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Papers prepared for the Workshop  
**The European Citizens'  
Initiative - A First Assessment**

organised by the European General Studies'  
Programme of the College of Europe,  
Bruges, 25 January 2011

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## Foreword

The European Citizens' Initiative (hereafter 'ECI'), the first supranational instrument of direct democracy, creates an additional direct link between the European Union citizens and the institutions of the Union. As one of the most innovative elements introduced by the Treaty of Lisbon, the ECI is often considered to bear great potential for the further development of transnational democracy. It does, however, also entail a number of (potential) challenges for the EU institutions and for politically active citizens – and, in the long term, perhaps also for institutions and political actors within the Member States of the Union.

On 25 January 2011, a month following the settlement of the inter-institutional compromise on the final text of the Regulation on the ECI,<sup>\*</sup> the European General Studies Programme of the College of Europe organized a one-day workshop to discuss the origin and modalities for implementation of the ECI, as well as its possible effect on the political system of the EU. Participants included representatives of the Commission, the Parliament and the Belgian Presidency, and academics.

This research paper includes some of the contributions which had initially been prepared for this workshop. They have subsequently been extended in light of the discussions held during that event and updated in light of subsequent developments.

The European General Studies Programme of the College and the authors of this online publication would like to thank the participants of the workshop – in particular *B. Biervert* (European Commission), *D. Wallis* (European Parliament), *M. Pecsteen* (Belgian Presidency), *T. Chopin* (Fondation Robert Schuman), *J. De Clerck-Sachsse* (IEP Paris/Commission), *R. Hrbek* (University of Tübingen), *J. Monar* (University of Sussex and College of Europe), and *C. Leconte* (IEP Lille) – for their interesting insights and valuable comments. The authors of the present contributions remain, of course, solely responsible for any shortcomings.

Thanks go also to M. Chang for publishing these articles as a *Bruges Political Research Paper* of the European Political and Administrative Studies Department of the College.

Bruges, 14 December 2011

D. Hanf

Director, European General Studies Programme of the College of Europe

<sup>\*</sup>See now Regulation 211/2011 of the European Parliament on the Council (OJEU 2011, L 65/1).

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# **A Preliminary Approach to the Regulation on European Citizens' Initiative from Comparative Constitutional Law**

By Víctor Cuesta-López

## **Introduction: a chance for widespread political participation**

The “Provisions on Democratic Principles” included in the consolidated version of the Treaty on European Union (arts. 9-12 TEU) propose an intricate model of democracy that combines several interrelated principles such as political equality, representation, participation, openness and transparency. In particular, art. 11 TEU on participatory democracy refers to the important role of European citizens and civil society organisations in EU governance and announces a set of mechanisms granting access to EU policy making. Warleigh has stressed the value of this provision, arguing that “the establishment of participatory democracy as one of the EU's normative bedrocks is a potentially important step because it makes clear that representation, that pillar of liberal democracy, cannot be the sole means to a legitimate regime in the EU”.<sup>1</sup> However, we should notice that participation of citizens and civil society organisations in EU governance is not conceived in these provisions as an enforceable subjective right. As Closa argues, “the kind of entitlements regulated convey an approach that is very much focussed on providing guidelines for the behaviour of the institutions of the Union and less so on empowering the citizens”.<sup>2</sup>

Participation by means of civil dialogue (art. 11.2 TEU) and consultation (art. 11.3 TEU) is mainly reserved for collective actors and normally depends on the possession of

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<sup>1</sup> Warleigh A., “On the path to legitimacy? A critical deliberativist perspective on the right to the citizens’ initiative”, in: Ruzza, C. and Della Sala (eds.), *Governance and civil society in the European Union: Normative perspectives (vol. 1)* (Manchester: Manchester University Press, 2007), p. 64.

<sup>2</sup> Closa C., “European Citizenship and New Forms of Democracy”, in: Amato G., Bribosia H. and de Witte B. (eds.), *Genèse et destinée de la Constitution Européenne: commentaire du Traité établissant une Constitution pour l’Europe à la lumière des travaux préparatoires et perspectives d’avenir* (Brussels: Bruylant, 2007), p. 1053.

some quality or resource.<sup>3</sup> Moreover, we could argue, as Craig and de Burca do, that “profit-making groups outnumber non-profit groups by a very significant margin, and their resources are much larger”.<sup>4</sup> As a result, it has been commonly argued that participatory governance remains “fundamentally elitist, characterized by a sort of self-appointed enlightened elite”.<sup>5</sup> Consultation and civil dialogue could strengthen the contribution of functional interest representation to supranational governance but, as Magnette argues, do not “guarantee a progress of enlightened understanding in the citizenry at large”.<sup>6</sup> Hence, these patterns of participation do not represent a definitive answer to the democratic challenge facing the EU.

Considering that further democratisation depends upon widespread political participation, we must welcome article 11.4 TEU on European citizens’ initiative (ECI), a device inspired by national constitutionalism that would allow every single national from the Member States to trigger the EU law-making process: “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 Treaties”. This provision was originally included in the Constitution for Europe and was ultimately transposed to the Lisbon Treaty. The proposal for an ECI was presented by conventional Jürgen Meyer in the very last session of the constitutional Convention. In his amendment to the draft Constitution he argued that ECI aimed,

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<sup>3</sup> Heinlet H., “Participatory Governance and European Democracy”, in: Kohler-Koch B. and Rittbergerr B., *Debating the Democratic Legitimacy of the European Union* (Lanham, Md.: Rowman & Littlefield, 2007), p. 225.

<sup>4</sup> Craig P. and de Burca G., *EU Law, Text, Cases and Materials* (Oxford: Oxford University Press, 2003), p. 165.

<sup>5</sup> Greven M., “Some Considerations on Participation in Participatory Governance”, in: Kohler-Koch, B. and Rittbergerr, B., *Debating the Democratic Legitimacy of the European Union* (Lanham, Md.: Rowman & Littlefield, 2007), p. 241.

<sup>6</sup> Magnette P., “European Governance and Civic Participation: Can the European Union be politicised?”, *Jean Monnet Working Papers*, No. 6, 2001, pp. 32-33.



“to bring Europe closer to the people, as Laeken recommended. It represents a large step in the democratisation of the Union. It will extend the existing right of petition to a right of the citizens to present legislative proposals to the Commission of the EU”.<sup>7</sup>

In fact, by means of ECI, citizens could set the agenda of the EU institutions, introducing unattended collective claims into the decision-making process.<sup>8</sup> In addition, ECI could serve to encourage political debate beyond domestic affairs and to construct supranational discourses in an emerging European public space. Considering these possible effects, Warleigh considers that “the formal granting of such ability to citizens, acting collectively, would be unparalleled in the history of international organisations and would thus have potentially enormous significance”.<sup>9</sup>

However, we should avoid high expectations concerning the political potential of the citizens’ initiative. The ECI is a variation of the *agenda initiative* (also known as indirect popular initiative) which is a device of participatory democracy fully subordinated to the political will of the legislature that could approve, alter or reject the citizens’ legislative proposals. In fact, the agenda initiative does not have political significance in any of the Member States where it has been implemented (Austria, Hungary, Italy, Latvia, Lithuania,

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<sup>7</sup> “The Commission has then to decide whether it will take legislative activity or not. It is very important that the threshold for the signatures that are to be gathered for the European Citizens’ Legislative Submission is not too high. A high threshold interferes with the process and effectively allow only powerful organisations the possibility of securing the required signatures”, European Convention, CONV 724/03.

<sup>8</sup> “The CI could give everyday citizens the chance to bring completely new ideas into the EU policy-making process because in the CI it is citizens who take charge and approach the commission, rather than the commission looking for tame interlocutors to beef up the perceived legitimacy of its proposals”, Warleigh, *op. cit.*, p. 66.

<sup>9</sup> Warleigh, *op. cit.*, p. 64.

Poland, Portugal, Slovenia and Spain).<sup>10</sup> Furthermore, we have to take into account that ECI will be subjected to a previous and additional political judgment by the European Commission. Moreover in the Member States the submission of an agenda initiative implies the beginning of the law-making process, and consequently, only the elected representatives are authorized to decide whether the initiative is or is not politically opportune; the ECI would be just a preliminary step in the law-making process which is always formally launched by the Commission that preserves the monopoly of the legislative initiative. Other additional difficulties for the ECI could arise from the diffuse character of the European public opinion and the weakness of the transnational civil society networks.

Let us now consider some other significant similarities and divergences between the procedures and conditions laid down in the recently approved Regulation 211/2011/EU of the European Parliament and the Council, of 16 February 2011, on the citizens' initiative and the rules governing other national popular initiatives. The Regulation on ECI came into force on April 2011 but its art. 23 declares that the provisions will be not applied until 1 April 2012. In

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<sup>10</sup> Austria: "Every motion proposed by 100,000 voters or by one-sixth each of the voters in three States shall be submitted by the main electoral board to the House of Representatives for action. The initiative must be put forward in the form of a draft law" (article 41.2 Constitution); Hungary: "At least 50,000 voting citizens are required for a national popular initiative. A national popular initiative may be for the purpose of forcing the Parliament to place a subject under its jurisdiction on the agenda. The Parliament shall debate the subject defined by the national popular initiative" (article 28-D Constitution); Italy: "The people may introduce public initiatives consisting of a bill drafted in articles and supported by at least 50,000 voters" (article 71 Constitution); Latvia: "Draft laws may be submitted to the Parliament by the President, the Government or committees of the Parliament, by not less than five members of the Parliament, or, in accordance with the procedures and in the cases provided for in this Constitution, by one-tenth of the electorate" (article 65 Constitution); Lithuania: "The right of legislative initiative in the Seimas shall belong to the members of the Seimas, the President of the Republic, and the Government. Citizens of the Republic of Lithuania shall also have the right of legislative initiative. A draft law may be presented to the Seimas by 50,000 citizens of the Republic of Lithuania who have the electoral right, and the Seimas must consider such a law" (article 68 Constitution); Poland: "The right to introduce legislation shall also belong to a group of at least 100,000 citizens having the right to vote in elections to the House of Representatives (*Sejm*). The procedure in such matters shall be specified by statute" (article 118 Constitution); Portugal: "The power to initiate laws and to propose referenda lies with Deputies, parliamentary groups and the Government, and further, in accordance with the terms and conditions established by law, with groups of electing citizens; the power to initiate laws with respect to the autonomous regions lies with the appropriate regional legislative assembly" (article 167 Constitution); Slovenia: "Laws may be proposed by the Government or by any deputy. Laws may also be proposed by at least five thousand voters" (article 88 Constitution); Spain: "An organic law shall regulate the forms and requirements for the exercise of the popular initiative for the presentation of proposals of law. In any case no fewer than 500,000 valid signatures will be required. This initiative is not applicable to organic laws, taxation, or international affairs, nor to the prerogative of pardon" (article 87.3 Constitution).

the meantime, the Commission have to set up technical specifications for online collection systems and the Member States must designate responsible authorities for the verification and the certification of the statements of support for the ECI.

### **The signatories and the organisers of the ECI**

Art. 11.4 TEU reserves the right to support a given citizens' initiative to the citizens of the Union, that is to say, to the citizens who are nationals of the Member States. It seems, then, that there is no scope in the EU primary law for extending this political right to third-country nationals residing legally in the Union. It is worth mentioning that while other political rights of the European citizens are expressly proclaimed in art 20.2 TFEU (the right to vote and to stand as a candidate in EP elections, the right of access to documents, the right to refer to the European Ombudsman, the right to petition), the right to support an ECI is not enounced as a subjective right.

Art. 3.4 of the Regulation 211/2011 requires that the signatories must be “of the age to be entitled to vote in elections to the European Parliament”. In order to foster the participation of young Europeans, the Regulation could have avoided the reference to the age to be entitled to vote in EP elections, which is determined by the Member States, and extended the right to support an ECI to EU citizens over sixteen years old. The Opinion of the Committee on Petitions on the Commission proposal for a regulation also defended the right to sign an ECI to all European citizens over 16: “A lower age limit is proposed in order to encourage younger citizens' participation in the democratic life of the Union. The age limit of 16 years in case of European election already exists in a certain Member States”<sup>11</sup>. Having said that, the fact is that in comparative law, the exercise of the legislative initiative is also commonly reserved to nationals of legal age who are enrolled in the electoral register. However, we should notice a significant exception in the Spanish Autonomous Community of Catalonia,

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<sup>11</sup> Report on the proposal for a regulation on citizens' initiative of the Committee on Constitutional Affairs (A7-0350/2010), 02.02.2010, p. 59.

where the right to sign and to promote a legislative initiative is extended to all foreign legal residents over 16 years-old.

Regarding the amount of statements of support needed for a given ECI, art. 11 TEU proposes a fairly low number which represent just 0.2% of the population of the EU. If we establish a comparison with the amount of signatures demanded to trigger the agenda initiatives in the Member States (Table 1) we realize that only the 50.000 signatures for the Italian *iniziativa legislativa popolare* represents a lower percentage over the total population (0.08%)

**Table 1: Signatures required for the agenda initiative in the Member States**

Agenda initiative	Population (millions, Eurostat 2010)	Signatures required	Percentage over population
Latvia	2.3	10% (230,000)	10
Lithuania	3.4	50,000	1.47
Austria	8.1	100,000	1.23
Spain	41.6	500,000	1.20
Portugal	10.4	75,000	0.72
Hungary	10.1	50,000	0.49
Poland	38.2	100,000	0.26
Slovenia	1.9	5,000	0.26
European Union	<b>486</b>	<b>1,000,000</b>	<b>0.20</b>
Italy	57.3	50,000	0.08

Art. 11.4 TUE also declares that the statements of support must come from a “significant number of Member States”. The Regulation 211/2011 determines the territorial distribution of the statements of support establishing a threshold of one quarter of the Member

States (7/27).<sup>12</sup> This proportion was fixed by the EP and amended the original proposal from the Commission establishing the minimum number of Member States at one third (9/27).<sup>13</sup> The territorial distribution requirement is a logical consequence of the transnational dimension of the Union, but it also has some precedents in comparative law. In Romania, for example, the supports for the initiative amending the Constitution must come from at least the half of the administrative departments and the supports for the legislative initiative must come from one quarter of the administrative departments. In several states in the United States, the territorial distribution of signatures supporting popular initiatives is pretty common. For example, in Alaska the signatures must come from  $\frac{3}{4}$  of the constituencies, in Arkansas from 15 of the 75 counties, and in Florida from 12 of the 23 constituencies. An additional important point about the territorial distribution is the minimum number of statements of support required in each Member State. Article 7.2 of the Regulation has chosen a minimum absolute number that corresponds to the number of the members of the EP elected in each Member State, multiplied by 750. In comparative law, a similar precedent comes again from the United States, where it the support of a minimum percentage of voters in each relevant county/constituency is normally required.

The Regulation on ECI assigns a legal status to the organisers of the initiative. As well as the signatories, organisers must be citizens of the Union and be of the age to vote in EP elections. The organisers will have to constitute a citizens' committee "of at least seven

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<sup>12</sup> The territorial distribution of signatures is determined in comparative law following two different techniques: either through a maximum number of signatures coming from a territory or through a minimum number of territories contributing with a minimum number of signatures. Auer also considers that "the distribution requirement can be established by different methods. One method is to define a maximum number of signatures coming from one Member State, e.g., 25%, meaning that additional support from one state would have no legal value and that at least four states must be implicated. Another method would determine a minimum number of states, e.g., eight, contributing with a minimum number of signatures, e.g., 50,000, thus allowing one highly motivated state to produce as many as 650,000 signatures", Auer A., "European Citizens' Initiative", *European Constitutional Law Review*, No. 1, 2005, p. 81.

<sup>13</sup> The original proposal from the Commission fixed the minimum number of Member States at one third. This draws on other provisions of the Treaty, according to which nine or one third of Member States is sufficient to ensure the representation of a Union interest. It is the threshold used in the provisions on "enhanced cooperation" or needed to trigger the subsidiarity procedure", European Commission, Proposal for a regulation on the Citizens' Initiative, COM(2010)119 final, p. 4.

natural persons who are resident of at least seven different Member States” (art. 3.2). The constitution of an *ad hoc* sponsor committee to promote a popular initiative is an extended requirement in comparative law: seven is also the minimum number of citizens that must constitute the committee to promote the popular initiative in Switzerland. Spanish law, in contrast, declines to set a minimum or maximum number of members of the committee. Regarding the territorial distribution of the organisers among seven Member States, we could say that this additional requirement has no precedents in comparative law. The citizens’ committee enjoy a set of procedural rights that guarantee its prominence throughout the process. Among the list of functions assigned to the organisers, we should mention the registration of the legislative proposal with the European Commission at an early phase of the process (art. 4.1), the translation of the proposed initiatives into other official languages of the Union (art. 4.1), the collection of the statements of support (art. 5.1), the submission of the statements of support to the relevant Member States to proceed with its verification and certification (art. 8.1) and the defence of the legislative demand before the Commission [arts. 9, 10.1 (b)] and the public hearing at the EP (art. 11) after its submission. The Regulation also declares the organisers’ right to withdraw a registered ECI before the submission for verification and certification to Member States (art. 4.5). This is also the case of the popular initiative in Switzerland where the absolute majority of the members of the initiative committees can demand the withdrawal of a successful request until the day on which the Federal Council fixes a date for a popular vote (article 73 Swiss Federal Act on Political Rights). Art. 4 of the Regulation 211/2011 requires the publication of “regularly updated information on the sources of support and funding” (art. 4). The Regulation does not foresee, however, any public funding for the organisers from the EU. By contrast, Spanish legislation provides for compensation of the expenses incurred during the signature gathering campaign when the agenda initiative reaches legislative process. In Catalonia, the committee of the

initiative can even demand an advance payment before the beginning of the signatures campaign.

### **The registration with the Commission and the decision on the admissibility**

Before the beginning of the collection of the statements of support, the citizens' committee should register its proposal with the Commission. Regarding the scope of the ECI, the organisers must provide information about its subject-matter and its objectives (art. 4.1 Regulation 211/2011). In particular, the required information for registering a proposed ECI, fixed in Annex II, includes the title, the subject matter, the description of the objectives on which the Commission is invited to act, the relevant provisions of the Treaties, the personal data of the organisers and a declaration about the sources of support and funding. As we can see, the organisers of the ECI formulate its proposal in general terms and not as a proper draft law. This is a major divergence with many of the expressions of agenda initiative which are commonly drafted in a bill. For instance, the Italian agenda initiative must consist "of a bill drafted in articles" (article 71 Italian Constitution) and the Austrian *Volksinitiative* "must be put forward in the form of a draft law" (article 41.2 Austrian Constitution). However, there are also some examples of popular initiatives formulated in general terms: the Swiss popular initiative can be submitted in the form of a general proposal (*initiative populaire générale*). The submission of this kind of popular initiative implies further intervention by representatives who would draft the final version presented to popular vote (art. 74.3 Swiss Federal Act on Political Rights).

Before its official registration, the proposed ECI is subjected to a preliminary examination by the Commission. The ECI will not be registered if its subject matter "falls outside the framework of the Commission powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties" [art. 4.2. a)], that is to say, if it exceeds the scope of Commission's legislative initiative. In addition, the Commission will reject the

registration if the ECI is “manifestly abusive, frivolous or vexatious”, or “manifestly contrary to the values of the EU set out in art. 2 TEU”<sup>14</sup> [art. 4.2.c), d)]. The constitutional and/or legal check of the popular initiatives is a widespread prerequisite that is commonly commended to administrative or parliamentary bodies. We should notice that these preliminary examinations are not a judgement of political opportunity and operate on the basis of a strict regulatory canon. Consequently, a negative decision on a popular initiative’s registration can be appealed by the organisers before the courts. In this regard, art. 4.2 of the Regulation announces the right to appeal against a negative decision on the admissibility of a given ECI before the European Court of Justice. As well as the Spanish agenda initiative, the preliminary examination of the ECI takes place before the beginning of the collection of statements of support, thus avoiding the circulation of proposals which in the end could not be admitted and the consequent frustration among signatories. Fortunately, the EP suppressed the Commission proposal’s provision establishing that the decision on the admissibility would be adopted after the collection of 300,000 statements of support from signatories from at least three member states (article 8 of the Commission proposal for a Regulation).<sup>15</sup> The rapporteurs of the Committee on Constitutional Affairs of the EP did not “support the idea of this check taking place after the collection of 100,000 or 300,000 signatures, as this would rightfully cause great frustration to organisers”.<sup>16</sup>

Art. 11.4 TEU and the Regulation 211/2011 do not present a list of particular issues excluded from the scope of the ECI. This is good news for the functionality of the ECI because in Member States such as Spain or Portugal, the voters cannot promote the adoption of statutes concerning fundamental matters. For instance, the Spanish Constitution specifies

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<sup>14</sup> Art. 2 TUE: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

<sup>15</sup> COM(2010)119 final, p. 14.

<sup>16</sup> Committee on Constitutional Affairs EP, Working Document on a proposal for a regulation of the European Parliament and of the Council on the citizens’ initiative, 22.06.2010, p. 6.



that the bills proposed by citizens shall not proceed “in matters of constitutional law, tax law or of international character, neither in that related to the prerogative of clemency”. The exclusion of “matters of constitutional law” from the scope of the Spanish agenda initiative is particularly severe because it implies that citizens may not introduce bills related to fundamental rights and public liberties, to the regulation of a good number of institutions and constitutional bodies, to the Statutes of Autonomy or the general electoral system. Nevertheless, we miss from the Regulation 211/2011 a reference to the single subject requisite that is quite extended in comparative law and that guarantees the coherency and substantive unity of the proposals presented by the citizens. For instance, in Switzerland, in the event that the text of a popular initiative fails to comply with the principles of unity of subject matter (Art. 139 paragraph 3 and Art. 194 paragraph 2 Federal Constitution) the Federal Assembly declares the initiative to be invalid as a whole or in part, to the extent that this is required (art. 75 Swiss Federal Act on Political Rights). Another question to consider about the scope of the ECI is whether it could serve to promote the amendment of the Treaties. Although the Commission can trigger the ordinary and the simplified revision procedures (art 48 TEU), it seems that this is a competence that clearly falls outside the ordinary power to submit “a proposal for a legal act of the Union for the purpose of implementing the Treaties” (art. 4.2.a) and consequently an ECI demanding the revision of the Treaties could be automatically dismissed.

Finally, article 4.1, paragraph 6, Regulation 211/2011 foresees the Commission’s assistance for the organisers who want to register a given ECI. This provision granting information and legal advice through a “contact point” could be particularly helpful given the extraordinary complexity of the EU legal system. This valuable provision has some precedents: the sponsor committee of the popular initiative in California enjoys extensive

assistance during the drafting process. The sponsors may take a general proposal to the Legislative Counsel, and there a staff member drafts the language of the initiative.

### **The collection, verification and certification of the statements of support**

The Regulation sets out the official form for the statement of support in annex III.<sup>17</sup> Only the forms written in one of the registered language versions and which comply with the model proposed in the annex to the Regulation could be used for the collection of the statement of support (art. 5.1, paragraph 2). The personal data required in the forms (full first names, family names, permanent residence, date and place of birth, nationality and personal identification number) could differ in each Member States in accordance with national laws and practices. Concerning the personal data collected from signatories, the Regulation alludes in recital 13 to the principle that personal data must be adequate, relevant and not excessive in relation to the purpose for the verification of statements of support by Member States. The competent authorities will destroy all the statements of support at the latest one month after issuing the certification on the number of valid statements (art. 12.3). In comparative law, the signature lists (forms, sheets of paper or cards) in support of a given popular initiative must also comply with the form prescribed by law. The laws on popular initiatives also determine the personal data required from signatories. For instance, Italian legislation on abrogative referendum and agenda initiatives similarly demands first name, family name, place and date of birth and municipal constituency from citizens.

Article 5.2 and 6 of the Regulation 211/2011 establish that the statements of support could be collected online as well. The organizers must ensure and the competent authority of the Member States must certify that the online collection systems have “adequate security and technical features in place” before the beginning of the collection campaign. In particular, the

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<sup>17</sup> The Commission is empowered to amend that annex taking into account information forwarded to it by Member States and in accordance with Article 290 TFEU.

online collection system must guarantee that only natural persons can submit a statement of support, that the data are securely collected and stored and, consequently, that they may not be modified or used for any purpose other than the support to a given ECI, and that the statement of supports generated complies with the model set out in Annex III [article 6.4.a), b), c)]. For that purpose, by 1 January 2012, the Commission would make available an open-source software incorporating the relevant technical and security features and set out detailed technical specifications for online collection systems. Spanish citizens are also allowed to express their support for agenda initiatives by way of electronic signature. Art. 7.4 of the Constitutional Law 3/1984 merely acknowledges the validity of the electronic signature and refers to the "corresponding legislation" for determining the conditions of its implementation. Although there is not a specific law regulating electronic signature in support of popular initiative, the *Junta Electoral Central* (the national electoral Committee) has established in a Resolution issued on 28 May 2009 that the use of electronic signatures supporting a popular initiative must comply necessarily with national Law 59/2003 on Electronic Signature. The electoral committee considers that the promoting committee is responsible for proving that its own register of electronic signatures fulfils all the technical requirements established in this regulation. The Catalan Law 1/2006 of popular legislative initiative has also provided for electronic signatures in the presentation of the initiative, in its first additional Provision. The legislator refers in this case to the instructions that the Government of the *Generalitat* may decree in the future, ensuring by all means, the authenticity of the electronic signatures presented. It is clear that the electronic signature will multiply the possibilities of success of the campaigns considering that a large quantity of potential signatories, who today do not sign proposals since they are not in contact with the promoters, may gain direct access to the propositions and sign them anywhere.

The organisers could extend the collection campaign for twelve months from the date of registration of the proposed citizens' initiative (art. 5.5 Regulation 211/2011). With the exception of the agenda initiative from Portugal where the organizers do not have a specific deadline to collect signatures, the laws on agenda initiative from Member States also establish a time limit that range between 60 days( Slovenia) and 9 months (Spain). In Switzerland, the signature lists for a popular initiative must be submitted together at the latest 18 months from the date of publication of the text of the initiative in the Official Federal Gazette. Once the collection campaign has expired, the "relevant competent authorities" designated by the Member States have to verify and certify the collected statements of support within a period of three months (art. 8.2). The verification of the statements of support, which must be done "on the basis of appropriate checks", could differ according to the national laws and practices of the Member States. In any case, the verification could be based on random sampling. There are no precedents of this kind of verification method of the signatures in support of a given national popular initiatives in the Member States. In European comparative law, the promoter submits the signed sheets to the relevant administrative or parliamentary body which verifies the registration of all the signatories in the electoral registers and counts the number of valid signatures gathered. However, random sampling is a well-known method of signatures' verification in the U.S.A. This is the case of California, where the county officials choose randomly the 3% of the signatures filed in their county (or 500 signatures in case the result of the operation is inferior to this amount) and then determine how many of those signatures are valid. In counties where 500 or fewer signatures were submitted, the county must inspect all the signatures for validity. After the Office of the Secretary of State has collected information about validity rates from all counties where signatures were filed, the office applies a formula to determine the statewide total of valid signatures (Section 9030-9035 of the California Elections Code).

## **The Submission of the ECI to the Commission**

Once the verification of the Statements of support has concluded, the designated authorities of the Member States have to issue a document certifying the number of valid statements of support received. The organizers will then submit the ECI to the Commission “accompanied by information regarding any support and funding received for that initiative” (art. 9, paragraph 1). Article 9 refers to the Regulation 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding in order to set out the amount of support and funding received from any source in excess of which information is required.<sup>18</sup> Such a provision has no precedents in European comparative law. Once the ECI has been properly submitted, the Commission must publish it in the register and receive the organizers who will explain “in detail the matters raised” [article 10.1.a)]. Art. 11 of the Regulation foresees a public hearing at the European Parliament for the organisers who will have the opportunity to defend the political opportunity of the ECI before the Commission, the MEP and “other institutions and bodies of the as may wish to participate”. This is a very positive provision that would allow the involvement of the citizens’ committee in the EU democratic deliberations.

Finally, the Commission has to take a decision, within three months from the date of submission, on the political opportunity of the ECI, declaring in a communication the “action it intends to take, if any, and its reasons for taking or not taking that action” [article 10.1.c)]. In this communication, the Commission sets out its “legal and political conclusions” about the citizens’ initiative. This provision is quite confusing given that the ECI had been previously subjected to a legal examination by the Commission. We argue that this “legal conclusion” could not be a new technical judgment on its admissibility but a final decision on the suitable

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<sup>18</sup> “A political party at European level as well as a political foundation at European level shall declare its sources of funding by providing a list specifying the donors and the donations received from each donor, with the exception of donations not exceeding EUR 500 per year and per donor”, article 6, b) of the Regulation 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding.

kind of legal act chosen in order to draft the ECI (“regulation”, “directive”, or “decision”) and the appropriate legislative procedure. As Auer argues, it seems that the Commission would be entitled “to change the title, the form and the language of the initiative before it gives its formal assent”.<sup>19</sup> It could be desirable that the Regulation had also allowed the participation of the citizens’ committee in the ECI’s drafting process. The internal regulation of the EU legislature, particularly the Rules of Procedure of the European Parliament, should also grant the intervention of the citizens’ committee along the whole law-making process. In this regard, Spanish legislation on agenda initiative allows a person appointed by the promoting committee to intervene in defence of the law proposition before the plenary session of the Parliament. The agenda initiatives sent to the Parliament of Aragón, the Parliament of the Canary Islands and the Parliament of the Balearic Islands may also be defended in the plenary session by a member of the promoting committee. In the case of Galicia, the defence may be exercised by any of the signatories appointed by the promoters. In Catalonia, the intervention of the promoters in the plenary debate is guaranteed by the Regulation of the Chamber: a member of the promoting committee opens the plenary debate presenting the proposition in fifteen minutes. Furthermore, the Catalanian legislation entails the possibility that the promoters may defend the initiative before the legislative committees which could introduce, later on, particular amendments to the citizens’ proposal.

## **Conclusion**

After this preliminary approach, we could conclude that the Regulation 211/2011 on the procedures and conditions required for an ECI has incorporated many of the best practices on popular initiative coming from comparative law. In this regard, we could be already optimistic about the democratic potential of the ECI. However, it should be noted that the functionality of this device will not only depend on a participatory-friendly legal regime. It is also clear that

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<sup>19</sup> Auer A., “European Citizens’ Initiative”, *op. cit.*, p. 84.

the influence of the ECI on the democratic life of the Union will depend on the receptive attitude from institutions towards the reasonable political demands raised by citizens. In addition, civil society organisations behind the citizens' committees will have to make a considerable effort in order to arise political debate beyond domestic affairs and encourage EU citizens to become actively involved. Finally, we argue that participatory governance by means of citizens' initiative is not a definitive solution to improve the democratic quality of EU: participation of civil society organisations in the policy-making can never replace spread political participation through representation. Direct participation and political representation should thus be seen as complementary strategies to democratise the EU.

Anticipating the attitudes of European civil society organisations to the European Citizens' Initiative (ECI): which public sphere may it promote?<sup>20</sup>

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<sup>20</sup> Aspects of this paper have been presented earlier at the "Communicating European Citizenship" organised by UACES in London in March 2010 and at the "The European Citizens' Initiative – a first assessment" seminar organised by the College of Europe in Bruges in January 2011.

# **Anticipating the Attitudes of European Civil Society Organisations to the European Citizens' Initiative (ECI): Which Public Sphere may it Promote?**

by Louis Bouza Garcia

## **The history of the ECI: two paradoxes**

This paper takes the recent regulation on the European Citizens' Initiative (ECI) as an opportunity to apply some insights from recent literature on the evaluation of participatory democracy<sup>1</sup> to the European Union. In this sense, the paper evaluates the ECI's possible impact on the EU's participatory model and considers that it may become particularly important in terms of inclusion and enlargement of the European public sphere. The ECI is not the first experience of the EU with participatory democracy. Since the White Paper on European Governance<sup>2</sup> the Commission considers its structured relations with civil society as a part of a new mode of governance that enhances the EU's legitimacy through the participation and empowerment of citizens' organisations. This paper considers some participatory democracy mechanisms such as regular consultation of civil society as a complement to representative democracy. The creation of a series of principles for the consultation of civil society organisations<sup>3</sup> is a direct consequence of the 2001 White Paper on Governance. The ECI introduces an important change in the way in which civil society organisations, which are likely to become the main users of this mechanism, engage European institutions. It does not consist in associating organised civil society to the decision making

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<sup>1</sup> Smith G., *Democratic Innovations* (Cambridge: Cambridge University Press, 2009); Parés Marc (ed.), *Participación y calidad democrática. Evaluando las nuevas formas de democracia participativa*. (Barcelona: Ariel, 2009).

<sup>2</sup> European Commission, *White Paper on European Governance* (Brussels: European Commission, 27 July 2001), p. 16.

<sup>3</sup> European Commission, *Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission* (European Commission, 11 December 2002).



process but rather in giving an important agenda setting device to organisations able to mobilise 1 million citizens across Europe.

There is an interesting paradox about the attitudes towards the ECI: although it is publicly praised as an important device for the democratisation of the EU, a number of influential actors are sceptical about its potential effects. Interviews carried out with a number of EU civil servants and civil society officials reveal that most members of the policy community that were influential in the inclusion of the article on the ECI into the European Constitution<sup>4</sup> did not expect the ECI to have any meaningful impact on EU affairs. The second paradoxical datum that is important for the evaluation of the role of civil society within this mechanism is that, although it seeks to empower large numbers of citizens, the ECI was not the result of active mobilisation by millions of citizens but of efficient lobbying by citizens' organisations in the Convention on the future of Europe.

Let it be clear from the beginning that this paper presents a series of hypotheses that will only be testable once the initiative is in force, although they are formulated on the grounds of the evaluation of current EU participatory mechanisms. Thus two preliminary criticisms may be expected based on two considerations. First, the ECI rests on a very weak conception of participatory democracy, since it is a very soft mechanism. Additionally the paper argues that the ECI it has little potential for bottom up deliberation or even top down communication. The paper argues that despite these objective shortcomings the initiative could nevertheless make a relevant contribution to the emergence of a European public sphere.

There are at least two reasons why the political context is favourable to the strong development of the initiative. First, the European Citizens' Initiative is a further step in the EU's activism in countering charges of a democratic deficit by promoting a governance model

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<sup>4</sup> Bouza Garcia Luis, "From Civil Dialogue to Participatory Democracy: The Role of Civil Society Organisations in Shaping the Agenda in the Debates on the European Constitution", *Journal of Contemporary European Research*, Vol. 6, No. 1, 2010, pp. 85-106.

comprising participatory and deliberative innovations complementing representative democracy. In this process participation by organised civil society has acquired a prominent place of honour.<sup>5</sup> Consequently, EU institutions may be willing to turn the ECI into a significant participatory tool. Second, the possibility that the ECI empowers organised groups may well be one of its strengths. As a matter of fact, the general public's disinterest in EU matters is not shared by civil society organisations, which have increasingly invested attention, time and resources in order to follow and influence the EU policy making-process.<sup>6</sup> The ECI can thus rely on the existence of a constituency of civil society organised at EU level that may under adequate circumstances find an interest in using this participatory tool to increase their salience in the EU policy-making process. The paper focuses on the consequences that the ECI may have on the institutional and political life of the EU, in particular regarding the role of civil society, as a consequence of the specific goals of the main actors of the process. A sociological institutionalist approach is deemed particularly useful to do so because of the paper's focus on the social construction and effect of an institutional device such as the ECI, and its ability to foresee social action at the field level, in this case that of European organised civil society.

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<sup>5</sup> Armstrong Kenneth A., "Rediscovering Civil Society: The European Union and the White Paper on Governance", *European Law Journal*, Vol. 8, No. 1, March 2002; Curtin Deirdre, "Private Interest: Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance", *Social and Legal Studies*, Vol. 12, No. 1, 2003, pp. 55-75; del Río Villar Susana, "La sociedad civil y su progresiva participación en la construcción europea: de la Conferencia Intergubernamental de 1996 a la Convención constitucional. Un proceso constituyente para la Unión, un referéndum para el demos europeo", Tesis doctoral, Universidad del País Vasco, 2004; Joerges Christian, "Deliberative Supranationalism –Two Defences", *European Law Journal*, Vol. 8, No. 1, 2002; Greenwood Justin, "Review Article: Organized Civil Society and Democratic Legitimacy in the European Union", *British Journal of Political Science*, Vol. 37, 2007, pp. 333-357; Saurugger Sabine, "The social construction of the participatory turn: The emergence of a norm in the European Union", *European Journal of Political Research*, Vol. 49, 2010, pp. 471-495; Magnette Paul, "Democracy in the European Union: why and how to combine representation and participation", in: Smismans Stijn (ed.), *Civil Society and Legitimate European Governance* (Cheltenham: Edward Elgar, 2006), pp. 23-41.

<sup>6</sup> Greenwood Justin, *Interest Representation in the European Union*, 2nd ed., European Union series / Palgrave Macmillan (Houndmills: Palgrave Macmillan, 2007); del Río Villar Susana, *Ciudadanía activa en Europa: proceso participativo y nuevos espacios para la comunicación*, 2nd ed. (Madrid: Grupo Difusión, 2008); Balme Richard and Chabanet Didier, *European Governance and Democracy* (Lanham: Rowman & Littlefield, 2008).

This paper first presents different perspectives taken by academic literature on the relationship between participatory mechanisms and the emergence of a European public sphere. It finds that while initially the ECI will do little to increase deliberation, in the long run it can contribute to increase the politicisation of the EU. Second, the paper discusses the circumstances and mechanisms under which the citizens' initiative could foster the creation of the public sphere. It points out that appropriate implementation of the regulation on the ECI could transform the attitude of the main public of the EU, organised civil society and movements, and unleash a competition for the usage of this mechanism. The final section of the paper reflects on the effects of this mechanism that can stimulate contention at the EU level and make uninterested or hostile citizens participate in the system.

### **Which kind of public sphere may it foster?**

The relationship between political participation and the public sphere is worth exploring, as advocates of participation like Pateman or Barber<sup>7</sup> consider that it entails positive consequences for society at large beyond the mere political system. In his argument for strong democracy, Benjamin Barber<sup>8</sup> analyses the dialogic relationship between the citizen and his community. In Barber's approach, which resembles the Athenian *isegoria*, dialogue, or talk in his own terms, is the process by which citizens and community interests are dialogically and mutually elaborated rather than opposed such as in liberal conceptions. Among nine functions of political talk that Barber identifies (178-198), two appear particularly important when we consider the EU's participatory model contribution to the emergence of a European public sphere: agenda-setting extended by talk beyond elites, and community building as the creation

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<sup>7</sup> Pateman Carole, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970); Barber Benjamin, *Strong democracy. Participatory politics for a new age*. (Berkeley and Los Angeles: University of California Press, 2003).

<sup>8</sup> Barber, *ibid.*, pp. 173-198.

of common interests and goods. Other authors<sup>9</sup> consider that participatory democracy may contribute to strengthening civic attitudes and civil society, as well as include excluded groups and bringing representatives closer to the people.<sup>10</sup> All of these mechanisms may, in turn, contribute to strengthening the European public sphere.

Some aspects of the European citizens' initiative fit into a model of strong democracy based on the public sphere<sup>11</sup> because the success of signature collection campaigns' depends on the ability of the ECI promoters to construct and communicate effectively a cause appealing to citizens. In particular, the ECI fulfils some of Barber's expectations about the potential of participation for equal access to political argumentation. First, it is a decentralised device with the potential to empower political "outsiders" in that it allows citizens to construct and promote autonomously a cause that is not or is inadequately represented by the existing means for democratic expression such as political parties or the media. Furthermore, unlike opinion polls, citizens' panels or deliberative polls, it is not a measurement of public opinion but the expression of the political determination of a significant, albeit a minority, number of citizens.

In any case, this discussion has to be reframed in the context of the existing European public sphere. The interest of the general public and of mass media for the EU, and in general for European topics, is very low and limited to rare, "spectacular" events. This leads some authors<sup>12</sup> to discard any consideration of the European public sphere for as long as these actors (media and general public) ignore European topics. However, it is possible to find European communicative spaces dominated by different actors and to ask which role these

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<sup>9</sup> Parés Marc and Resende Paulo E.R., "Tipos y prácticas de participación promovidas por la administración pública: sus límites y radicalidades", in: Parés Marc (ed.), *Participación y calidad democrática* (Barcelona: Ariel, 2009), pp. 98-100.

<sup>10</sup> *Ibid.*, pp. 92-94.

<sup>11</sup> Giorgi Liana and Crowley John, "The political sociology of the European public sphere", in: Giorgi Liana, Von Homeyer Ingmar and Parsons Wayne (eds.), *Democracy in the European Union: Towards the emergence of a public sphere* (London/New York: Routledge, 2006), pp. 1-23.

<sup>12</sup> Delanty Gerard and Rumford Chris, *Rethinking Europe. Social theory and the implications of Europeanization*. (London/New York: Routledge, 2005).

spaces play in the emergence of a European public sphere.<sup>13</sup> This approach, thus, pays attention to the effect of the communication between European institutions, political leaders and specialists of EU matters, such as organised civil society, for the emergence of a European general public sphere. Following this approach, it is possible to distinguish three different models of the relationship between political participation, including the ECI, and the emergence of a European public sphere.

### **Top down Europeanisation**

The first model corresponds to the EU institutions' expectations concerning participatory mechanisms: they conceive them as information and communication devices. The European Commission has elaborated a whole discourse about the involvement of civil society in the governance of the EU.<sup>14</sup> Commission officials and academics share a vision that democracy at the EU level presents differences with national models and hence representative democracy in the EU is to be complemented with other, participatory or deliberative, models of democracy. Following the rejection of the European Constitution in France and the Netherlands in 2005 the Commission tried to associate civil society consultation to the EU's communication policy.<sup>15</sup> This strategy aims at "communicating Europe in partnership"<sup>16</sup> and tries to get the general public interested in the fairly specialised consultations of civil society happening in Brussels.

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<sup>13</sup> Eriksen Erik Oddvar, "Conceptualising European public spheres. General, segmented and strong publics", in: Fossum John Erik and Schlesinger Philip (eds.), *The European Union and the Public Sphere. A communicative space in the making?* (London: Routledge, 2007).

<sup>14</sup> It is interesting to note that the debate about the democratic model and its "complements" is a tool for inter-institutional debates, as the Commission, the Parliament and the Economic and Social Committee have different positions, Smismans Stijn, "European Civil Society: Shaped by discourses and institutional interests", *European Law Journal*, September 2003.

<sup>15</sup> European Commission, *The Commission's contribution to the period of reflection and beyond: Plan D for Democracy, Dialogue and Debate* (Brussels: European Commission, 13 October 2005); European Commission, *White Paper on European Communication Policy* (Brussels: European Commission, 1 February 2006).

<sup>16</sup> European Commission, *White Paper on European Communication Policy*, *ibid.*

The European Commission seems to extend this expectation to the ECI. In the explanatory memorandum of its proposal for a regulation on the citizens' initiative, the Commission considers that the ECI "provides a singular opportunity to bring the Union closer to the citizens and to foster greater cross-border debate about EU policy issues, by bringing citizens from a range of countries together in supporting one specific issue".<sup>17</sup> This expectation seems to imply that by signing petitions citizens will automatically be better informed on what the EU does and will become more knowledgeable of the EU. The ECI's contribution to vertical Europeanisation will, however, be minimal since it requires only a small measure of communication which is likely to happen in a "vertical way", that is, appealing to a special section of citizens' interests (for instance environmental or health concerns) which is a type of communication likely to touch on already well informed citizens.<sup>18</sup>

Thus this approach expects the ECI to be a way to foster deliberation and knowledge on EU affairs. Despite the abovementioned potential of the ECI to link directly the public and EU decision making, citizen initiatives do not fit well in a deliberative model because signature collection does not provide evidence about the usage of argument or the transformation of the points of view of the contenders. In this sense, they rather constitute a political participation and interest aggregation mechanism. Regarding knowledge, there is little evidence to support the hypothesis that citizens will become better informed on the EU by merely signing an ECI. In fact, the campaigns are unlikely to address citizens concerned with European matters, but rather citizens concerned by a specific cause or problem that must be addressed at European level. Additionally, the extent to which signatories will follow the

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<sup>17</sup> European Commission, *Proposal for a regulation of the European Parliament and of the Council on the citizens' initiative* (Brussels: European Commission, 31 March 2010), p. 3.

<sup>18</sup> Bouza García Luis, "Can segmented publics foster a general public sphere in the EU? An example from the consultation practices of the European Commission", *Observatorio (OBS\*)*, 2009.

issue after they endorse a specific initiative will depend on the promoters to keep them informed.

However, this paper's argument is that this tool can strongly contribute to deliberation on the European Union beyond the extremely specialised circles<sup>19</sup> or very vague ones in terms of political will formation<sup>20</sup> where the literature has usually placed deliberation on EU affairs. It would do so by providing the conditions for the emergence of debates about European affairs and lifting the entrenched resistances of political parties or the media.<sup>21</sup> It is in this sense that the citizens' initiative could be a significant trigger for a functional reflexive democratisation process,<sup>22</sup> because it would create the initial conditions for a demand of further democratisation. Building on Eder and Trenz's more sophisticated conception, the general argument would be that the ECI could attract the attention of the media and foster greater debates attracting citizens' attention.

However it is unlikely that the mere usage of the ECI will enlarge the debates on the EU. First, this mechanism seems to rely on imitation, implying that the more the ECI would be used, the more it will attract other initiatives. In this sense, this does not substantially change the media approach to the EU, since previous democratic changes (direct election of the EP, increase of co-decision procedure between the European Parliament and the Council or the deliberation of the European Convention) did not spark a substantial, let alone sustained, attention of the media for the EU. This is confirmed by the fact that none of the numerous European signature collection campaigns initiated since the Convention's decision

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<sup>19</sup> Joerges, "Deliberative Supranationalism – Two Defences", *op. cit.*

<sup>20</sup> Boucher S., "Possible to get citizens interested in EU", *EurActiv*, 26 October 2007, <http://www.euractiv.com/en/opinion/boucher-possible-get-citizens-interestedeu/article-167912>; Joerges, "Deliberative Supra-nationalism – Two Defences", *op.cit.*

<sup>21</sup> Schmitter Philippe C., "On the Way to a Post-Functionalist Theory of European Integration", *British Journal of Political Science*, Vol. 39, No. 1, 2009, pp. 211-215.

<sup>22</sup> Trenz Hans-Jörg and Eder Klaus, "The Democratising Dynamics of a European Public Sphere: Towards a Theory of Democratic Functionalism", *European Journal of Social Theory*, No. 6, 2004, pp. 5-25.

to propose the admission of a European citizens' initiative, in 2003,<sup>23</sup> has attracted significant media attention.

Second, the ability of the ECI to attract the media attention will not depend on the mechanism itself but on the subject matter addressed by the ECI. In this sense the media are likely to pay more attention to "exotic" initiatives which are unlikely to be taken on board by the Commission, either because they are opposed to its own agenda, e.g. eurosceptic ones, or simply because they are beyond its own mandate. A good example may be the popular question of the European Parliament seat, on which the Commission has no competence to act or to initiate any change. Additionally, failed initiatives, particularly if they touch upon controversial issues, will receive much more attention. In this model the contribution of the ECI to the attention of the media may be limited or rather counterproductive from the EU institutions point of view.

### **Democratisation as a result of competition**

An alternative approach to the citizens' initiative's influence on the emergence of a European public space puts the focus on indirect citizens' mobilization by organisations trying to influence EU politics. This model does more justice to the abovementioned reflexive democratisation argument, by focusing not on an automatic spillover from the EU institutions to the general publics, but on induced spillover by political actors. In this model, the generalisation of the debate on the EU is not the result of the EU institutions or other political actors' activism, but of the basic mechanisms of a political system and a public space: competition between these actors for attention or political resources. It thus focuses on one of the EU's key publics: organised groups and specialists.

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<sup>23</sup> Fischer Christine and Lichtbau Theresa, "Chapter 8: European Citizens' Initiative – interim results", in: Pichler Johannes W. (ed.), *We change Europe! The European initiative – Art 8b(4) Treaty of Lisbon* (Wien: Neuer Wissenschaftlicher Verlag, 2008), pp. 333-352; Kaufmann Bruno, *The European Citizens' Initiative Handbook* (Luxembourg: Green European Foundation, November 2010).



The ECI is considered here as a political tool likely to be used by these actors inasmuch as it provides them with access to the EU political system. From a formal point of view the European Citizens' Initiative is a weak device as it does not impose strong legal obligations to act upon the institutions.<sup>24</sup> From an institutional perspective however, it is relevant since it endorses officially a form of collective action. Such endorsement may turn the ability to design and carry out pan-European campaigns mobilising public opinion at the national level into a more influential form of collective action in the EU.

The literature has repeatedly pointed out that civil society organisations tend to use insider access collective action registers when addressing EU institutions<sup>25</sup> and that the grassroots level is often not associated by the European level organisations when engaging in policy discussions at EU level.<sup>26</sup> If the capacity to organise signature collection campaigns and to mobilise citizens becomes a more valuable strategy, the Citizens' Initiative may unleash a competition between different organisations that so far used insider access strategies. Thus it may, potentially, restructure the relations among these actors and between them and the institutions, by creating a cleavage between those able and willing to use the new tool and those attached to older forms of collective action.

In such a scheme, general public deliberation on the EU would acquire an increased political relevance, as it would be closely associated to the competitive dynamics in the EU public sphere, which is far from being the case up to now: civil society organisations take part in deliberative discussion fora, but the dynamics active in these specialised public spaces do not provide room for the general public. Thus, it appears that the competition between

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<sup>24</sup> Mincheva Elitsa and Szeligowska Dorota, "The regulation implementing the European Citizens' Initiative" (presented at "The European Citizens Initiative – A first assessment", College of Europe, 2011).

<sup>25</sup> Balme and Chabanet, *European Governance and Democracy*.

<sup>26</sup> Sudbery Imogen, "Bridging the Legitimacy Gap in the EU: Can Civil Society Help to Bring the Union Closer to its Citizens?", *Collegium*, No. 26, 2003, pp. 75-97; Mahoney Christine, "Networking vs. allying: the decision of interest groups to join coalitions in the US and the EU", *Journal of European Public Policy*, Vol. 14, No. 3, April 2007, pp. 363-383; Kohler-Koch Beate, "Is there an EU model for participatory governance and does it hold its promises?" (presented at the What Can Canada and the European Union Learn from Each Other?, University of Victoria, 2010).

organisations using different collective action registers for the attention of the institutions may have a potential for the politicisation of debates and discussion on the EU that has been identified as a need for the emergence of a democratic public sphere.<sup>27</sup>

This approach endorses potential criticisms that the ECI does not empower citizens, but well-organised and resourceful groups. The argument is that the ECI is not easy to launch by ordinary citizens and requires a degree of political organisation and expertise that is only available to organisations. However, it is difficult not to see that as a democratic progress. Firstly, it empowers civil society organisations by providing them an institutionalised way to introduce proposals. And secondly, as the next section will argue, it provides them with a strong motivation to engage directly with their grassroots members and citizens in general on EU topics. Since most of these organisations tend to prefer insider access' strategies this is with no doubt a major progress. That said, organisations will only use this mechanism if it is likely to be successful and if the costs are likely to be inferior to the returns. The following section examines how EU institutions may act on both aspects.

### **Under which conditions will civil society use the ECI?**

The ECI may make an important contribution to the enlargement of the European public sphere if its currently most active publics, mainly civil society organisations active at the EU level, use it regularly. However, two obstacles to the generalisation of the usage of ECIs by civil society seem to emerge. First, the regulatory and practical difficulties of organising European initiatives are addressed. Second, the attitudes of EU level civil society organisation towards the initiative are considered, in particular by comparing them to their participation via other tools such as civil dialogue

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<sup>27</sup> Giorgi and Crowley, "The political sociology of the European public sphere", *op. cit.*

## **Institutional difficulties: a relatively favourable regulatory environment**

At first sight the European Citizens' Initiative is rather generous: compared to similar schemes used at national level,<sup>28</sup> the threshold of required signatories is rather low since one million citizens represent only 0.2 % of the total population of the EU.

However this does not mean that it will be easy to gather signatures. The weakness of the general European public being the main challenge, the regulatory framework of the initiative is decisive for a successful instrument. Although observers of the early stages of the institutional debate on the regulation<sup>29</sup> have pointed out that the regulation proposed by the Commission established major hurdles for the initiative, it appears that the finally adopted Regulation makes the ECI much easier to implement as a result of the intervention of the European Parliament. The design of the instrument, which is covered elsewhere in this issue,<sup>30</sup> is a decisive factor in the decision of civil society to use the ECI to try to influence EU politics: this is only likely to happen if the benefits in terms of influence outnumber the costs of organising an ECI. The main cost consists in gathering one million signatures in at least a quarter of the member states. The best example of the difficulty for organisations to gather this number of signatures is the failure of the European Trade Union Confederation (ETUC), which represents sixty millions workers across Europe, to reach this number in its campaign to defend public services.<sup>31</sup> This cost is significantly increased by the uncertainty linked with the admissibility of the initiatives, and partly waived by some of the ECI regulation provisions. By contrast, the benefit offered to the supporters appears small by

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<sup>28</sup> Cuesta López Víctor, *Participación directa e iniciativa legislativa del ciudadano en democracia constitucional* (Pamplona: Aranzadi, 2008).

<sup>29</sup> Kaufmann, *The European Citizens' Initiative Handbook*, *op. cit.*, pp. 6-10 and p. 67; Bouza Garcia Luis, *Democracia participativa, sociedad civil y espacio público en la Unión Europea*, Estudios de Progreso (Madrid: Fundación Alternativas, 23 December 2010), pp. 26-31.

<sup>30</sup> Mincheva and Szeligowska, "The regulation implementing the European Citizens' Initiative", *op. cit.*

<sup>31</sup> Campaign for "High-quality public services, accessible to all" <http://www.etuc.org/a/3093> (accessed for the last time on 12/07/2011).

comparison to existing mechanisms, unless the Commission's political stance shifts the relative cost of these mechanisms.

Second to gathering one million signatures, the most relevant cost for the organisation of a European citizens' initiative is gathering the signatures in at least 7 member states (1/4 of the total), the Regulation's definition of the "significant number of Member states" mentioned by the Treaty. Whereas the demand that ECIs represent genuinely European causes contributes to fostering the emergence of a public sphere, it is this very absence that makes it difficult to organise the initiatives. It would have been paradoxical to establish a demanding threshold (1/3 of Member states, such as in the Commission's initial proposal) for the sake of the creating more European causes, as undertaking an would be extremely costly. In this sense, collecting signatures in 7 different countries implies costs like translation and organisation, including coping with the different provisions for verification of signatures, which are beyond the capacities of most organisations in Europe.

These non-negligible costs are significantly increased by the effect of uncertainty as to the admissibility not only in political but legal grounds, as ECIs have to be presented on matters and issues on which the Commission can act. Although the Commission will discard initiatives *manifestly* beyond the scope of its powers, it will only proceed to a detailed analysis on the admissibility after signature collection has been completed. Whereas it seems unlikely, dismissing an initiative having 1 million signatures on formal grounds is a possibility that introduces uncertainty as to the effect of successful campaigns and increases the costs of using the ECI.

Additionally, the regulation includes some dispositions that could be considered as "cost waivers", in that they facilitate the process. The most obvious one, which was present in the first version of the Commission's proposal, is the possibility to collect statements of support online. This is most likely to change the very conception of signature collection

campaigns: it can be expected that online campaigns relying on social media and viral diffusion will significantly reduce the time and effort needed to collect the signatures. The second one is the requirement to set up an organisation committee, which is a formal recognition of the promoters of the initiative. Although this recognition is a soft one when compared to several national frameworks because there are no provisions about cost reimbursement lest the possibility to withdraw the initiative,<sup>32</sup> the possibility for a group of citizens to be involved at some point of the decision making process by formally presenting the initiative to the institutions is a significant novelty for the EU political system.

It thus appears that despite imposing some non-negligible costs, an effort was made to make the Regulation relatively user-friendly by including as well some significant innovations to waive these costs. The next section suggests however that some of the more relevant difficulties and opportunities lay beyond the formal question and are embedded in the nature of the EU political system and its weak general public sphere.

Furthermore, the regulation has not addressed a procedural question which may be politically sensitive, which is the confluence of similar or totally opposite initiatives.<sup>33</sup> Although this eventuality has been regulated in some national legislation in order to avoid a sort of inflation of initiatives over topics already addressed and that initiatives are coherent, the EU seems to have decided to deal with this issue as a political matter. However, this challenge may provide as well some opportunities for pan-European deliberation if it is not exclusively dealt by the Commission's discretionary decision but by a procedure aiming to foster a debate among these conflicting proposals. A first obvious step would be to provide information to organisers of existing potentially conflicting proposals and possibly favour a public debate among those before or during the signature collection. A second idea may be to

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<sup>32</sup> Cuesta López, *Participación directa e iniciativa legislativa del ciudadano en democracia constitucional*, op. cit., pp. 225-233.

<sup>33</sup> Cuesta López Víctor, "The European Citizens' Initiative in comparative perspective" (presented at "The European Citizens Initiative - A first assessment", College of Europe, 2011).

delay presentation of any of these initiatives until the other has concluded its period of collection in order to contrast whether two conflicting proposals are really on the agenda. Should this finally occur, the Commission would have a very strong ground to elaborate its own proposal albeit letting the Committees of both proposals be heard before the Parliament. Although this may require some adjustments to the Regulation, it may foster a genuinely deliberative policy-making process.

### **Political difficulties**

As it was pointed above, the inclusion of the ECI in the Treaty is the result of a lobbying campaign by civil society organisations.<sup>34</sup> However the organisations that were the most influential in this achievement, IRI and *Mehr Demokratie*, are not regularly involved in the regular “civil dialogue” that was shaped by civil society consultations by EU institutions between 1996 and 2003.<sup>35</sup> On these grounds arises an unexpected political obstacle to the general usage of the ECI: the well-established European civil society organisations are unlikely to use the ECI because they have a preference for alternative participatory mechanisms.

#### *A sceptic attitude by established European civil society organisations*

When the forms of action and advocacy of civil society organisations active at EU level are considered, it appears that signature collection and initiatives are infrequent in contrast with a high degree of involvement into stable participatory systems. Whereas this obviously does not make these organisations unable to use the initiative, it casts a doubt about

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<sup>34</sup> de Clerck-Sachsse Julia, “The emergence of the European Citizens’ Initiative in the European Convention” (presented at “The European Citizens Initiative - A first assessment”, College of Europe, 2011).

<sup>35</sup> 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”, *op. cit.*

these organisations willingness to use this tool,<sup>36</sup> in particular if one compares it with the influence they can achieve via other less costly mechanisms.

To start with, if one considers the twenty-two organisations that were most active in the abovementioned consultations on participatory democracy in the EU, only three of them asked the European Convention to include principles of direct democracy in the European Constitution. The aim of the majority of these organisations was to promote a system of institutionalised access of civil society organisations to the European institutions. Regarding the citizens' initiative, the position of these organisations could be summarised in the following extract from an interview with a member of the Social Platform, one of the leading organisations in the abovementioned group:

“[...] we did not ask for the citizens' initiative, it was a very open process, and that came from other people. [...] It was not our idea, but we were very happy that it was included [...].”<sup>37</sup>

This quote is a good summary of the position of these organisations' towards the citizens' initiative: it is considered a positive evolution, but not as the main mechanism of the model of participatory democracy that they were promoting.

Turning now to the reactions of these civil society organisations to the recent consultation on the Green Paper on the citizens' initiative,<sup>38</sup> it is noticeable that only eight organisations out of the abovementioned twenty-two did actually contribute to this consultation. This confirms that the European Citizens' Initiative is far from being a priority for the organisations that were involved in the inclusion of civil dialogue in the Treaty article on participatory democracy.

Qualitative analysis of these contributions shows a generally positive but distant attitude. Four of these contributions are very supportive of the ECI. However, another group

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<sup>36</sup> de Clerck-Sachsse, “The emergence of the European Citizens' Initiative in the European Convention”, *op. cit.*

<sup>37</sup> Interview with a member of the Social Platform, carried out in Brussels in February 2009.

<sup>38</sup> European Commission, *Green Paper on a European Citizens' Initiative* (Brussels: European Commission, 11 November 2009).

of four organisations wrote to ask the Commission to carry out action as well on other participatory tools. The following example from the Social Platform position paper stands out as a confirmation:

“Social Platform welcomes the Green Paper on the citizens’ initiative. As a response, Social Platform calls on the European Commission to launch a public consultation on how to implement the first part of the Lisbon Treaty article 11 on civil dialogue. [...] This would ensure that both parts of the article are properly implemented. Social Platform would like to stress that the *right to petition* is not the only new instrument related to participatory democracy that the Treaty of Lisbon introduces into EU decision making processes.”<sup>39</sup>

It thus appears that there is little appropriation of the European Citizens’ Initiative by the organisations, which had advocated for better access to EU institutions for organised European civil society. It can be argued that this attitude is connected to the modest place that the mobilisation of activists, supporters and grassroots members plays, in general, in the collective action register of these organisations.

### *Powerful alternative tools*

The lack of connection between the demands of European-level civil society organisations and their grassroots members and their difficulty to mobilise them was clear as well during the European Convention, when civil society organisations obtained the inclusion of an article on participatory democracy in the Treaty:

“And then we have the, [...] CONCORDs and the Social Platforms, who in a way delude themselves about the way they are making impact. The Convention was where their credibility was smashed. It was smashed because they could not deliver, they made a lot of noise by saying: ‘Our members are not happy, our members would want this...’, and they got a lot of what they asked for. And then when the politicians would come and say: ‘And now your members will be happy and they will be supportive?’ ‘Oh! There’s no way we can contact them’.”<sup>40</sup>

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<sup>39</sup> Platform of European Social NGOs, *Re: Green Paper on citizens’ initiative – complement it with a consultation on how to organise the dialogue with civil society organisations, as provided by article 11 of the Lisbon Treaty*, contribution of the Platform of European Social NGOs to the consultation on the Green Paper on a European Citizens Initiative, p. 1, stress on right of petition added by the author.

<sup>40</sup> Interview with a member of CONCORD, done in Brussels in September 2009.



Several reasons have been pointed out in the literature to explain this relative disconnection: the structural lack of staff,<sup>41</sup> the preference for insider lobbying styles<sup>42</sup> or to the structure of opportunities created by the institutional setup.<sup>43</sup> In a sense, mobilising members at EU level is difficult *per se* and is not really a very valuable tool in interest representation in Brussels. Thus, some organisations have developed close ties with institutions based on an exchange of expertise, support and trust which have resulted in a very large independence from their principals. This results in EU-level civil society little interest in organising campaigns akin to citizens' initiatives.

The reason for the creation of participatory mechanisms involving civil society organisations is that they are expected to be close to citizens and able to convey a two-way communication between them and the European institutions.<sup>44</sup> Whereas the involvement of organised civil society in participatory mechanisms is obviously a democratic improvement, this contributes little to bringing the EU closer to citizens if organisations do not effectively bring citizens into the process. On the one hand, civil dialogue is an important contribution to better policy making and to EU institutions accountability, but it is a minor contribution to the EU public sphere. On the other hand, demonstrations and signatures collection are an important contribution to the public sphere, but are much more costly and less efficient for organisations than participation in institutionalised dialogue.

It is thus clear that the question of the ECI efficiency and capacity to influence the EU decision making process depends of the capacity of its promoters to build up an influential

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<sup>41</sup> Sudbery, "Bridging the Legitimacy Gap in the EU: Can Civil Society Help to Bring the Union Closer to its Citizens?", *op. cit.*

<sup>42</sup> Maloney William and van Deth Jan (eds.), "Introduction", in: *Civil Society and Governance in Europe. From national to international linkages* (Cheltenham: Edward Elgar, 2008), pp. 5-7.

<sup>43</sup> Hooghe Marc, "The Political Opportunity Structure for Civil Society Organisations in a Multilevel Context: Social Movement Organisations and the European Union", in: Maloney William and van Deth Jan (eds.), *Civil Society and Governance in Europe. From national to international linkages*, *ibid.*, pp. 71-90; Mahoney, "Networking vs. allying: the decision of interest groups to join coalitions in the US and the EU", *op. cit.*

<sup>44</sup> European Commission, *White Paper on European Governance*, *op. cit.*; European Commission, *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission.*; European Commission, *The Commission's contribution to the period of reflection and beyond: Plan D for Democracy, Dialogue and Debate.*

coalition able to put political pressure on the European institutions. In this sense, the ability to mobilise public opinion may become a relevant resource yet a rare one since many European organisations will have difficulties in doing so.

### **Anticipating the effects of the ECI: competition and politicisation**

The analysis carried out so far suggests that the success of the European citizens' initiative would have the potential to contribute to the politicisation of EU affairs. One of the reasons is that it would grant a way of access to outsider organisations and causes that will introduce a controversial approach in a consensus-prone polity. The ECI may thus have a restructuring effect in the European as it may bring with it a whole set of new actors. To some extent this has been confirmed by the fact that the abovementioned consultation on the citizens' initiative had seen a number of new organisations participating and signing up to the register of interest representatives, starting with the organisations that promoted it in the Convention ('Initiative and Referendum Institute' and '*Mehr Demokratie*'), which had not signed in to the register before.

The importance of civil dialogue as the predominant mechanism for the relations between civil society and EU institutions tends to exclude less organised interests and more radical groups from EU politics. This is because influence in these fora is the consequence of repeated involvement, ability to engage with other organisations and civil servants and availability of expertise. By contrast, the ECI provides access to the organisations having alternative resources such as the ability to organise public-oriented campaigns. In this sense the ECI may be used by outsider organisations despite its weak legal rank, because this is already part of their collective action repertoire and because of the endorsement that the Treaty recognition implies.

Furthermore, the eventual emergence of a bigger weight *de facto* for the ECI would substantially increase the number of organisations willing to invest resources in ECIs. In fact, collecting signatures to petition European Institutions is something citizens and organisations could already do by virtue of freedom of expression. Thus, if the ECI is really to provide any kind of new empowerment to its promoters and signatories, it can be argued from a normative point of view that the Commission should present all successful initiatives, even if they incompatible with its own agenda.<sup>45</sup> On the one hand this would not change the Commission's formal right of initiative. On the other, it would grant that all the organisations able to conduct campaigns would have an opportunity to present their proposals to the decision making institutions. This is particularly important when it comes to eurosceptic initiatives, as their rejection without a debate would certainly deepen the EU's legitimacy crisis. Furthermore, this may contribute to turn the frequent opposition to the EU into an institutionalised opposition to the serving Commission policies. In turn, that would give the Commission and the public the opportunity to make the EU's decision-making institutions accountable. The Commission is often the victim of "blame Brussels game". However, if it presented Eurosceptic initiatives to the European Parliament and the Council, this very fact could shed light over the democratic nature of the EU decision-making process as the proposals made by participatory mechanisms will finally be decided by representative democracy institutions such as the Parliament and the Council.

This normative argument coincides as well with the foreseen attitude of the Commission. The Commission's expectation to obtain legitimacy from civil dialogue seem to have decreased, as it has not taken forward any action to modify the existing schemes and now seems to place bigger expectations on the ECI which allows a much larger citizens' participation. Creating such a *de facto* policy would thus contribute to increase both the

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<sup>45</sup> Bouza Garcia, *Democracia participativa, sociedad civil y espacio público en la Unión Europea*, *op. cit.*

number and the diversity of the initiatives, providing an important push for the emergence of a European public sphere because it would make the ability to engage with the public one of the conditions of the success of European civil society organisations. A favourable attitude by the Commission to this public sphere enhancing mechanisms can be expected because the Commission has designed programmes with this purpose for years.

The effect of such an evolution on the public sphere would be far from negligible. It would provide organised civil society with a stronger access to the policy agenda than it can be achieved by civil dialogue. In turn, it would give them a very strong motivation that does not exist now to inform, involve and mobilise their members and public opinion at large. In this sense, organisations that have traditionally been influential via insider tactics would have to compete with outsider organisations mobilising public opinion via the ECI, which would in turn give them a motivation to use it too and thus contribute to a generalisation of the ECI. This could be even strengthened if the ability to organise citizens' initiatives was to be taken into account as a way to measure the representativeness of civil society organisations participating in civil dialogue.<sup>46</sup> This proposal does not necessarily exclude advocacy organisations promoting a cause instead of their members, since advocacy organisations may very well carry out signature collection beyond their own members. Exceptions may nevertheless be formulated for organisations advocating minority interests or causes. An increased usage of outsider repertoires relying on public opinion mobilisation such as signature collection may bring some elements of a protest regime to the EU<sup>47</sup> into Commission – civil society relations making them less expertise-oriented and consensus-prone. However a radical transformation of the EU system is unlikely because the very logic of competition can conduct organisations seeking influence to suggest initiatives that can be endorsed by the European institutions.

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<sup>46</sup> *Ibid.*

<sup>47</sup> Balme and Chabanet, *European Governance and Democracy*, *op. cit.*, p. 34.

The question about the EU's politicisation is controversial because it deals directly with the transformation of the public's attitudes towards the EU. It challenges the first approach outlined in section 2, which assumes that the citizens just need more knowledge to appreciate the EU. On the contrary, it fully assumes the political nature of the EU as a mature structure where the issue at stake is no longer the polity building but its policies. Such an approach transforms the understanding of contestation as no longer a challenge to European integration but as a routine phenomenon of political competition over it. Whereas this is obviously far from being the general rule, it may well be a relevant new development for some political actors<sup>48</sup> and countries.<sup>49</sup>

It seems that the ECI may be a bigger novelty than generally expected, as it may place the Commission but also European institutions in general in the relatively new situation of managing agendas and proposals coming from outsider organisations. In this sense, the crucial issue in the future of the ECI will be the attitude that the Commission will adopt towards it. It may on the one hand choose to accept proposals advancing its own agenda and dismiss all the others. Whereas this will certainly be fully legitimate, it will miss the opportunity to turn contestation into the political system and to normalise it.

It has been argued that granting every proposal reaching one million signatures the possibility to be discussed by the institutions may unleash a politicisation of the relations between the EU institutions and organised civil society. This would happen in a sort of cycle, as the ECI would certainly turn this tool into the most powerful influence device available to organisations as it would ensure a proposal's inclusion in the decision-making mechanism, which would provide a strong motivation for organisations to turn from low to high saliency lobbying repertoires. Whereas a measure of radicalisation is expected, and will also contribute

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<sup>48</sup> Della Porta Donatella, "The Europeanization of Protest: A Typology and Empirical Evidence", in: Kohler-Koch Beate and Rittberger Bertold (eds.), *Debating the Democratic Legitimacy of the European Union* (Lanham: Rowman & Littlefield, 2007), pp. 189-208.

<sup>49</sup> Hooghe Liesbet and Marks Gary, "A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus", *British Journal of Political Science*, Vol. 39, No. 1, 2009, pp. 1-23.

to the end of constructing a public sphere, it is most likely that organisations seeking influence rather than just fame will make proposals that are acceptable to EU institutions, which would contribute to moderate some of the degree of contestation towards the polity by institutionalising opposition. In the medium-term, the conditions for success in terms of becoming actual legislation will require the construction of relevant political coalitions, and possibly reaching far more than the minimum requisites of a million signatures in 7 countries. However, the basic point is that the role of the gatekeeper is essential if such a circle is to be unleashed. Otherwise the cost of using the ECI may outnumber its predictable benefits and discourage most organisations from doing so.

## **Conclusion**

Having analysed the effect that the ECI may have on the role of European civil society organisations in the public sphere, the conclusion is that despite its weak legal and institutional profile, the citizens' initiative can play an important role in shaping a more public oriented role for European organised civil society. The paper has aimed at providing a series of plausible hypotheses on how organised civil society may use the ECI, building on available data and assessments of their collective action repertoires. That said, it is clear that these hypotheses will only be testable once the ECI becomes usable in mid-2012.

Following an institutionalist approach, the focus has been put on the political significance of the ECI. The ECI is rooted in the European Convention and on the preceding debate concerning European governance. The Commission has maintained this approach to the European democratic deficit debate in the aftermath of the rejection of the Constitutional Treaty and in the debate about the Lisbon Treaty. In this sense, the paper considers that the ECI is coherent with a decade-long policy by the Commission, making this institution friendly towards the mechanism. The paper has found the existence of a non-negligible cleavage

between civil society groups that are well-organised and represented in the EU consultative mechanisms and other outsider organisations that may start using the citizens' initiative. In this sense, it is expected that there will be a measure of competition for the EU institutions' attention among EU level civil society groups involved in civil dialogue and those using the initiative, with the possibility that the usage of the ECI could spill over from outsider to better established organisations.

Of course this possible effect is conditional on the initiative's efficacy and efficiency, that is, when the benefits it provides outweigh its costs. It has been pointed out that organising successful signature collection campaigns is a target beyond the capacities of many European organisations, despite the low signature threshold and the possibility to collect them on the Internet. In this sense, civil society organisations will only invest resources in this tool if they consider that a relevant objective can be achieved. If the Commission does not develop a supportive attitude to the ECIs, facilitating their arrival into the legislative agenda, the result may be that organisations wanting to influence EU policy making will ignore the ECI, leaving it to organisations willing to show that the EU does not listen to its citizens.

This paper's conclusions rely strongly on the expectation that the Commission will prove a commitment to participatory democracy. The Commission could do that by developing a policy extending the ECI beyond its present boundaries. The first one would be to accept all successful initiatives. This would have the advantage of enlarging the EU's public sphere by providing attention to groups that do not share the Commission's agenda. Whereas some radicalisation of EU politics cannot be excluded, it will certainly be limited to organisations seeking to build a name because initiatives contrary to EU values will be discarded at the registration and because organising an ECI is too costly for organisations to systematically present unacceptable proposals. Additionally the Commission could, at least in the early life of the initiative, develop a policy of active support for the initiative.

The ECI may prove to be a bigger innovation than it is expected by some of the actors of the civil society field as it changes the agenda setting dynamics. Until now, the access to the agenda was limited to organisations sharing the EU's general orientation. Although the ECI does not necessarily change this, it is expected that the political pressure on EU institutions to admit alternative conceptions of the EU or simply alternative policy agendas will be much higher with the initiative. This will certainly have the effect of making EU politics more contested and less prone to consensus, concentrating contention on EU policies rather than on the polity.



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# **The European Citizens' Initiative – Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis**

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## **Introduction**

Democracy is one of the founding principles of the European Union. According to Article 10(1) and Article 10(2) of the Treaty on European Union (TEU), “the functioning of the Union shall be founded on representative democracy”, “citizens are directly represented at Union level in the European Parliament” that they elect directly since 1979, and “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments”. Hence, the European political arrangement is a complex system of representation combining two different procedures of legitimisation: direct and indirect.<sup>1</sup>

Representative democracy can be conceptualised in many possible ways, as the flourishing field of democratic theory demonstrates. Voting constitutes the cornerstone of representative democracy; it is a central instance of formal political participation of citizens. While voting can be understood as a preference-aggregation mechanism, a mechanism to exercise control over officials or a procedure revealing the general will, it is necessary for the maintenance and meaningfulness of the system.

Yet, in established democracies, over the last couple of decades, there has been a steady trend of decreasing voter turnout. While lower turnout could be a sign of contentment of voters with the system, the literature rather associates it with a growing disinterest in

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<sup>1</sup> Mangiameli Stelio, “The role of the European Parliament and the principle of representative democracy”, [http://www.europeanpubliclaw.eu/paper/169-stelio-mangiameli-the-role-of-the-european-parliament-and-the-principle-of-representative-democracy.html#\\_ftn2](http://www.europeanpubliclaw.eu/paper/169-stelio-mangiameli-the-role-of-the-european-parliament-and-the-principle-of-representative-democracy.html#_ftn2) (accessed online on 15 July 2011).

politics and decreasing trust in politicians,<sup>2</sup> as far as other options of formal political participation (membership in trade unions or in political parties) or civic participation<sup>3</sup> also decline. However, as explained by Pippa Norris, the newer, informal “channels of civic engagement, mobilisation and expression” such as NGO participation, protest or consumer movements are on the increase.<sup>4</sup>

The trend of declining formal participation is not new to the European Union. Since the first direct elections of the European Parliament which took place in 1979, every following voters’ turnout has been lower, to pass from 62% to 43% in only 30 years’ time.<sup>5</sup> While the powers of the European Parliament grow with consequent treaty changes, one could expect citizens to be more interested in voting and selecting their representatives. In spite of that, the turnout progressively declines and the discourse about ‘democratic deficit’ flourishes, too.

This last concept, coined in 1979 by David Marquand<sup>6</sup>, implies that at the Union level, citizens lack proper representation, and that European institutions are not sufficiently accountable before national publics. However, Yves Mény reminds that “the debate has raged about the extent and content of this deficit”<sup>7</sup> or even about its very existence.<sup>8</sup> Without aiming at resolving this debate about the democratic deficit/legitimacy crisis/credibility crisis in the EU, it is necessary to look into possible remedies to it.

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<sup>2</sup> Zittel Thomas and Fuchs Dieter, *Participatory democracy and political participation. Can participatory engineering bring citizens back in?* (Routledge: London, 2007), p. 1.

<sup>3</sup> Putnam Robert D., “Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America”, in: Niemi Richard G. and Weisberg Herbert F. (eds.), *Controversies in Voting Behavior* (CQ Press, 2001), p. 40.

<sup>4</sup> Norris Pippa, *Democratic Phoenix: reinventing political activism* (Cambridge: Cambridge University Press, 2001), p. 4.

<sup>5</sup> Source: [http://www.europarl.europa.eu/parliament/archive/elections2009/en/turnout\\_en.html](http://www.europarl.europa.eu/parliament/archive/elections2009/en/turnout_en.html). (Accessed online on 16 July 2011) The decline of voters’ turnout was gradual over time, so it would be impossible, for instance, to attribute the responsibility for it to newer member states who integrated in 2004 and where, on the whole, voters’ turnout is lower than in Western European countries. The percentage of voters’ turnout in the European Parliament elections is quasi a mirror illustration of French, German or Dutch turnouts, for that matter.

<sup>6</sup> Marquand David, *Parliament for Europe* (J. Cape, 1979), p. 64.

<sup>7</sup> Mény Yves, “De la démocratie en Europe: old concepts and new challenges”, *Journal of common Market Studies*, Vol. 41, No. 1, 2003, pp. 1-13.

<sup>8</sup> For different definitions of ‘democratic deficit’ and divergent stances on its existence see e.g. Majone G., 1993, 2000; Hix S. and Follesdal A., 2002, Schmitter P., 2004 or Levinson S., 2006.

At the European level, the need to bring more citizen participation and support for the institutional and political system is put forward. This focus is not specific to the European level, it can also be found at the national level, where governments try to overcome the aforementioned decrease in formal political participation. T. Zittel calls it by the name of ‘participatory engineering’ that implies “purposive attempts on the part of political elites to affect political participation via the reform of the institutions of democracy”.<sup>9</sup>

Indeed, the attempt to amend the institutions of democracy occurred at the EU level. Seemingly, the solution of promoting more participatory democracy, as a complement to the existing representative system, was chosen. This commitment was embodied by introducing into the Treaty the provision promoting the development of more citizen participation (Article 11 TEU). This is where our attention is pointed in the direction of the European Citizens’ Initiative (ECI), resulting from Article 11(4) TEU.

The object of this paper is to analyse the nature and formal requirements of the ECI, which allows one million European citizens from a significant number of Member States to invite the European Commission to present a piece of legislation<sup>10</sup> on a specific issue for further consideration of the two main branches of the Union legislators: the European Parliament and the Council of Ministers. The ECI can be seen as closer to informal rather than to formal instruments of political participation, foreseen as complementary to the existing formal participatory mechanisms, pillars of the representative democracy.

The question is whether this new mechanism, which will be used as of April 2012, will succeed in reducing citizens’ negative perception of distance from the European institutions.

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<sup>9</sup> *Op. cit.* 7.

<sup>10</sup> However, the ECI does not undermine the principle of representative democracy and does not destitute the European Commission from its monopoly of legislative initiative. Auer Andreas, “European citizens’ Initiative”, *European Constitutional Law Review*, 2005, 1, p. 80.

At present, it seems that while the ECI could promote more popular participation in decision-making, by giving the European citizens an indirect<sup>11</sup> (or at least political)<sup>12</sup> right of initiative, it could indeed turn to be, with time, an enhancement of participatory democracy at the European level.

The remainder of the paper will present the genesis of ECI and will discuss a number of controversial issues that arose during the process of fleshing out its form (section 2). Then, the legal nature of ECI will be discussed (section 3). Finally, the concluding remarks will elaborate on the ECI's possible contribution to the political system of the European Union, and the ways in which its use could remedy the democratic deficit and affect the concerned institutions, the European Commission, in particular (section 4).

### **The genesis of the ECI**

The idea of establishing the ECI predates the Lisbon Treaty. At first, it was the idea of introducing a right of petition to the European Parliament that was discussed in the context of the IGC in the lead-up to the Amsterdam Treaty. Subsequently, more open debate on the subject was launched in the framework of the Convention on the future of Europe. As a result of the effective lobbying by the Initiative and Referendum Institute (IRI) and by two members of the Convention (Jürgen Meyer and Alain Lamassoure), the Draft Constitutional Treaty contained a new Article 46, referring for the first time to the principle of participatory democracy in the EU and introducing the European Citizens' Initiative – the first transnational instrument of participatory democracy.

While the explicit mention of the principle of participatory democracy itself did not outlive the rejection of the Draft Constitutional Treaty, the paragraph on the ECI was

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<sup>11</sup> Response by Mehr Demokratie e.V. on the EU Commission's Green Book on the European Citizens' Initiative, 19.01.2010.

<sup>12</sup> Kaczynski Piotr Maciej, "The European Citizens' Initiative: A Proper Response from the Commission", CEPS, 08.01.2010, available at [www.ceps.eu/ceps/download/2841](http://www.ceps.eu/ceps/download/2841)



preserved. The most relevant articles introduced by the Lisbon Treaty in terms of establishing the relationship between the principle of representative democracy and the principle of participatory democracy are Articles 10 and 11 TEU-L. Article 10 TEU-L, which mirrors Article 45 of the Draft Constitutional Treaty, confirms that the principle of representative democracy remains the founding principle of the Union. Article 10(3) TEU-L establishes a link between this principle and the right of citizens to participate in the democratic life of the Union. This provision should be read in conjunction with the provisions on the right to vote and the eligibility of EU citizens in EP elections, the right to address a petition to the EP, and the right to contact the European Ombudsman. The new Article 11 TEU-L, while no longer entitled ‘principle of participatory democracy’, demonstrates the desire to bring the Union closer to its citizens, in the same manner as article 46 of the Draft Constitutional Treaty. In its initial paragraphs, the article refers to the importance of maintaining a regular dialogue with civil society (more akin to ideas coming from the deliberative theory of democracy). Article 11(4) TEU-L provides that at least 1 million EU citizens, nationals of a significant number of Member States, may invite the European Commission 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 and where such an act falls in the framework of the Commission’s powers. The modalities for implementation of the citizens’ initiative were to be fixed in a regulation adopted under the ordinary legislative procedure.

Concerning the implementation of Article 11(4) TEU-L, a period of consultation took place between November 2009 and January 2010, allowing for the involvement of a broad range of actors.<sup>13</sup> As expected, emphasis was placed on the need to ensure that the procedures and conditions remain simple, user-friendly and accessible, as well as proportionate to the (restrictive) nature of the instrument. Following the consultation, the Commission presented a

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<sup>13</sup> Specifically, 329 replies were received from stakeholders, individual citizens, organisations and public authorities. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:0370:FIN:EN:PDF>

proposal for a regulation in March 2010. It maintained some thresholds at a rather high level, i.e. the admissibility check was supposed to be performed only after the collection of 300,000 signatures.

Once the European Commission presented the draft proposal of a regulation, the Council agreed on the proposed draft on June 14, 2010. It did insist, however, on the introduction of a number of changes. In particular, it considered that the Commission had to take a decision on admissibility as early as upon collection of 100,000 signatures from at least 3 Member States. The admissibility criteria have remained the same apart from one additional clarification that the Council insisted upon. An initiative would not be registered if contrary to the values of the Union, as listed in Article 2 TEU.<sup>14</sup> In this way, no flexibility is left to the Commission to go beyond the values listed in the Treaty when assessing the validity of an initiative. Furthermore, the Council insisted upon the insertion of an obligation on organisers to submit information on funding when submitting an initiative. Finally, it tasks the Commission with the preparation of a report on the implementation of the regulation 3 years after its entry into force.

Parallel to the consideration by the Council, the European Parliament also started to work on this dossier. According to the legislative procedure, the appropriate committees in which rapporteurs have been appointed started reviewing the project. On 3 May 2010, two rapporteurs from the Committee on Constitutional Affairs (AFCO) were appointed (Alain Lamassoure, EPP, and Zita Gurmai, S&D), and on 1 June 2010, they were joined by two more rapporteurs from the Committee on Petitions (PETI, Diana Wallis, ALDE, and Gerald Häfner, Greens). These appointments were followed by the drafting of working documents by both pairs of rapporteurs, as well as by the organization of a number of seminars or public hearings organised by almost all political groups in the European Parliament. According to rapporteurs

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<sup>14</sup> Article 2 TEU refers to respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

of the Committee on Petitions, G. Häfner and D. Wallis, “never has there been such widespread and open debate about a Draft Regulation in the history of the Parliament's activities”.<sup>15</sup> It is interesting to note that it was the first time ever for the Committee on Petitions to be directly involved in legislative activity. It was invited to provide its “knowledge and expertise in relation to the rights of citizens as expressed through the right of petition with which the 'Citizens' initiative' has much in common”.<sup>16</sup>

In total, in 2010, the Committee on Petitions discussed the ECI on six occasions (27 January, 29 September, 25 October, 9 and 22 November, 1 December) and the Committee on Constitutional Affairs, which was the leading committee on ECI, discussed different aspects of the Commission's draft on seven occasions: 19 April, 12 July, 30 September and 4/5 October, 8 and 29 November and finally 13 December. The aforementioned hearings in the European Parliament included representatives of national parliaments (joint AFCO-PETI meeting on 4 October), the same as experts who had contributed to the idea and introduction of Article 11.4 in the Lisbon Treaty.

A number of points proposed by the Commission were objected and discussed. The overall concern was to amend the proposed draft so as to make it as user-friendly as possible. According to Jürgen Meyer, participating in the AFCO hearing on 5 October, there was an urgent need to remove what he considered to be the bureaucratic burden and red tape that started to accumulate around the proposal. For example, he pointed out that the new instrument was not binding in the first place for the Commission. Hence, the ECI needs to be as simple and usable a procedure as possible, according to Sylvia-Yvonne Kaufmann (also in the hearing on 5 October).

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<sup>15</sup> “Opinion of the Committee on Petitions for the Committee on Constitutional Affairs on the proposal for a regulation of the European Parliament and of the Council on the citizens' initiative”, 23 November 2010. Available at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/organes/peti/peti\\_20101201\\_1500.htm](http://www.europarl.europa.eu/meetdocs/2009_2014/organes/peti/peti_20101201_1500.htm), consulted online on 22 January 2010.

<sup>16</sup> *Idem.*

A number of questions kept coming back in the discussion. On the more technical side, one of the more prominent points was the admissibility check: the MEPs wondered not only who should realise it (the European Commission or the Petitions Committee, for instance), but also when to do it. The shared opinion among the speakers was that doing an admissibility check after collecting 300,000 (or even 100,000) signatures would be too late, and could discourage people from investing their effort into the procedure. A suggestion was presented to perform the admissibility check either at the registration of initiatives or, at the latest, after having collected 5,000 to 10,000 signatures. Another important question was the number of countries from which the signatures must originate: there was a broad agreement among the members of the AFCO Committee that 1/3 of Member States would be too big of a hurdle. Often 1/4 was suggested, 1/5 (especially in the Committee on Petitions) or even less, 4 or 5 states (S. Kaufmann). The time span of twelve months for collecting the signatures after the registration of an initiative seemed too short, and it was suggested to replace it with 18 months. This proposition was formulated in light of previous experience of collecting signatures Europe-wide, that due to organizational complexity it took more than a year to gather a million of signatures. Some MEPs also objected the necessity of presenting an ID card/number while signing an ECI that proved controversial for civil society organizations.<sup>17</sup> They objected to it as being too intrusive, and unnecessary for the check of signature that would entail the name, surname, date of birth, address and signature. Yet another point of discord was the required age to sign an ECI: while members of AFCO seemed to agree with the Commission proposal of the age enabling one to vote in the European elections, members of PETI seemed to be willing to go one step further and allow those 16 years of age to sign an

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<sup>17</sup> Carsten Borg from ECI Campaign stated, for instance, that the requirement of providing ID number from signatories would effectively render the ECI unusable, because people would not approve of collecting such sensitive information about themselves. This was also the opinion of Tony Venables from ECAS. Sources, respectively: Initiative for European Citizens' Initiative, at <http://www.citizens-initiative.eu/?p=181> and EUobserver, "EU democracy instrument continues to cause headaches", 23 June 2010, available at <http://euobserver.com/9/30350> (consulted online on January 21, 2010).

ECI. To their mind, such an option could contribute to generating more and better-informed debates about European issues from an early age.

When it comes to more political issues, the most important one concerned the follow up of a successful ECI. In other words, what would happen if 1,000,000 signatures were collected within 12 months in  $\frac{1}{4}$  of the Member States and an initiative fulfilled all formal requirements? The opinion shared by members of AFCO Committee was that in such circumstances the organisers of such an initiative should at least be granted a public hearing in front of the Commission. The Commission should be bound to inform the organisers of an ECI of what would happen to their proposal. Of course, if it were accepted by the Commission and gave grounds to a new legislative proposal, then there would be no major problem. The problem might rather emerge in the situation where the Commission decided not to follow-up the proposal that gathered 1,000,000 signatures. The MEPs even suggested defining the grounds on which the Commission might reject an ECI. Some suggested that the EP should get the right to pressure the Commission to follow up on proposals; or at least, the citizens should have the right to appeal to the European Court of Justice against a refusal of the Commission to follow-up a successful initiative. Yet another concern that was voiced, but not clearly addressed by the Committee on Constitutional Affairs, was how to prevent the process from being hijacked by interest groups that would amount to an abuse of the ECI procedure. Yet another limitation of the ECI that was discussed was its material boundaries. Liberal MEP Andrew Duff, among others, objected to the fact that citizens would fall short of the opportunity of proposing ECIs that would promote treaty revisions and they would have to focus merely on application of the treaties.

It is important to bear in mind that throughout that period the institutional dialogue led<sup>18</sup> the debate: the European Commission, Council and Parliament (with its final position set out in the amended draft regulation voted by AFCE on November 29 that excluded some of the most audacious propositions of PETI, such as to allow all EU legal residents, and not only citizens, from the age of 16 to sign ECIs) were trying to reach a compromise solution, in order to keep up to the initial schedule of having the plenary vote on the draft regulation before the end of 2010. There have been quite a few problematic issues: while the European Parliament was against the ID requirement, many Member States found it important for the process of checking the signatures. Second, the idea of lowering the age of signature of ECIs below the voting age in the European elections did not meet the Council's agreement. Third (and what took the most time in the negotiations), the question of what would be a significant number of Member State proved to be controversial. While the Parliament was arguing for 1/5, the Commission and the Council were upholding the initial proposal of 1/3. As to the timing of the admissibility check, the Parliament suggested the very beginning of the process, i.e. when a Committee of citizens is registering the procedure. The Commissioner for inter-institutional relations, Maros Sefcovic, seemed favourable to such a solution. Yet another technical point of discord was when the regulation would come into force. While the European Parliament wanted to give Member States 6 months for the implementation of the regulation, the Council's position was 12 months.

While the hearings in the European Parliament were public, the inter-institutional negotiation was not. The representatives of civil society organizations were highly critical of the fact that the process of dialogue negotiation was held behind closed doors. Nevertheless, in the end, and with a considerable engagement of the Belgian Presidency during the

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<sup>18</sup> The informal dialogues between institutions aim at finding compromise solutions on legislative projects that would be acceptable for the three institutions (Commission, Parliament and Council). Often times, the role of rotating Council presidency can be important in these dialogues, because the representative of the presidency identifies important discussion points, tries to reconcile possible divergent positions within the Council, and negotiates with the representatives of other institutions.

negotiations, the institutions came up with a compromise. In the words of Bruno Kaufmann, while “the well-balanced registration procedure featuring a citizens' committee, the wide signature-gathering options, and also the encouraging hearing privileges for successful initiatives" have been maintained

"some potentially lethal provisions have been preserved, such as the cumbersome ID requirements in some of the member states, the wide-ranging financial transparency rules with their unclear sanctions, and the requirement to provide initiative texts in all the national languages where signatures will be gathered".<sup>19</sup>

For other controversial points, the following solutions were retained: the signatures need to originate from at least ¼ of Member States; the admissibility check would be done already at the registration of an initiative; the age of vote was not lowered to 16 years, but upheld at the age allowing to vote in the European elections, the signatures will have to be collected during 12 months after the registration of an initiative by the Commission, and Member States were given 12 months for implementing provisions of the regulation.

## **Implementation of the ECI**

### **Legal nature of the ECI**

As a preliminary remark, it would be useful to delineate the legal nature of the ECI by contrasting it with other instruments of participatory democracy intervening at the initiative stage of the elaboration of a legislative measure. Such an analysis would be useful in assessing the degree/extent of citizens' participation for which the initiative allows. The analysis will be based on one of the classifications constructed around three criteria: who is the author of the ballot proposal, who is the initiator of the procedure and who is the ultimate decision-maker as to the outcome of the procedure.<sup>20</sup>

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<sup>19</sup> Kaufmann Bruno, “Merry Christmas, Europe!”, *EUobserver*, 12 December 2010, available at <http://euobserver.com/18/31521> (consulted online on January 22, 2010).

<sup>20</sup> Kaufmann Bruno, *The European Citizens' Initiative handbook: your guide to the world's first transnational direct democratic tool* (Brussels: Green European Foundation, 2010), p. 36.

The procedure, which allows for the greatest involvement of citizens in the legislative process, is the citizens' or popular initiative. It consists in establishing the right of a minority of citizens to propose to the general public the introduction of new law or a law modifying an existing legislative measure. The people, then, vote on the proposal in a referendum. Alternatively, the initiators of a proposal may also be enabled to withdraw it. So, the proposal emanates from the people and is decided upon by the people and, therefore, it gives the electorate agenda-setting power. The ECI resembles the popular initiative in that the initiator is a minority number of citizens. However, it is not for the European electorate to vote on the proposed initiative. The ECI is limited to the *right to initiate* and it is a competent authority, the Commission, which decides whether it should result in a fully-fledged legislative proposal. Further in the paper we will consider the extent to which the Commission may exercise discretion in this regard. This tool of direct democracy exists in Switzerland and in the US, where citizens can introduce an initiative with a subsequent vote without the need for approval by a representative authority.

One variation of the popular initiative is the popular initiative with the possibility of authorities' counter-proposal. In this case, the procedure is again launched by a prescribed number of eligible voters, but the political authorities have the right to formulate a counter-proposal in the framework of the process. The public then has to vote on both proposals simultaneously. The ECI does not include this very feature, but the institutions have the power to oppose an initiative through mechanisms inherent to the legislative procedure. As the Commission has the monopoly of legislative initiative, it may very well decide not to follow up on an initiated proposal, especially if its own policy agenda consists of measures going in a different direction. Alternatively, the Commission could, in the framework of the legislative process, propose different options and leave the choice of the best course of action to the Council and the Parliament. Then, concerning the Council and the Parliament, if they



wish to strike out an initiative that has made it to a draft proposal, they may very well do so at the adoption stage.

The instrument that the ECI ascribes to is the agenda initiative/popular initiative proposal. The agenda initiative is the right of a specified number of eligible voters to propose the adoption of a law or measure to a competent authority. So, while the initiator is a group of citizens, the decision-maker is a representative authority. In the case of the ECI, this is the Commission. An agenda initiative can take different forms – it may take the form of an agenda initiative without popular vote, an agenda initiative followed by a public vote or a popular motion. The latter is a “demand made, by a certain number of citizens, to Parliament asking it to enact some law or to take a decision within the range of its powers and competences”.<sup>21</sup> In the EU context, the ECI is an agenda initiative with a popular motion to the Commission, because it is the Commission and not the Parliament that holds the right of legislative initiative.

Finally, the ECI needs to be distinguished from the existing right of EU citizens to address a petition to the EP.<sup>22</sup> Under Article 227 TFEU, any citizen of the Union, as well as any person residing in any EU Member State, has the right to address a petition to the EP where it concerns a matter that comes within the EU’s field of activity and affects them directly (entails a change in their legal position). In this context a petition can be individual or collective. Requirements such as a threshold consisting of a number of signatures do not apply to it, and the organ it is addressed to has no duty to fulfil or answer it. While the primary function of a petition is problem-solving, in certain cases the Committee on Petitions may refer a petition to other European Parliament committees for information or further action. As a consequence, a committee might take a petition into account in its legislative activities. Still, the ECI offers a much more extensive right of participation of citizens in the legislative

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<sup>21</sup> Auer, *op. cit.*

<sup>22</sup> See articles 21 and 194 EC Treaty, currently, articles 24(2) and 227 TFEU. It is to be distinguished from the right of petition suggested at the Amsterdam IGC.

activity: in particular, it is submitted directly to the main body holding the right of legislative initiative.

It is evident from this summary that it is the popular initiative that offers the most extensive rights of participation to citizens. The ECI does not go as far. It is an invitation to the Commission to introduce a legislative proposal, provided that certain conditions are satisfied, and thereby establishes a new constitutional competence for the citizens, adding an element of participatory democracy to the principle of representative democracy along which the Union's functioning is modeled. Despite its limitations, this new tool confers upon EU citizens powers of agenda-setting. It is a mixed form of participation as it combines features of direct democracy – as it is the citizens who set in motion the law-making procedure and spark an EU-wide debate – and indirect democracy – as the Commission maintains the ultimate initiative-making power.

After this brief analysis of the legal nature of the ECI, we turn to a closer examination of the conditions for implementation of the ECI as defined in the Regulation on the citizens' initiative.<sup>23</sup>

### **Requirements for a successful ECI**

It is necessary to distinguish between conditions which need to be fulfilled by organisers at the stage of **registration** of a proposed ECI, on the one hand, and requirements which need to be satisfied at the stage of final **examination** by the Commission of a successfully registered proposal. It is the former that will be the subject of this section. Under Article 4(2), registration will be refused by the Commission if any of the following conditions are not met:

*(a) the citizens' committee has been formed and the contact persons have been designated;*

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<sup>23</sup> Regulation No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, Official Journal of the European Union, L 65/1, 11.03.2011.

*(b) the proposed citizens' initiative does not manifestly fall 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;*

*(c) the proposed citizens' initiative is not manifestly abusive, frivolous or vexatious;*

*(d) the proposed citizens' initiative is not manifestly contrary to the values of the Union as set out in Article 2 TEU.*

The quantitative thresholds relating to the number of signatures required, as well as their territorial distribution, are necessary conditions for the examination by the Commission of the proposal.

*Who can introduce an ECI (personal element)?*

By virtue of Article 11(4) TEU-L, an ECI can be organised and endorsed by a specific body of natural persons: citizens of the Union and, therefore, nationals of a Member State. Therefore, third country nationals and legal persons are precluded from organising or signing an ECI. This is more restrictive than the personal scope of the right of petition, which extends to residents of a Member State. Interestingly enough, the Commission has adopted a different view as to the organisers of a citizens' initiative in the draft proposal, as it provided for the possibility for legal persons to prepare and submit an ECI to the Commission. Under Article 2(3) of the Regulation on the citizens' initiative, the organisers can be only natural persons.

Moreover, the organisers of an ECI must form a citizens' committee responsible for the preparation and submission of a citizens' initiative to the Commission.<sup>24</sup> The committee should consist of at least 7 persons who are residents of at least 7 Member States and should include one representative and one substitute to perform a liaison function with the EU institutions. On the one hand, the rationale behind the adoption of this provision was to ensure that the organisers of an ECI speak with one voice. It appears somewhat restrictive and overly

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<sup>24</sup> Article 3(2) of the Regulation on the citizens' initiative.

formalistic to require of citizens to choose a particular structure for the initiation of an ECI rather than leave them the freedom to organise themselves in a different manner. While the provision may have been helpful as a non-binding recommendation to organisers, it seems overly burdensome and somewhat disproportionate as a compulsory condition sanctioned by refusal of registration according to Article 4(2)(a) of the Regulation. On the other hand, the committee would serve as a filter in contacts with the institutions. Most countries that have experience with initiatives require the establishment of such a committee as a precondition for registration (protects from “spamming”).<sup>25</sup> While MEPs are allowed to support the organisation of an ECI, they may not be counted towards the members of a citizens’ committee. This exclusion of MEPs from the citizens’ committee could be explained by the desire to confer full ownership of the initiative on citizens. Indeed, the ECI should not represent an additional agenda-setting tool for the institutions. This would suggest that not only MEPs, but – by analogy – also the representatives of the other EU, and even national, institutions should not be counted as members of the citizens’ committee.

*Subject-matter (content)*

The regulation spells out the limits to the material scope of an initiative, which condition registration. First, the initiative should not *manifestly* fall outside the scope of the Commission’s power of legislative initiative under the Treaties. This means that the proposal should concern an area where the Union has competence to act. The type of competence – exclusive, shared, parallel or complementing – is not relevant as long as the Commission has a right of initiative in the area concerned. This would not be the case, for instance, of the CFSP. What if citizens were to invite the Commission to adopt an act which comes within the Commission’s powers of execution? In principle, according to Article 291(1) TFEU, it is for the Member States to adopt measures implementing legally binding acts of the Union. If such

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<sup>25</sup> de Witte Bruno, Trechsel Alexander H., Danjanović Dragana *et al*, “Legislating after Lisbon: new Opportunities for the European parliament”, EUI paper, European Union Democracy Observatory, Florence, June 2010, p. 8.

measures need to be adopted at the Union level in order to ensure uniform implementation, the Commission is vested with implementing powers.<sup>26</sup> So, whenever a legally binding act of the Union requires implementing measures and confers implementing powers on the Commission, an ECI could indeed aim at the adoption of such measures (comitology). Determining whether a subject falls in the scope of the Commission's powers to initiate legislation can be very difficult for laymen. One example of this is the 'one seat' initiative, which made it clear that sometimes even MEPs are not fully clear about the delimitation of competences. Moreover, the term 'manifestly' suggests that the decision as to the existence of competence is not a final one. Indeed, it appears that at the stage of registration there is an 'entire' but not a 'full' admissibility check. A more in-depth analysis of admissibility – in particular, the existence and scope of competence – will be done only once all signatures are collected. Admittedly, such a solution is not favorable to the organisers. On the other hand, a full admissibility check at the stage of registration does not seem realistic as it would impose a very heavy workload on the Commission. Ultimately, it is the Court of Justice that has the final word in determining the existence of Union competence. Second, the proposed initiative should not be manifestly abusive, frivolous or vexatious. This refers to a scenario where the initiative is launched not in order to lead to the adoption of a legislative measure, but, e.g. for a euro-skeptic group to raise their visibility. Third, the initiative should not be manifestly contrary to the values of the Union as set out in Article 2 TEU. So, for instance, a proposed initiative should not violate the Charter of Fundamental Rights. Since the admissibility check takes place earlier, all matters pertaining to the content of a proposed measure are to be considered at the stage of registration. Non-respect of these limitations is sanctioned by refusal of registration.

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<sup>26</sup> Article 291(2) TFEU.

Another issue that could be considered is whether through an ECI citizens could seek to amend existing EU secondary law or even request a Treaty amendment. To amend existing legislation would be admissible. In case of treaty amendment, it is the Commission who has power to submit proposal for revision to Council; however, Article 11(4) seems to exclude it, as an ECI is expected to focus on the purpose of “implementing the Treaties”. It has been suggested that an ECI can go as far as asking the Commission to propose to the Council to adopt a decision declaring the existence of a serious and persistent breach by a Member State of the values referred to in Article 2.<sup>27</sup> This is so since the application of Article 7 TEU does not imply Treaty changes.

The organisers can also suggest the form, which the adopted act should take (regulation/ directive/ decision). For instance, if the objective is to achieve full harmonisation in a given area, instead than minimum harmonisation, a regulation would be more appropriate than a directive. In any case the Commission has the last word on this matter.

#### *Formal requirements*

Upon registration, an initiative needs to state the title, the subject-matter and the objectives of a proposed legislative measure. The organisers need to provide regularly updated information about the sources of support and funding in order to guarantee full transparency. If all substantive and formal requirements are satisfied, the Commission has to register an initiative within two months.

#### *Quantitative element: number of signatures required*

In terms of quantitative requirements, according to the Treaty and the implementing regulation, a citizens’ initiative needs to be signed by at least 1.000.000 citizens, a threshold which is not too difficult to reach in a Union of half a billion people (see section 4 for more details) and rather low by comparison with the requirements applied in different national

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<sup>27</sup> Priollaud F.-X. et Siritzky D., *Le Traité de Lisbonne, Texte et commentaire article par article des nouveaux traités européens* (Paris: La documentation française, 2008).

constitutional contexts. It should be noted that this requirement intervenes at the stage of examination by the Commission of the initiative. At the stage of registration no such threshold is set, as registration intervenes prior to initiating the collection of statements of support from signatories.

#### *Territorial element*

In order to ensure that a proposal is genuinely representative of a Union-wide interest, a territorial element was added to the abovementioned threshold. Indeed, the regulation establishes a double majority requirement. First, a “significant number”<sup>28</sup> of Member States is defined by the regulation as  $\frac{1}{4}$  of the Member States, meaning that the signatures have currently to come from at least 7 Member States. This is a welcome improvement compared to the more narrow  $\frac{1}{3}$  initially suggested by the Commission. Second, a minimum threshold of signatures has to be met in seven of the Member States, which is established by multiplying the number of MEPs of the Member States concerned by a factor of 750. It is worth noting that such a territorial distribution requirement is of federalist nature.<sup>29</sup>

#### *Establishing the thresholds: collecting statements of support*

Once the Commission has registered a proposed initiative, the organisers are responsible for collecting statements of support from signatories using specific forms provided for in the Regulation.<sup>30</sup> This can be done both in paper form and electronically. Under Article 5(5) of the Regulation, all statements of support must be collected after the date of registration of the proposed initiative and within a 12-month deadline. Specific requirements apply to online collection systems: the online collection system has to be certified in the Member State in which the data collected will be stored. In addition, the online systems should have adequate security and technical features in place. Once all signatures are

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<sup>28</sup> Regulation No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative, Official Journal of the European Union L 65/1, 11.03.2011.

<sup>29</sup> Auer, *op. cit.*, p. 81.

<sup>30</sup> Article 5(1) of the Regulation on the citizens’ initiative.

collected, the organisers must submit them to the Member States of origin / nationality of the signatories to allow them to verify them through appropriate checks within a period of 3 months. The regulation provides for the possibility for the organisers to withdraw their proposal, but only prior to the submission of statements of support. If all conditions are complied with, the Commission has to examine the citizens' initiative and, within 3 months, set out in a communication its conclusions on the initiative, the action it intends to take, if any, and its reasons for doing so.

### **Judicial review of the Commission's decisions**

In the context of the process described above, the Commission adopts a legal act concerning a proposed ECI at two distinct stages: first, when considering admissibility at registration and, second, upon examination of a successfully registered proposal. At each of these two stages the Commission has certain duties and powers.

Concerning the admissibility check, Article 4(3) of the Regulation states that the Commission has the power to refuse registration where the conditions laid down in paragraph 2 are not met. Under Article 4(3), refusal of registration gives rise to certain obligations of the Commission: it has to inform the organisers of the reasons for refusal, as well as of all possible judicial and extrajudicial remedies available to them. The Regulation itself does not provide any further detail as to what the remedies in question are. It appears logical that, among the different acts that the Commission may adopt, a decision addressed to the organisers would be most appropriate. It is logical that the organisers should be able to challenge such a decision in the framework of an action for annulment under Article 263 of the Treaty on the Functioning of the European Union (TFEU). This article provides that any natural or legal person may introduce an action for judicial review of an act of the institutions (in this case – the Commission) addressed to that person. The ground for review invoked could be, for instance, an infringement of an essential procedural requirement where the



Commission fails to adequately justify its decision. Privileged applicants, the Member States, the Council and the European Parliament, could also challenge the refusal on similar grounds. One could imagine a scenario where the Parliament decides to challenge the Commission's refusal to register or follow-up on a proposal backed by the EP.

Then, under Article 10 of the Regulation, the examination by the Commission of a registered proposal has to follow a specific procedure. In particular, it has to publish the initiative in the register, receive the organisers in order to give them an opportunity to explain the matters raised by their proposal and, finally, within 3 months, present in a communication its legal and political conclusions on the proposed initiative. In addition, it has to justify its decision to follow up or not. The communication has to be notified to the organisers and the EP, and has to be made public. Moreover, in the 3-month period, the organisers must be allowed to present the initiative in a public hearing at the European Parliament. The decision of the Commission at this stage – not to follow up or even to follow up on a proposal – can be challenged before the Court of Justice under Article 263 TFEU (see above).

Concerning the standard of judicial review carried out by the judge, the greater the margin of discretion of the Commission, the more narrow the scope of review. The criteria to which the Commission has to refer to decide on registration of an ECI are clearly defined and, in consequence, judicial review will, most likely, be confined to the determination of whether the Commission has correctly applied these criteria. On the other hand, the decision of whether and how to follow up on a citizens' initiative gives a significant margin of appreciation to the Commission. It is, therefore, unlikely that the judge would examine in depth the legal and political reasons which led the Commission to take action or not.

## **Contribution to the political system of the EU**

One of the important questions is the possible impact of the ECI as implemented by Member States. Surely, at this stage, it is difficult to predict how many ECIs will be registered, how many of them will be declared admissible, how many of them will gather the required 1 million signatures of citizens coming from the specified number of countries, and finally how many among those that received the required number of signatures would result in the proposition of legislation coming from the European Commission. Nevertheless, it seems fit to reflect upon the possible impact the ECI might have on the institutional system of the EU.

It seems that the European Commission will have a crucial role when it comes to the possible impact of the ECI. It is so, not only because it will play an important role for ECIs from the technical point of view, but even more so, because it can be the most strongly affected by this new instrument of participatory democracy.

The first challenge for the Commission will occur at the moment of the registration of initiatives. From the political point of view, as far as the admissibility check should be done at the registration of the procedure, the Commission might find itself under pressure to “judge politically sensitive issues (at an early stage), although these might not even stand a chance of reaching the one-million threshold”.<sup>31</sup> In addition to that, there is a possibility that several contradictory or competing initiatives could be presented, and the Commission might need to decide which of them it would or would not register and why.

Furthermore, there is also a practical aspect of the ECI that might become a burden for the European Commission. The implementation of the ECI could possibly increase the workload of the Commission, which is given a considerable number of duties. In terms of infrastructure, the Commission has to make available and maintain software for online

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<sup>31</sup> Stratulat Corina and Emmanouilidis Janis A., “The European Citizens’ Initiative: next step, implementation”, *Commentary of the European Policy Center*, 16 December 2010.

collection of signatures, as well as related support services. It will have to provide a regularly updated guide on the citizens' initiative. Additionally, it will have to set up a help desk for organisers and keep them informed about current or intended legislative proposals related to their initiative or related ECIs. Furthermore, the Commission will have to enter into a dialogue with the organisers at an early stage of the procedure. Significantly, the Commission should give organisers of a successful ECI the opportunity to present their initiative at a public hearing. It would be impossible for the Commission to neglect or overlook this duty since the hearing has to take place in the Parliament, and the MEPs are eager to oversee the Commission's follow-up of initiatives that gathered over 1,000,000 signatures.

Subsequently and more importantly, the Commission will be under close scrutiny because the ECI's political "impact and importance will entirely depend on the definition of the powers of the Commission as the addressee of the ECI".<sup>32</sup> The European Commission will have to find a balanced position for itself on the scale going from total submission towards total control. Andreas Auer describes the total submission position as one of a "mere connecting link"<sup>33</sup> between the signatories of an ECI and the European legislators (the European Parliament and the European Council); the total control position would mean that the Commission would be refraining from putting ECIs through, even if they met all the formal requirements, purely at its own discretion. Finding a right balance between these two options seems vital, because in case of total submission, the Commission will see its position deteriorating, while in case of total control, it would degrade the newly implemented procedure and might also reinforce the perception of itself as technocratic, distant, even non-democratic institution.

Hence, it seems that for ECI to be successful in contributing to foster the pan-European debates and enhance the European democracy, it needs not only to be user-friendly,

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<sup>32</sup> Auer Andreas, "European citizens' Initiative", in *European Constitutional Law Review*, 2005, 1, p. 83.

<sup>33</sup> *Ibid.*

on the technical level, but also it will need the political support of the Commission. As *Mehr Demokratie* (2010), a civil society organization that calls for fostering direct democracy at the European level, underscores,

“ECI offers significant possibilities for the development of European civil society and of European public space and thus for democracy itself at the EU level – as long as the Commission, as the intended recipient of such initiatives, makes active use of the opportunity the ECI presents for engaging intensively with the citizens”.

If we imagine a situation when an ECI is registered, then passes positively the control of admissibility, and gathers the necessary signatures, it might be a challenge for the Commission to decide not to initiate corresponding legislation. If this happens, one could think of the possibility of the European Parliament stepping in and questioning the Commission or a specific Commissioner about the reasons for the rejection of a specific ECI, beyond the reasons provided in the communication from the Commission on this subject.

When it comes to forecasting the prospective number of registered or successful ECIs, previous examples of European-wide initiatives might serve as an indicator. In fact, as far as the idea of ECI emerged within the Convention on the future of Europe, and was included in the Constitutional Treaty, many civil society organisations started collecting signatures and calling them ECIs, even if, in the end, the Constitutional Treaty has never entered into force. Still, these signature-collection campaigns can be perceived as examples of ECIs *avant la lettre*. Between 2004 and 2007, at least 20 such initiatives were launched in diverse fields, such as health, energy, education, social welfare, foreign aid, and European institutions.<sup>34</sup> These initiatives were promoted by different actors: foundations, associations, MEPs, NGOs, etc. The collection of signatures was most often electronic, but also on paper, sometimes with a built-in verification procedure.

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<sup>34</sup> Wallis Diana, Leinen Jo, Berg Carsten, Carline Paul, Kaufmann Bruno, “The future of European democracy has begun”, *IRI-Handbook* 2008.

The experience of these initiatives (many of which kept referring to themselves as ‘petitions’) was, to Bruno Kaufmann’s mind,<sup>35</sup> instructive for the future, and showed a necessity of clear organisation and management of the procedure. They also showed that it is possible to gather one million signatures in a short period of time.

Bruno Kaufmann takes the “One seat” initiative that called for having only one seat for the European Parliament (Brussels) as a case study.<sup>36</sup> A European Parliament Member launched it. It managed to collect the required number of signatures in four months. However, this success could not have been taken advantage of, as far as the signatures were collected only electronically, and no proper verification procedure could have been supplied. This shows that a proper system for signature collection is vital for the successful outcome of such initiatives.

Certainly, there might be fields in which collection of signatures should seem easier than others, because there are strong networks of NGOs and other civil society organizations across Europe, e.g. health protection, human rights, animal welfare, etc. On this note, it might be interesting to invoke Greenpeace. During 18 months, between 2005 and 2007, it collected over one million signatures in favour of labeling dairy and animal products, where animals were fed GMO food.<sup>37</sup> On this occasion, signatures were collected in 21 EU countries, most of them in countries where Greenpeace has strong regional offices. Over 990,000 signatures were collected on paper. And in the end, Greenpeace was successful in putting its concerns on the European agenda, because the institutions reacted positively to the deposited proposal.<sup>38</sup>

By the beginning of December 2010, Greenpeace managed yet again to collect more than a million signatures of European citizens in favour of a ban on genetically modified

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<sup>35</sup> Kaufmann Bruno, “Citizens beyond the Nation-State”, *IRI-Handbook* 2008.

<sup>36</sup> Kaufmann Bruno, “One million reasons for more democracy in Europe”, *EUobserver*, 21 September 2006.

<sup>37</sup> Contiero Marco, “One million signatures in 18 months”, *IRI-Handbook* 2008.

<sup>38</sup> Greenpeace, “DONE: 1 million voices for a GE-free future”, available at <http://www.greenpeace.org/international/en/campaigns/agriculture/solution-ecological-farming/take-action/EU-Petition/>, consulted online on 22.07.2011.

organisms. Even if Greenpeace insisted on labelling their initiative an ECI, referring to Article 11(4) of the, by the time of collection of signature the regulation on the ECI procedure was not yet implemented. Hence, the European Commission maintained its opinion that it cannot be considered an ECI. Nevertheless, it promised to study the view expressed in this ‘petition’.<sup>39</sup> It is not sure, how it will be treated subsequently. All the same, it shows that citizens are ready to sign important to their mind initiatives, and an organization can gather a substantial number of signatures in a short period of time, even without the help from the European Commission.

It is certain that the prospective success of ECIs will depend on the strength of civil society organisations advocating specific causes, and also on their uprooting in different European countries, or networking with different organizations in the same field. It will also depend on citizens and their perception of the new instrument, and their willingness to seize it and advocate questions close to their hearts. Surely, the initial stage of the existence of the new instrument can have strong consequences over its prospective use and development. If the first ECIs would collect signatures required by the regulation, and if the Commission would take it up in a legislative proposal, then it could influence even more people to put forward their projects. However, if the first ECIs launched in 2012 would fail in collecting signatures, or the Commission would massively reject them, it could discourage people from using this instrument, and it would be also counterproductive in its aim to give citizens more opportunities to participate, and to reduce the alleged ‘democratic deficit’.

It is true that even if the Commission decides to present a legislative proposal based upon a successful ECI, it is not the end of the process. First of all, the legislative proposal of the Commission could alter the substance of an ECI and thus discontent its signatories. Second, even if a legislative proposal would reflect perfectly the will of the signatories of a

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<sup>39</sup> Press release on the European Citizens’ Initiative, MEMO/10/683, Bruxelles, 15.12.2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/683&type=HTML>, consulted online on 20.05.2011.

specific ECI, it still might stumble either in the Council, or in the Parliament. It is a possible, even if unlikely, scenario, insofar as usually the Commission consults its proposals with other institutions prior to presenting them officially, in order to ensure their prospective success. But even if a legislative proposal resulting from an ECI was not voted on by one of the legislative branches of the EU, it still seems as a 'lesser evil' than if the Commission promoted a total control approach and decided not to follow up on any, or only on very few, ECIs.

When it comes to the question of whether the ECI could be a remedy to the alleged 'democratic deficit' of the EU, it still seems that the Commission is the main player here. If it finds a balanced way to deal with successful ECIs, then the citizens will not think that their voices and opinions remain unheard, and the perception of institutional distance might be bridged, no matter whether a proposal would pass or not. Of course, ideally, the Commission's proposal would be adopted, and in this case the citizens would be fully satisfied. However, even if it were not adopted, already the fact of it being considered by the Commission and triggering a debate in the Parliament and Council could be enough for citizens to feel that their opinions are not being neglected. Of course, it would all depend on reasons of rejections of such a proposal. Nevertheless, one could imagine that a rejection of such a proposal would be less detrimental to the prospective role of the ECI in bringing citizens closer to institutions, than a Commission's decision not to follow up on ECIs that succeeded in gathering the necessary number of signatures.

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