In what ways do you think it should be different, if any?

3. Why did you decide to bring a case to the Court of Justice of the European Union?

4. In your opinion, how will the Court approach your case, particularly with regard to the fact that it is the first case ever for judicial review of a Commission’s rejection of an ECI?

5. In your opinion, what is the future of ECIs?
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<th>ECR</th>
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<td>P Atlanta AG and others v Commission and Council</td>
<td>[1999]</td>
<td>I-6983</td>
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<td>C-105/75</td>
<td>Guiffrida v Council</td>
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<td>Jippes</td>
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