



# European Citizens' Initiative

**Legal options for implementation  
below the constitutional level**

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## I. Executive Summary

The EU has long been criticized for its democratic deficit. Several proposals for overcoming or reducing this deficit have been made. Some of them mention the role of more citizen participation and direct democracy. It was in this spirit that the ECI found its way into the Constitutional Treaty, creating the first tool of transnational participatory/direct democracy. It is aimed to give the Union's citizens more influence on EU politics while maintaining the institutional balance - especially the initiative monopoly of the European Commission - of the Union.

The ECI is binding in that sense that the Commission has to take legislative action once an ECI is admissible. However, it is not obliged to simply pass the unchanged ECI text on to the other institutions. Constitutional/treaty amendments can be proposed by an ECI, but for reasons of clarity, this should be made explicit in the implementing law/regulation. ECIs can also be submitted to influence the CFSP.

There are several theoretical options of putting the ECI into practice. Among the reviewed ones<sup>1</sup> only the amendment of the Constitutional Treaty (*e.g.* in the form of a mini-treaty and the enactment by a regulation) could be recommended. A regulation could and must be based on Art. 308 TEC. Both options create legally binding forms of implementing the ECI, unlike the self-binding options of an inter-institutional agreement or integration into the rules of procedure of the Commission. This implies that citizen initiatives would have the possibility to seek redress before the ECJ and that binding standards for member states could be set.

The mini-treaty option is preferable compared to regulation. However, if the constitutional deadlock of the Union continues, an ECI-regulation should be enacted.

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<sup>1</sup> Waiting for the ratification of the Constitutional Treaty, amendment of the Constitutional Treaty, amendment of the existing treaties, enactment by a directive / regulation, enactment by an interinstitutional agreement and integration into the Rules of Procedure of the European Commission.

## II. Introduction

For half a century, Europe has been the concern solely of political elites. The citizens' role has been limited to one of a spectator - only being able to observe the actions of heads of state and governments. This method of European integration has reached its capacity, as has been clearly demonstrated by the process of drafting and ratifying the Constitutional Treaty.

A new approach of allowing citizens to shape the future of the European Union is needed. In a limited way, the Constitutional Treaty tries to reflect this reality. Article I-47 (4) of the Draft Treaty Establishing a Constitution for Europe creates (for the very first time) a transnational tool of participatory/direct democracy.

*It reads: "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come."<sup>2</sup>*

This clause is commonly to be referred to as the European Citizen's Initiative (ECI). There are two main arguments favouring the ECI: Participation and (citizens') integration. The ECI is regarded as a device for citizens to be able to, at the very least, influence the agenda, if not the decision-making of the EU. The citizens will be granted the same legal footing as the European Parliament and the Council regarding initiative rights. On the other hand, many ECI-supporters hope that it will lead to the establishment of transnational public debates and movements. The integration of countries shall be complemented by an integration of the citizens.

Due to the outcome of the referenda in France and the Netherlands the ratification of the Constitutional Treaty is not yet possible. A civil society campaign has therefore been launched to implement the ECI independently of the Constitutional Treaty.<sup>3</sup>

The central aim of this study is to evaluate legal options for implementation of the European Citizens' Initiative (ECI) below the constitutional level. This study will first provide some background information on the history of the ECI. Rules in form and rules in use of citizens' initiatives in European countries will also be briefly summarized. The legal nature of the ECI – especially the question of the Commissions obligations and the possibility of treaty-amending ECI's – will be analyzed in more detail. The study concludes with a recommendation of how to implement the ECI. The eight existing citizens' initiatives referencing Art. I-47 can be found in the appendix. This is rather remarkable, as this instrument does not yet have a legal existence. Beyond the scope of this study, however, is the question of referenda regarding European affairs.

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<sup>2</sup> Conference of the Representatives of the Governments of the Member States: Treaty establishing a Constitution for Europe, CIG 87/04, 6.8.2004.

<sup>3</sup> See [www.citizens-initiative.eu](http://www.citizens-initiative.eu).

### III. ECI – Background information

#### III.1 History of ECI

Claims that the EU has a ‘democratic deficit’ and that it is crucial for the EU’s future to strengthen its democratic legitimacy have continued to arise for at least 20 years. For the greater part of its history, citizens have not been at the centre of the European political system. One response to this was the establishment of the Citizenship of the Union, in addition to national citizenships. The Maastricht Treaty (1992) – Treaty Establishing the European Community (TEC)<sup>4</sup> – has integrated the Citizenship of the Union into the Treaty of Rome. The rights granted to the EU citizens include the right of free movement, the right to vote in communal elections in all Member States, the right of diplomatic protection and the right to petition to the European parliament. These rights were regarded as a first step towards full-fledged citizens’ rights. The concept of the Union Citizenship is dynamic.<sup>5</sup> Art. 22 TEC provided for threeannual reports by the Commission that could form a basis to complement the Citizenship of the Union by the Council and subsequent approval of the Member States. Thus far, the Commission has presented four reports.<sup>6</sup> However, none of them referred to new instruments of participatory or direct democracy. The question of whether Art. 22 can be used as a legal basis for an ECI regulation will be reviewed in the sections to follow.

In the run-up to the Amsterdam Intergovernmental Conference (IGC) 1996 the then foreign ministers Wolfgang Schüssel (Austria) and Lamberto Dini (Italy) proposed a right of submission to the European Parliament. If 10% of the electorate in each of at least three Member States would have submitted a political proposal drafted in the form of articles the European Parliament would then be obliged to consider that submission.<sup>7</sup> However, the timing for such an instrument proved to be inopportune; the IGC refused to agree on it.

Prior to Schüssel’s and Dini’s proposal, the European Parliament had expressed its support for strengthened political rights of citizens several times. Starting very cautiously in 1988, with the reference to the role of political participation in the political process and highlighting “specific consultation on legislative matters”, as well as mentioning the role of the (national) political parties<sup>8</sup> the Petitions Committee 2002 proposed - with regard to the deliberations of the constitutional convention - to upgrade the right to petition to a right of submission whereby changes to the community legislation could be initiated by petitions.<sup>9</sup> This would have been constituted a form of a mass petition – an instrument legally situated between the right to petition and the right of initiative. One year later the Committee emphasised that the current constitutional setting of the Union does not allow for Initiative and Referendum.<sup>10</sup> In 2004, the Committee declared the rights of petition and complaint to the Ombudsman as direct democracy.<sup>11</sup>

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<sup>4</sup> Consolidated Version of the Treaty Establishing the European Community: Official Journal of the European Communities, C 325/33 – 184, 24.12.2002.

<sup>5</sup> Kluth, W., in Calliess, C./Ruffert, M. (eds.): Kommentar zu EU-Vertrag und EG-Vertrag, 2002, Art. 22 EGV, RN 1.

<sup>6</sup> KOM (93) 702; KOM (97) 230; KOM (2001) 506; KOM (2004) 695.

<sup>7</sup> Agence Europe Nr. 6823 vom 2.10.1996.

<sup>8</sup> European Parliament, Resolution on the procedures for consulting European citizens on European Political Union, Doc. A2-106/88, 17.6.1988.

<sup>9</sup> Europäisches Parlament, Bericht über die Beratungen des Petitionsausschusses in der Sitzungsperiode 2001-2002 (2002/2019(INI)), A5-0271/2002, 17.7.2002, p. 6.

<sup>10</sup> Europäisches Parlament, Bericht über die Beratungen des Petitionsausschusses in der Sitzungsperiode 2002-2003 (2003/2069(INI)), A3-0239/2003, 19.6.2003, p. 5

<sup>11</sup> Europäisches Parlament, Bericht über die Beratungen des Petitionsausschusses in der Sitzungsperiode 2003-2004

Proposals from social scientists and civil society groups to overcome or reduce the democratic deficit by participatory/direct democratic means were also made. The German political scientist Heidrun Abromeit proposed the establishment of a set of direct-democratic instruments - mainly veto rights (territorial and sectoral veto) and mandatory referenda in case of new treaties and treaty amendments.<sup>12</sup> The Austrian lawyer and political scientist Michael Nentwich argued for a “European indirect popular initiative” - one that is very similar to the Swiss citizens’ initiative. 3-4% of the electorate (or of the ballots cast in the previous European election) in at least five Member States can submit a proposal to the Council and the Parliament. If they refuse to enact the law, a European-wide referendum will take place. In concurrence with Abromeit, Nentwich is also in favour of obligatory referenda for changes in primary law.<sup>13</sup> Several other scientists have also presented proposals for more direct democracy in the EU, although at times in a less concrete manner.<sup>14</sup>

NGOs and civil society groups have proposed direct-democratic instruments for at least 15 years. The network “Eurotopia” argued for a European constitution which should be drafted by direct-democratic means and should contain elements of direct democracy.<sup>15</sup> The “Loccumer Erklärung”, drafted by a European network of citizen groups, proposed a right of submission to the European Parliament (1% of the electorate of at least three Member States would need to sign) and a Swiss-type right of treaty-amending initiatives that would lead to a European referendum if 10% of the electorate in every (!) Member State signed an initiative.<sup>16</sup> The most elaborate and detailed proposal for direct democracy in the EU comes from the network of European democracy movements - Democracy International. In their discussion paper, “More democracy in Europe,” they developed concrete proposals for a three-step citizen-lawmaking procedure and obligatory referenda in the case of transfer of sovereignty (e.g. to the WTO or the UN) and treaty/constitutional amendments.<sup>17</sup>

It was therefore no wonder that the Convention preparing the Treaty establishing a European Constitution was eager to evaluate possible tools of participatory and direct democracy. In close cooperation with civil society organizations and after intensive discussions the presidium decided in its last meeting on June, 12<sup>th</sup>, 2003 to include the ECI in the draft Constitutional Treaty. The wording was based on Art. 192 TEC (the right of the European Parliament to ask the Commission to take legislative action). It was intended from the beginning that all issues within the framework of the powers of the European Commission could be tackled by an ECI. More details of the “birth” of the ECI can be found elsewhere.<sup>18</sup>

In the subsequent deliberations and negotiations of the Intergovernmental Conference, there were three amendments to the text of the European Convention (where the ECI was Art. I-46 (4)): In the first sentence, the words “*who are nationals*” have been included. This makes it clear that only

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(2004/2090(INI), A6-0040/2005, 11.2.2005, p. 3.

<sup>12</sup> Abromeit, H.: Democracy in Europe: Legitimising Politics in a Non-State Polity, 1998, pp. 95-135.

<sup>13</sup> Nentwich, M.: Opportunity structures for citizens participation, the case for the European Union, in: Nentwich, M./Weale, A. (eds.): Political theory of constitutional choice, 1998, pp. 125-139. Nentwich also proposes a “controlling petition referendum” that is similar to Abromeit’s veto referenda.

<sup>14</sup> Abromeit, op. cit., p. 118.

<sup>15</sup> Kaufmann, B./Köppen, P.: The Rostock Process, 1991-2004: On the way to more direct democracy in Europe, 2001, p. 89.

<sup>16</sup> Reprinted in Erne, R./Gross, A./Kaufmann, B./Kleger, H. (eds.): Transnationale Demokratie, Impulse für ein demokratisch verfasstes Europa, 1995, pp. 432-433.

<sup>17</sup> Democracy International: More Democracy in Europe, 2005, <http://www.democracy-international.org/fileadmin/di/pdf/papers/di-more-democracy.pdf>, retrieved on 23.10.2006.

<sup>18</sup> Efler, M.: A Rollercoaster Ride towards Transnational Democracy, in Kaufmann, B./Lamassoure, A./Meyer, J. (eds.): Transnational Democracy in the Making, Initiative & Referendum Institute Europe, 2003, pp. 47-49.

citizens who have the nationality of at least one of the Member States have the right to sign an ECI. Secondly, “*within the framework of its powers*” has been added, thus emphasising that an ECI is only possible where the Commission has the right of Initiative. And finally, it was made explicit in the second sentence of Art. I-47 (4) that the European law shall include “*the minimum number of Member States from which such citizens must come.*”

### III. 2 Citizen initiatives in other European countries

In Austria, the experiences with the “Volksbegehren”<sup>19</sup> are mixed. There are some indirect effects like agenda setting, mobilisation and influence on public debates. The direct effects – enactment of laws and definitive policy changes – are only limited. In 6 of 29 cases (as of 2002) citizens’ initiatives were enacted by parliament in total or in significant parts. On the other hand, even citizens’ initiatives with a very high number of signatures were completely ignored by the parliament. The addressment of initiatives was often considerably delayed.<sup>20</sup>

Italy has much experience with its citizen initiative right which must be signed by 50.000 citizens. However, like in Austria, institutional hurdles play a decisive role in the success (or lack thereof) of initiatives ever being able to reach the citizens. Of the 213 popular initiatives submitted for legislative approval, 29 have been enacted.<sup>21</sup> In Spain, where the hurdle is much higher (500.000 citizens have to sign) a similar situation exists. 5 of 32 submitted initiatives have garnered sufficient support to even be subject to parliamentary debate – only 1 of those 5 initiatives was ever enacted.<sup>22</sup>

Similar outcomes have been experienced in Poland. The Polish Constitution allows popular initiatives since 1999. The initiators must gather 100,000 signatures in support of the proposal: approximately 0,3 % of the total registered electorate. As of 2005, the procedure was used 55 times – however, legislation enacted by the parliament resulted in only 6 of those instances.<sup>23</sup>

The limited range of issues able to be addressed by an initiative and the ultimate power of the legislature in determining outcomes are among the most important factors that have served to hinder the success of citizen initiatives.

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<sup>19</sup> The name of the citizens’ initiative in Austria. 100.000 signatures (1,7% of the electorate) must be gathered.

<sup>20</sup> Rehmet, F.: Volkspetitionen – Praxis und Wirkungen. Das Beispiel der unverbindlichen „Volksbegehren“ in Österreich, Mehr Demokratie e.V., Diskussionspapiere und Untersuchungen, No. 16, 14.11.2003.

<sup>21</sup> Vanzetta, Alexa: Non-binding citizen and regional initiatives in Italy, Mehr Demokratie (eds.), 2006, p. 20.

<sup>22</sup> Cuesta, Victor: The Future of the European Citizen Initiative, in Kaufmann/Lamassoure/Meyer (eds.), op. cit., p. 74.

<sup>23</sup> Anna Rytel: The Popular Initiative in Poland, Institute of Constitutional Law and Political Institutions, University of Gdansk, 8.5.2006.

## IV. ECI – the legal setting

What exactly is the ECI? Is it binding for the Commission or not? Can an ECI be used to propose amendments to the Constitutional Treaty? What are the limitations of the ECI? These questions will be answered in the following section.

### IV.1 Nature of ECI

It is imperative that the nature of the ECI is initially defined.<sup>24</sup> The ECI, as it exists in the draft constitution, allows citizens to ask (or “invite”) the Commission to start a legislative process. This wording leaves open the legal nature of the ECI. It has already created some confusion among analysts of ECI regarding the role of the European Commission.

It is quite clear that the ECI is non-binding for the Commission in the sense that it has to submit the ECI proposal unchanged to the Parliament and the Council.<sup>25</sup> This would not be in line with the Commission’s monopoly of legislative initiative and the wording of Art. I-47 (4). However according to the majority view of European law experts and the “*effet utile*” of the ECI, it has a binding nature for the Commission in the sense that it has to take *some* legislative action on the topic proposed by the ECI. The precondition is that the ECI is declared admissible.<sup>26</sup>

It would be a misuse of citizens’ resources if the gathering of one million signatures would be without any consequence for the Commission. The very intention of the ECI is to give the citizens more influence on EU politics. It is therefore necessary that an admissible ECI has some result. This is not a contradiction to the Commission’s initiative monopoly, as the Commission is not strictly bound by the content of the ECI. In this respect, it is very important that Art. 192 (2) TEC was the model for the drafting of Art. I-47 (4).<sup>27</sup> Art. 192 (2) creates a “right of initiative for an initiative” or “indirect initiative right” for the European Parliament. This is a binding right. The Commission has to present a draft legal act, but is flexible regarding the timing and the content of its proposal. If the Commission refuses to act, the Parliament could take action for failure to act.<sup>28</sup> The same applies to Art. 208 TEC that gives the Council an indirect initiative right.<sup>29</sup> The obligation of the Commission is somewhat similar to the obligations Member States have with respect to directives: they are binding, as to the result to be achieved, but the choice of form and methods is left open to the national authorities (Art. 249 TEC). Analogously, the ECI has the same legal consequence.

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<sup>24</sup> The following remarks are based on the wording of Art. I-47 (4) Constitutional Treaty. They may not be valid if this wording will be changed.

<sup>25</sup> Only Cuesta, *op. cit.*, p. 72, seems to agree with a limited role of the Commission: “...*once the initiative has satisfied these requirements, the popular request should be automatically passed on by the Commission to the lawmaking process.*”

<sup>26</sup> Epiney, A.: Europäische Verfassung und Legitimation durch die Unionsbürger – Zu den Rechten der Unionsbürger in der Verfassung für Europa, in Kadelbach, S. (ed.): Europäische Verfassung und direkte Demokratie, 2006, pp. 49-52, citing supporting evidence and Fischer, K.-H.: Der Europäische Verfassungsvertrag, 2005, p. 202 (views the ECI as a breach of the initiative monopoly of the Commission).

<sup>27</sup> Meyer, J.: Questions & Answers about the new citizens right, in Filliez, F./Kaufmann, B. (eds.): The European Constitution - Bringing in the people, Contributions on “The options and limits of direct democracy in the European integration process”, 2004, p. 26.

<sup>28</sup> Kaufmann-Bühler, W., in Lenz, C.-O./Borchardt, K.-D. (eds.): EU- und EG-Vertrag, Kommentar, 2006, Art. 192 EGV, RN 9-10; Epiney, *op. cit.*, pp. 49-52 citing supporting evidence; Kluth, *op. cit.*, Art. 192, RN 9-11 citing supporting evidence (refusing only the interpretation that the Parliament could make a complaint for failure to act).

<sup>29</sup> Kaufmann-Bühler, *op. cit.*, RN 2; Epiney, *op. cit.*, p. 52 citing supporting evidence; Kluth, *op. cit.*, Art. 208, RN 3-4 citing supporting evidence, but also citing one dissenting opinion.



The Commission's obligation is therefore to check whether the formal conditions (number of signatures, number of countries involved, etc.) of the ECI have been fulfilled and that no conflict with European law exists. The latter would especially mean compliance with the boundaries of the European competencies and the Fundamental Rights of the Union. It would be necessary that the Commission state its reasons in case of rejection.<sup>30</sup> The Commission is obliged to take legislative action once the required number of signatures has been attained and the ECI is declared admissible. The implementing legislation should establish strict time frames for the matter's subsequent treatment by the EU institutions.

In any case, it is not possible to bind the Parliament or the Council because only the Commission is the recipient of the ECI. Even if the Commission fully approves an ECI, there is no guarantee that it will ever enter into force. If the Parliament and the Council do not act, there is no possibility of a referendum on the ECI. This is different from the Swiss-style popular initiatives. However, despite its constraints, we do not foresee that the ECI will be rendered useless. Citizen initiatives in other European countries (see summary below) illustrate that it is possible to effect change. The success largely depends on the design.) We should also not forget that an instrument like the ECI is not necessarily apparent for all member states. States like the United Kingdom, France and Germany have no initiative rights at the federal level. Optimistically, the ECI could at least lead to the introduction of citizen initiatives in some European countries. The Netherlands recently adopted such an instrument: 40,000 Dutch citizens are able to submit a political proposal to the parliament for deliberation on a given issue.<sup>31</sup>

An ECI needs also to be differentiated from the existing right to petition. The right to petition is a request by an individual or a group of individuals directed to the European Parliament.<sup>32</sup> It is rather designed for submitting complaints than to initiate legislation (though it could also be used in that way).

In conclusion, the ECI is a right of submission or an indirect initiative right for the citizens. It is more than a mere petition right but less extensive than citizen lawmaking procedures like e.g. in Switzerland.

## IV.2 Amendments of the Constitutional Treaty

Some analysts of Art. I-47 (4) Constitutional Treaty are of the opinion that an ECI could not propose constitutional amendments.<sup>33</sup> The skepticism is based on the terms "*for the purpose of implementing this Constitution*" and "*legal act*" in Art. I-47 (4). "*Implementing*" could imply regarding the current constitutional setting as a status quo that should not be questioned by an ECI. Regarding "*legal act*", it is reasoned that this refers exclusively to the legal acts in Art. I-33 of the Constitutional Treaty which did not mention the treaty revision clauses IV-443, IV-444 and IV-445 of the Constitutional Treaty.

Such an interpretation warrants rebuttal. The term "*implementing this constitution*" could very well be interpreted as implementing all provisions of the constitution including Art. IV-443, IV-444 and

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<sup>30</sup> This should also be clarified in the implementing law.

<sup>31</sup> Nijeboer, A./Pabst, R.: The Netherlands introduce Citizen's initiative, <http://democracy-international.org/dutch-initiative.html>, retrieved on 23.10.2006.

<sup>32</sup> Auer, A.: European Citizens' Initiative, *European Constitutional Law Review*, 1 (2005), p. 80; Meyer, op. cit., p. 26.

<sup>33</sup> Cuesta, op. cit., p. 72; Auer, op. cit., p. 29 (without further reasoning); apparently also Epiney, op. cit., p. 47.

IV-445. Only violations of the Constitutional Treaty are forbidden by this term if an ECI itself is not directed towards a constitutional amendment. It is also argued that this term has no autonomous meaning.<sup>34</sup> With respect to the term “*legal act*,” it is necessary to note that there is no explicit reference to Art. I-33. It is generally agreed upon that more legal acts exist than are listed in Art. I-33.<sup>35</sup> The revision of the Constitutional Treaty – be it by ordinary or special procedure – is blatantly a legal act.<sup>36</sup> It should also be noted that European countries with citizen initiatives excluding the proposal of constitutional amendments do so explicitly. Furthermore, it was not the intention of the drafters of Art. I-47 (4) to limit the ECI to a statutory initiative. Finally, it would be an overly restrictive approach to exclude constitutional amendments. The *effet utile* of the provision is to give European citizens more influence on European policy while maintaining the institutional balance. Excluding the most important legal form would surely be a departure from that goal.

Based on the aforementioned reasons, Art. I-47 (4) does not exclude ECIs directed at amending the Constitutional Treaty.

Politically, it would be a major shortcoming if ECIs were unable to propose amendments to the Constitutional Treaty. The Constitutional Treaty is very complex and regulates much more policy content than national constitutions do. Excluding such amendments would prevent European citizens from participating in the most important policy fields. Should the citizens of Europe not be able to ask the Commission to propose such amendments? The example of the civil society campaigns invoking Art. I-47 (4) (see Annex) clearly demonstrates that constitutional matters are of crucial importance for citizens. The most publicly known campaign for a permanent seat of the European Parliament would have also required a treaty amendment.

### IV.3 Limitations

Another (systemically logical) limitation is that an ECI has to respect the framework of the powers of the European Commission. The Commission has the right of initiative in nearly all of the policy areas where the EU has jurisdiction - and this is almost every policy area.<sup>37</sup> This is also true for the Common Foreign and Security Policy (CFSP) and for justice and home affairs. The CFSP – which integrates the Common Defence Policy – is within the framework of the Commissions’ powers because Art. 22 Treaty on European Union (TEU)<sup>38</sup> enables the Commission to take the initiative, the intergovernmental character of the CFSP notwithstanding. As does Art. 34 (2) TEU for the intergovernmental (police and judicial cooperation in criminal matters)<sup>39</sup> and Art. 67 (1) + (2) TEC for the community part of the justice and home affairs (visas, asylum, immigration and other policies related to free movement of persons).<sup>40</sup> The fact that the Council or Member States also have the right of initiative does not necessarily lead to the conclusion that an ECI would be illegal or outside the Commission’s powers. One of the very few examples where the Commission does not have any right of initiative is Art. 190 (4) + (5) TEC that gives the European Parliament the sole

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<sup>34</sup> Epiney, op. cit., p. 49.

<sup>35</sup> Hetmeier, H., in Lenz/Borchardt, op. cit., Art. 249 EGV, RN 3; Ruffert, op. cit., Art. 249 EGV, RN 1, 121.

<sup>36</sup> In German constitutional law, all amendments of the constitution are laws, the need for special procedures and qualified majority notwithstanding.

<sup>37</sup> Kluth, W., in Calliess/Ruffert, op. cit., Art. 250 EGV, RN 5.

<sup>38</sup> Consolidated Version of the Treaty on European Union: Official Journal of the European Communities, C 325/5 – C 325/181, 24.12.2002.

<sup>39</sup> The Amsterdam Treaty has extended the right of initiative to every area of the justice and home affairs, Nemitz, P.F., in Borchardt/Lenz, op. cit., Art. 34 EUV, RN 3; Brechmann, W., in Calliess/Ruffert, op. cit., Art. 34 EUV, RN 3-4.

<sup>40</sup> Brechmann, op. cit., Art. 67 EGV, RN 1-2; Bergmann, J., in Borchardt/Lenz, op. cit., Art. 67 EGV, RN 3, 6 +7.

responsibility to draft a proposal for a uniform election procedure for the European Parliament and for the regulations and general conditions governing the performance of the duties of its members. The same applies to the regulations and general conditions governing the performance of the Ombudsman's duties (Art. 195 (4) TEC). An ECI on these topics would be illegal under the wording of Art. I-47 (4) of the Constitutional Treaty. Although, an ECI legislative proposal, independent of the text and form of the Constitutional Treaty, could broaden the scope to include these exceptional initiative powers of the Parliament

An ECI - if it is not by itself directed to an amendment of the treaties - has also to respect the provisions of the European treaties, *e.g.* the limits of the Unions' competencies, the institutional balance of the Union, or fundamental rights and freedoms established by the European Court of Justice.

The exact scope of the ECI will be decided by the legal act chosen to implement it and will depend on subsequent practical experiences and court decisions.

## V. Evaluation of different legal options

The constitution has been rejected by the voters in France and the Netherlands. What does this mean for the future of the ECI? There are several options as to how to continue with the ECI. These options are:

- Waiting for the ratification of the Constitutional Treaty
- Amendment of the Constitutional Treaty
- Enactment by a directive / regulation.
- Enactment by an interinstitutional agreement
- Integration into the Rules of Procedure of the European Commission

The principle pro's and con's of each option, its legal admissibility and effect and the political consequences will be evaluated.

### **Waiting for the ratification of the Constitutional Treaty**

We do not expect the draft Constitutional Treaty to be ratified in the foreseeable near future. The Constitutional Treaty has been rejected by the voters and these decisions have to be respected. Therefore, waiting for the present text to be ratified by each Member State of the EU is not a viable option.

### **Amendment of the Constitutional Treaty**

Another option might be the amendment of the current draft constitutional text. One possibility would be to concentrate on some of the undisputed institutional provisions of the treaty. The most detailed approach thus far has been proposed by Nicolas Sarkozy.<sup>41</sup> He is in favour of a “mini-treaty” that should focus on those provisions that are considered to be the most urgent institutional reforms. The ECI should be one of the priorities.<sup>42</sup> The more far-reaching treaty amendments should be worked out by a large-scale convention coming into effect after the 2009 European Parliament elections.<sup>43</sup> In Sarkozy's proposal, however, it is unclear whether this should be an explicit component of the mini-treaty.

This option seems to be somewhat more realistic than the ratification of the unchanged text. From a democratic point of view, this option could only be recommended if it is truly focused on urgent and undisputed institutional reforms and paves the way for a general treaty reform/constitutional process. It should not be used to bypass the French and Dutch voters and to introduce the current Constitutional Treaty through the backdoor. Once this condition has been met, it is an interesting option because it would give the ECI primary law status and it is a very transparent form of enactment compared to most of the options reviewed later on. For reasons of clarity and legal safety, the term “for the purpose of implementing this constitution,”<sup>44</sup> should not be used in the mini-treaty (see IV.2). One could expect that such a mini-treaty could be negotiated quickly because it would

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<sup>41</sup> Sarkozy, N.: Speech to the Friends of Europe Foundation and the Robert Schuman Foundation, 8.9.2006.

<sup>42</sup> The others are qualified majority voting/co-decision procedure, double majority system; election of the Commission President by the Parliament, strengthening of the subsidiarity principle, stable presidency of the European Council, Foreign Minister, enhanced cooperation and legal personality for the Union.

<sup>43</sup> Ibid., pp. 2-5.

<sup>44</sup> Or “for the purpose of implementing this treaty”.

involve re-using the provisions agreed upon by the European Convention and the IGC. It would require ratification in all Member States, including all countries that have ratified the Constitutional Treaty thus far. Realistically, this could not be achieved before 2009.

This option is in principle very consequent. In the long run, a legal basis in primary law for participatory and direct democracy is definitely necessary. This is also common constitutional practice in Europe.<sup>45</sup> It would create directly binding law for the Member States and could also legally empower citizens (groups) by giving them enforceable rights within the ECI procedure (e.g. a right to be heard by the competent institutions).

### **Enactment by a directive / regulation**

The logical next option to be evaluated is an enactment by secondary law. Art. 249 TEC provides the most common legal acts of the Union: Regulations, directives, decisions, recommendations and opinions.<sup>46</sup> In the following, only regulations and directives will be analyzed, as the other legal acts clearly do not fit with the aim of establishing a citizen-friendly ECI procedure. Decisions are binding but only suitable for the regulation of individual cases and, therefore, administrative and not legislative decisions. Recommendations and opinions do not have binding force and are therefore not appropriate. Regulations, on the other hand, are binding in their entirety and directly applicable in all Member States, whereas directives are only binding as to the result to be achieved and leave the choice of form and methods open to the national authorities. However, before analyzing the legal ramifications in further detail, the question whether or not it is legally admissible to enact an ECI-regulation or directive must be addressed.

### Legal basis

Every legal act of the Union needs a legal basis. The principle of conferral of competencies (Art. 5 TEC) clearly states: “*The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.*” The crucial question is, therefore, whether such a legal basis exists in this case. European Law differentiates between special and general legal bases, whereby the special legal basis is preferred over the general one.

There is no explicit legal basis for the ECI in the treaties. This would have been established with the Constitutional Treaty. The only other special legal basis could be Art. 22 TEC (see III.1). The concept of the Citizenship of the Union creates rights similar to the ECI, especially the right to vote in communal elections in all Member States and the right to petition the European parliament. However, as previously mentioned, the extension of citizen rights depends on a Commission report. No Commission report hitherto mentions the role of direct or participatory democracy in general or more particularly in the form of a citizens’ initiative. Thus Art. 22 is not available as a legal basis.<sup>47</sup> No special legal basis exists.

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<sup>45</sup> For an overview on direct-democratic procedures and plebiscites in the constitutions of 32 European states see Initiative & Referendum Institute Europe: Guidebook to Direct Democracy in Switzerland and beyond, 2005 edition, pp. 228-260. From the countries with ECI-style citizen initiatives (Austria, Hungary, Italy, Lithuania, Poland, Portugal, Romania, Slovenia, Spain) only Portugal seems to regulate this instrument by secondary law. In the Netherlands, the citizens’ initiative was included in the regulations of the parliament. If it had been fixed in law, the constitution would have to be changed too, which is very difficult in the Netherlands.

<sup>46</sup> There are some other forms of legal acts - even with binding force – but they are beyond the scope of this study.

<sup>47</sup> Even if there will be explicit or implicit reference of the ECI in a future Commission report, it will be a difficult means of getting ECI legislation enacted. The Commission has to present a proposal, the Parliament needs to be heard, and the Council has to decide unanimously. Then the proposal needs the adoption of all Member States. This adoption could be done by referendum, parliamentary

The ECJ has developed the “implied powers” doctrine. This is related to powers not stated specifically but are considered to be “reasonably” implied because the duties of the legislator implied the right to use means adequate to its ends. However, it would be irrelevant to argue that the right of initiative of the Commission could not be used seriously without the ECI. Furthermore, the German Constitutional Court is quite sceptical regarding the applicability of the implied powers concept as a whole.<sup>48</sup> Implied powers could not be used as a legal basis.

European Law acknowledges three general legal bases; Art. 94 and Art. 95 TEC and Art. 308 TEC. Art. 95 and Art. 94, that has the role of a residual norm for Art. 95, are obviously not available. They serve to give a possibility for the “*approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market*”. Because ECI has very little to do with Member States law these articles are not available. The question is whether Art. 308 TEC (Residual power) is available. It reads: “*If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.*”

To qualify as a legal basis for a ECI-legislation, four hurdles have to be overcome: Art. 308 TEC should 1.) not be used for hidden treaty amendments, the measures have 2.) to be in the course of the operation of the common market, action 3.) should prove necessary to attain 4.) one of the objectives to the community. In the following section, each of the four qualifications will be analyzed individually.

#### 1.) No hidden treaty amendment:

This qualification cannot be found directly in the text of Art. 308. It has been developed by the ECJ. Art. 308 has the ability to allow for the implementation of existing treaty objectives where no explicit powers exist. It should not be used to create new treaty objectives or to bypass the formal procedure of treaty amendments (Art. 48 TEU). It has to be used to complement competencies, and not to expand them.<sup>49</sup> In a corresponding ECJ opinion regarding the accession of the EC to the ECHR (European Convention on Human Rights), the ECJ denied the applicability of Art. 308. Current European Law does not provide the EC with the competence of accession to the ECHR. It was reasoned that the accession would lead to a new international law and a different institutional system. Such an amendment has a constitutional dimension and therefore a formal treaty amendment would be necessary.<sup>50</sup>

Would this also hinder the possibility of an ECI legislation based on Art. 308? The ECI would not lead to a new international law system because it has nothing to do with international law (other than

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decision or governmental approval depending on the content of the proposal, see Kaufmann-Bühler, op. cit., Art. 22, RN 2. This complicated procedure is perhaps the reason why the Union’s citizenship has not been strengthened so far by Art. 22 TEC. The extensions adopted under this procedure would be part of the Union’s primary law, see Kluth, W., op. cit., Art. 22, RN 6.

<sup>48</sup> Calliess, C., in Calliess/Ruffert, op. cit., Art. 5 EGV, RN 14.

<sup>49</sup> Bitterlich, J., in Lenz/Borchardt, op. cit., Art. 308 EGV, RN 2-3; Rossi, M., in Calliess/Ruffert, op. cit., Art. 308 EGV, RN 1-3, 52-55; Schwartz, I.E., in von der Groeben, H./Schwarze, J. (eds.): Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, Kommentar, 6. Auflage, 2004, Art. 308 EGV, RN 9-28; Geiger, R.: Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, 4. Auflage, 2004, Art. 308 EGV, RN 1; Streinz, R., in Streinz, R. (ed.): Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, 2003, Art. 308 EGV, RN 1-10.

<sup>50</sup> ECJ, Assessment 2/94, 28.3.1996, Slg. 1996, I-1759.

European Law). It could also not seriously regarded as paving the way into a different institutional system. The institutional system of the Union as a whole will not be touched, it will be slightly modified. Only the Commission is obliged to act in an unspecified way (and that is also not a consensus view). The functions of the Parliament and the Council remain completely unchanged. Every ECI could completely fail if these two institutions refuse to act. The same is true for the division of powers between the Union and the Member States. The fact that the clear majority of European countries that have citizen initiatives have included this right in their national constitutions does not lead to the interpretation that the ECI has a “constitutional nature”. The constitutional systems of the Member States are different than that of the Union, in that the citizens’ initiative is a direct initiative right to be submitted to the national parliament that is empowered to directly decide whether it will adopt a citizens’ initiative or not. The ECI is an indirect initiative right directed to the Commission which – as already mentioned – has a lot of freedom in handling the ECI and stands at the beginning of a very complex lawmaking process. Furthermore, the fact that most countries have integrated their citizens’ initiatives into their constitutions seems to be more politically than legally motivated. Slovenia and the Netherlands demonstrate that it is not absolutely necessary to include it in the constitution.

A ECI legislation would not be an illegal hidden treaty amendment.

“to be in the course of the operation of the common market”

The prevailing opinion in the literature is of the opinion that measures adopted under Art. 308 have to comply with the common market – they should not violate its principles. It is not necessary that they have a factual relationship to the common market or guarantee its functioning.<sup>51</sup> The ECJ has even given the “green light” to measures regarding the external affairs of the community.<sup>52</sup> This interpretation can also be supported in that Art. 308 is incorporated in the General and Final Provisions of the TEC, indicating applicability for all parts of the treaty. A narrow interpretation limited to the functioning of the common market would also deprive Art. 308 of its independent meaning, as it is already covered by Art. 94 und Art. 95.

An ECI legislation would surely “*be in the course of the operation of the common market.*”

“If action by the Community should prove necessary”

It is important to clarify that Community action should not be objectively necessary but merely “*prove necessary*”,<sup>53</sup> in constituting a very significant difference. The necessity is given if there is a discrepancy between a community objective and its realisation. The institutions have very broad discretion. This discretion can legally only be challenged by the ECJ in respect to the appropriate exercise of discretionary power.<sup>54</sup> Some commentators do interpret this condition as reducing the

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<sup>51</sup> Streinz, op. cit., Art. 308 EGV, RN 19-21; Rossi, a.a.O., Art. 308 EGV, RN 23-24; Schwartz, op. cit., Art. 308 EGV, RN 147-167, all provide further supporting evidence. Competing opinion Bitterlich, op. cit., Art. 308 EGV, RN 8, who sees this term as directed to the functioning of the common market. In this interpretation measures adopted on the basis of Art. 308 would need a factual relationship to the common market.

<sup>52</sup> Schwartz, op. cit., Art. 308 EGV, RN 160-161, citing an ECJ assessment that allows the applicability of Art. 308 in the field of the external relations of the Community, EuGH – AETR, 22/70 – Slg. 1971, 263.

<sup>53</sup> The German text is somewhat clearer: „*Erscheint ein Tätigwerden der Gemeinschaft erforderlich...*“

<sup>54</sup> Streinz, op. cit., Art. 308 EGV, RN 22-25; Rossi, op. cit., Art. 308 EGV, RN 26-29; Schwartz, op. cit., Art. 308 EGV, RN 168-178.

chosen measures of the absolute necessity to fulfil the objectives.<sup>55</sup> However, because they also agree in respect of the limited justiciability, there should be only limited, if any, practical difference.

It could be concluded that an ECI-legislation would not be in contradiction with this condition due to the discretion of the institutions.

### Objective of the Community

Community action is only allowed when it is directed towards the implementation of a treaty objective. What a treaty objective exactly implies is contested in the literature and in the ECJ case-law. The majority view tends towards a broad interpretation, considering the objectives in Art. 2, 3 und 4 as general community objectives and the objectives in several individual provisions as special objectives that justify action under Art. 308. The latter have preference over the general objectives. Objectives of the Treaty on European Union are not applicable.<sup>56</sup> All tasks of the community constitute objectives.<sup>57</sup> It is contested whether the objectives in the preamble constitute treaty objectives. The majority view seems to deny that the preamble constitutes objectives.<sup>58</sup> However, the ECJ has frequently ruled – but not in explicit reference to Art. 308 – several times in favour of regarding preamble objectives as treaty objectives.<sup>59</sup>

The question is whether explicit or general treaty objectives exist that justify ECI legislation. Turning first to the explicit objectives the only possibility seems to be the Union's Citizenship (Art. 17-22 TEC). The Union's citizenship constitutes the community as a political community. As already mentioned (see III.1), the Union's citizenship is designed as a dynamic concept that gives the Union the opportunity of strengthening citizen rights. Some commentators regard it as cornerstone of European integration.<sup>60</sup> The periodical reporting is designed to give an overview about the state of the citizens' rights and possibilities and necessities of their further development. The current treaty regulations on the Union's citizenship constitutes a minimum standard that has to be further developed.<sup>61</sup> Thus far it constitutes a task, and a task constitutes an objective in European Community Law. In conclusion, there is an objective that could (and must) prove necessary to attain.<sup>62</sup>

### Use of competencies

Art. 308 is a legal base for an ECI-legislation in the sense of Art. 5 (1) TEC. But such a legislation has also to conform with the principles of subsidiarity in its narrow sense (Art. 5 (2)) and the principle of proportionality (Art. 5 (3)). The first principle justifies action, "*only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the*

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<sup>55</sup> Bitterlich, op. cit., Art. 308 EGV, RN 10; Geiger, op. cit., Art. 308 EGV, RN 6.

<sup>56</sup> This could have simplified this problem because democracy is explicitly mentioned there in Art. 6 TEU as a constitutive principle.

<sup>57</sup> Streinz, op. cit., Art. 308 EGV, RN 18; Rossi, op. cit., Art. 308 EGV, RN 10-20; Schwartz, op. cit., Art. 308 EGV, RN 83-146; Bitterlich, op. cit., Art. 308 EGV, RN 7. Geiger, op. cit., Art. 308 EGV, RN 3-5, disagrees that Art. 2 constitutes treaty objectives.

<sup>58</sup> Geiger, op. cit., Art. 308 EGV, RN 5; Streinz, op. cit., Art. 308 EGV, RN 18; Bitterlich, op. cit., Art. 308 EGV, RN 7; Rossi, op. cit., Art. 308 EGV, RN 19. Schwartz, op. cit., Art. 308 EGV, RN 112-123, is in favour of the applicability of preamble objectives.

<sup>59</sup> For an good overview see Schwartz, op. cit., Art. 308 EGV, RN 118-119.

<sup>60</sup> Kaufmann-Bühler, op. cit., Art. 22 EGV, RN 1.

<sup>61</sup> Ibid; Kluth, op. cit., Art. 22 EGV, RN 2 citing supporting evidence.

<sup>62</sup> It might also possible to use an objective in the TEC-preamble as justifying Community action under Art. 308. This will not be further analyzed because there is already a special treaty objective.



*Community.*” However, it is not necessary to analyze whether an ECI-regulation might violate this principle. That is why it is only of relevance for areas which do not fall within the exclusive competence of the Community. The ECI is within the exclusive competence of the community because it could be obviously regarded as belonging to the autonomy of the institutional system of the EU; the latter is an area within the exclusive competence of the Community.<sup>63</sup> Even if one does not consider the ECI to be regarded as an exclusive community competence, it is hard to imagine how the empowerment of the Union’s citizens regarding European policy can be sufficiently achieved by the Member States.

The proportionality principle - “*Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty*” - can only be discussed with regard to the specific content of the ECI legislation. This matter is beyond the scope of this study, but there is clearly not much need for binding requirements for the Member States, as the ECI deals primarily with the institutions of the Union. Only the method of signature gathering<sup>64</sup> could be an issue for harmonization of Member States’ action. An ECI legislation would therefore be unlikely to be in conflict with the proportionality principle.

All conditions of Art. 5 and Art. 308 have been fulfilled. It is also important to note that Art. 308 has been used quite frequently in the past. It should not construct an insurmountable barrier for achieving more participatory democracy in the Union.

An ECI-legislation is legally possible.

### Legal effect

Regulations are binding in their entirety and are directly applicable in all Member States: whereas directives are only binding as to the result to be achieved and leave open to the national authorities the choice of form and methods. The implementation can violate the national constitutions and – at least in Germany – be challenged by the national constitutional courts. The lawmaker is not entirely free in respect of the form of the legal act. According to the already mentioned proportionality principle he or she has to choose that form that interferes as few as possible with national competencies.<sup>65</sup>

There are sound reasons for choosing the regulation as the appropriate form for an ECI-legislation. The ECI is part of the exclusive competencies of the Union, as it belongs to the autonomy of the institutional system. One of its most important aims it to enable transnational discussions and policy action. By its very nature, there is little interference with Member States’ competencies. Thus a directive would not be optimal because the substantive rules of the ECI (number of signatures, scope, significant number of countries, time frame, etc.) should be uniform. It would also imply further delay in the application of the ECI. The regulation is therefore the appropriate form of a legal act.<sup>66</sup>

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<sup>63</sup> Zuleeg, M., in von der Groeben/Schwarze, op. cit., Art. 5 EGV, RN 8.

<sup>64</sup> Especially in Germany there are discussion whether signatures should be gathered “free” (e.g. at public events, street gathering) or whether citizens have to go into official buildings (e.g. town halls) in order to sign.

<sup>65</sup> Hetmeier, op. cit., Art. 249 EGV, RN 2.

<sup>66</sup> This conclusion is also supported by the text of Art. I-47 (4) of the Constitutional Treaty because it speaks of “*European laws*” that should specify the procedure. In the concept of the Constitutional Treaty a European Law corresponds to the regulation whereby European Framework Laws correspond to directives, see Fischer, op. cit., p. 184; Evers, S., in Berg, C./Kampfer, C. (eds.): *Verfassung für Europa, Der Taschenkommentar für Bürgerinnen und Bürger*, 2004, p. 150.

One significant limitation arises with respect to the scope of an ECI legislation, the chosen form of a legal act notwithstanding. Art. 308 seems to justify only Community action; it's not applicable for action of the European Union. The practical implications are that ECIs directed to, for example, the CFSP or to police and judicial cooperation in criminal matters would not be admissible. But there is at least one regulation based on Art. 308 that deals with CFSP matters.<sup>67</sup> This problem would not arise in the concept of the Constitutional Treaty because the TEC and TEU is merged into one single institutional framework, the different types of legal acts and procedures notwithstanding.

### Procedure

Art. 308 requires a proposal of the Commission and unanimous action by the Council. The Parliament only needs to be heard. Convincing the Commission to present a draft regulation (thus far it has refused to take action) is therefore the first task and could become a sizeable one. This will certainly depend on the fate of the Constitutional Treaty. If it is to be revived, the chances for an ECI legislation are quite bleak, as the very text of the new treaty includes the ECI. However, if the constitutional stalemate continues and no solution can be found, then there are good reasons for such an isolated approach. The German Council Presidency will be decisive for this issue. The unanimity principle means that the resistance of a single Member State could block the enactment of an ECI regulation. This is quite an important hurdle, but we should not forget that all Heads of States and Governments have already consented to the ECI during the Intergovernmental Conference negotiating the Constitutional Treaty. There is also an interesting academic debate whether the Council is obliged to take action once the conditions of Art. 308 have been fulfilled. While the ECJ has decided that the Council is not obliged,<sup>68</sup> a minority view in the literature holds the opposite opinion. This is based on the wording, "*the Council shall*" and the apparent difference in the text of Art. 95 of the Treaty Constituting the European Coal and Steel Community (ECSC) - which served as a model for Art. 308 (then Art. 235) - giving the Council discretion - "*could*."<sup>69</sup> The majority view rejects this interpretation with reference to the ECJ-ruling and to the discretion of the Council.<sup>70</sup>

The author shares the minority view. The Council is obliged to act once Community action proves necessary to attain. The wording of Art. 308 is instructive and explicitly excludes the discretion of the Council, in that the Council has to take action. However, the Council is not obliged to adopt a proposal from the Commission unaltered.

### Conclusion

An ECI regulation is legally possible, would have binding force, and would enable initiators to challenge unfavourable decisions of the Commission before the ECJ. While Member States would be bound to a uniform procedure, there would be no interference with their sovereign powers. The regulation should make it clear that treaty amendments can be proposed by an ECI. The Council has to act once the Commission makes a proposal for a legal act. A regulation could be enacted much faster compared with primary law amendments. Some foreseeable drawbacks include the unanimity

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<sup>67</sup> Council Regulation (EC) No 381/2001 of 26 February 2001 creating a rapid-reaction mechanism, Abl. 2001L 57/5.

<sup>68</sup> Rossi, op. cit., Art. 308 EGV, RN 63.

<sup>69</sup> Schwartz, op. cit., Art. 308 EGV, RN 188-191.

<sup>70</sup> Streinz, op. cit., Art. 308 EGV, RN 31; Rossi, op. cit., Art. 308 EGV, RN 63-64; Geiger, op. cit., Art. 308 EGV, RN 13.

requirement<sup>71</sup> and the potentially limited scope of the instrument compared with the constitutional options.

### **Enactment by an interinstitutional agreement**

The ECI might be integrated in an interinstitutional agreement. This option has already been presented in the so-called “Voggenhuber-Duff”-report of the European Parliament.<sup>72</sup> Interinstitutional agreements (IIA) are agreements between the Commission, Parliament and the Council. As of yet, they have no general legal basis in primary law; the draft Constitutional Treaty would have created one with Art. III-397.<sup>73</sup> Their function is to regulate the details of the cooperation of the institutions. One of the main practical implications of IIA is to pave the way for subsequent treaty amendments. The European Parliament has also incrementally increased its powers via this measure. They also served to contain institutional conflicts, *e.g.* in the budgetary procedure.<sup>74</sup>

Would it be legally possible to establish the ECI by an IIA? IIA could neither change nor complement the treaties; furthermore they would have to be agreed upon by all three organs. They could not alter the vertical (between the Member States and the European Union) or horizontal (between the institutions) balance of power. IIA that give institutions powers without a basis in treaty law, and therefore amend the institutional balance, are illegal.<sup>75</sup>

The creation of an ECI by an IIA should be able to conform to these hurdles. The ECI is neither shifting the power balance between the EU and the Member States nor between the institutions. Because the ECI respects the monopoly of legislative initiative of the Commission, there is also no shift of power between the citizens and the Commission. The agreement of all (primary) institutions is a political question. An IIA would therefore be legally possible and much faster compared to the other options analysed so far.

However, there are very significant shortcomings of the IIA. One, is the very limited legal effect of an IIA. Only the concluding parties are bound by these agreements.<sup>76</sup> Especially with respect to Member States, no obligations could be conferred. But this could become an issue when it comes to the questions of the type of signature gathering (see above). An IIA also could not create legal There are also political reasons that lead to a sceptical outlook on this option. It would be symbolically peculiar to integrate the citizens’ initiative into the interinstitutional structure of the EU.

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<sup>71</sup> Even if the Council is obliged to act, there is a problem with unanimity regarding the content of an ECI regulation. Unanimity would potentially lead to a kind of “minimum consensus.”

<sup>72</sup> Europäisches Parlament: Struktur, Themen und Kontext für die Bewertung der Debatte über die Europäische Union, Entschließung des Europäischen Parlaments zur Reflexionsphase: Struktur, Themen und Kontext für eine Bewertung der Debatte über die Europäische Union (2005/2146(INI)), 19.1.2006, p. 4, Z. 9. The report mentioned the possibility of the “*introduction of a form of citizens’ initiative*” by an interinstitutional agreement or by revision of rules of procedure (leaving open which rules of procedure they mean).

<sup>73</sup> “*The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Constitution, conclude interinstitutional agreements which may be of a binding nature.*”

<sup>74</sup> Kaufmann-Bühler, *op. cit.*, Art. 197, RN 12-13; A very good analysis of the role and development of IIA can be found in Hummer, W.: Interinstitutionelle Vereinbarungen und „institutionelles Gleichgewicht“, in: Hummer, W. (ed.): Paradigmenwechsel im Europarecht zur Jahrtausendwende. Ansichten österreichischer Integrationsexperten zu aktuellen Problemlagen. Forschung und Lehre in Österreich, 2004.

<sup>75</sup> Hummer, *op. cit.*; Kaufmann-Bühler, *op. cit.*, Vorbem. Art. 189-201, RN 5.

<sup>76</sup> Kaufmann-Bühler, *op. cit.*, Art. 197, RN 12. But, according to Hummer, *op. cit.*, even this internal binding nature is not always ensured, but this is not of deeper interest for this study. This is supported by the very text of the draft Constitutional Treaty (see FN 73).

Participatory democracy is not a game between the institutions initiated by the citizens. It is (or should be, in my understanding) a right of the citizens to influence the policies of the EU. The enactment of an IIA, the possibility of publication in the Official Journal notwithstanding, is also much less transparent than the enactment of directives/regulations and especially than primary law amendments.

Via an IIA, only an ECI “light” could be enacted that would leave citizens powerless in case of non-action on the part of the Commission and violation of ECI procedures. The option is thus not recommended.

### **Integration into the Rules of Procedure of the Commission**

Another option would be to integrate the ECI into these rules of procedure of the Commission.<sup>77</sup> They are governing the internal affairs of the Commission. In the annex, there is already a “Code of good administrative behaviour for staff of the European Commission in their relation with the public” dealing with issues like access to documents or handling of citizen inquiries. The Rules of Procedure could be amended by a simple majority of the members of the Commission (Art. 219 TEC and Art. 8 Rules of Procedure). There is already one case of precedence: in the Netherlands the citizens’ initiative was enacted in the rules of procedure of the Parliament.

All counterarguments that have arisen regarding the interinstitutional agreements are also valid for the Commission’s Rules of Procedure. They are neither binding for Member States, nor are enforceable by citizens.<sup>78</sup> An additional problem is that only the role of the Commission regarding the treatment of ECI’s can be regulated that way. However, it might also be prudent to give the Council and the Parliament (limited) roles, e.g. the right of the citizens’ initiative also to be heard by these institutions once the Commission has decided to begin the legislative process. This would not be possible in the Rules of Procedure of the Commission.<sup>79</sup>

For the aforementioned reasons, this option would not be recommended.

### **Conclusion**

All of the discussed options have their disadvantages and pitfalls; none of them is easy to achieve. The integration of the ECI into a mini-treaty is the best option if this treaty is strictly bound on undisputed, institutional reforms and paves the way for a general treaty reform/constitutional process. If this is not attainable, the enactment of an ECI-regulation is the next best option. All other options could not be recommended.

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<sup>77</sup> Rules of Procedure of the Commission, Official Journal L 308 , 08/12/2000 P. 0026 – 0034, amended by Commission Decision of 15 November 2005 amending its Rules of Procedure (2005/960/EC, Euratom), Official Journal L 347/83.

<sup>78</sup> With regard to the good administration codex there seems to be some disagreement in the literature. Lais, M.: Das Recht auf eine gute Verwaltung unter besonderer Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs, Zeitschrift für europäische Studien, 3/2002, <http://www.jura.uni.sb.de/projekte/Bibliothek/texte/lais.html>, p. 21, denies that the codex creates enforceable rights for the citizens. Ruffert, M., in Calliess/Ruffert, op. cit., Art. 218 EGV, RN 2 +9 sees a binding nature of the codex because the right of complaint at the Commission and the ombudsman gives it an external effect. The author of this study agrees with Lais. One very important difference to the codex is that the ECI, in contrast to the right of good administration, clearly has no basis in primary law or in court rulings.

<sup>79</sup> Theoretically, the ECI could be integrated parallel into the rules of procedure of the Commission, the Council and the Parliament. However, this would not cure the non-binding nature and the lack of enforceability. It would also lead to a intransparent and potentially incoherent procedure.

## VI. Annex: Past and current campaigns invoking the European citizens' initiative

<b>One Million Europeans Against Nuclear Power</b>	This campaign, organised by Atomstopp, Friends of the Earth Europe, Global 2000, Sortir du Nucléaire, WISE, Woman for Peace, and supported by more than 350 NGOs, has gathered (as of 24.10.06) more than 505,000 signatures against nuclear power in Europe.	<a href="http://www.million-against-nuclear.net">www.million-against-nuclear.net</a>
<b>EU media regulation Initiative</b>	The idea of gathering one million signatures for media pluralism came out of an international conference on 23 April, 2005 in the European Parliament. This has been supported by MEP Michele Santoro (PSE, Italy). Since there is no follow-up-action on the website, the campaign itself has apparently not started yet.	<a href="http://www.euractiv.com/Article?tcaturi=tcm:29-137649-16&amp;type=News">www.euractiv.com/Article?tcaturi=tcm:29-137649-16&amp;type=News</a> <a href="http://keywords.dsvr.co.uk/freepress/body.phtml?category=news&amp;id=993">keywords.dsvr.co.uk/freepress/body.phtml?category=news&amp;id=993</a>
<b>Campaign for one million signatures in favour of Union citizenship for all residents</b>	The National Assembly Against Racism (Great Britain) aims to gather one million signatures to grant Union Citizenship to all residents, regardless of nationality. The organization also stipulates that regardless of the evolution of the Constitutional Treaty, they will nevertheless deliver the signatures to the various national governments, to the European Commission, and to the European Parliament.	<a href="http://www.naar.org.uk/newspages/050421c.asp">www.naar.org.uk/newspages/050421c.asp</a> <a href="http://www.aedh.net/petition-million.htm">www.aedh.net/petition-million.htm</a>
<b>Animal Welfare Initiative</b>	Endorsed and initiated by various Green parties, the campaign seeks to place restrictions on inhumane and unnecessarily long transportation of live animals in Europe. They aim to gather one million signatures to add a clause on animal transport to an anticipated EU Constitutional Treaty.	<a href="http://www.fyeg.org/index.php?option=content&amp;task=view&amp;id=90&amp;Itemid=159">www.fyeg.org/index.php?option=content&amp;task=view&amp;id=90&amp;Itemid=159</a>
<b>Initiative "Pour la Justice" – The Right of Initiative of the Citizens of the European Community</b>	This cyber-campaign, directed to European Commission, European parliamentarians, heads of state and government and parliaments of the individual Member States, invokes the right (as stated in the draft constitution) of citizen initiative to propose eleven statements as basis of an Europe in "freedom, security and justice". The petition was started by Chantal Cutajar, professor of criminal law at Strasbourg University and President of Le Droit pour la Justice, who launched this campaign on her website 9 March, 2005. The campaign aims to gather one million signatures and is exclusively online.	<a href="http://www.petition-europe-justice.com">www.petition-europe-justice.com</a>
<b>The One Seat Campaign</b>	Headed by Cecilia Malmström (member of the European Parliament for the Swedish Liberal Party), the campaign strives to stop the "travelling circus" to Strasbourg. As of 25.10.06, the petition has been signed more than 1,044,700 Europeans.	<a href="http://www.oneseat.eu/">www.oneseat.eu/</a>
<b>The Help Africa Petition</b>	This campaign, started in 2004 by British PM Michael Willis, aims to gather one million signatures calling for European financial support of people with AIDS in Africa. It is also mentioned that the ability to garner support for this cause is possible within the legal framework of the EU.	<a href="http://www.helpafricapetition.com/">www.helpafricapetition.com/</a>
<b>European Civil Service</b>	Launched in April, 2006 by the European Movement France, this petition aims to gather one million signatures for a European Civil Service. "This Service should allow every young European to engage in a project of solidarity in another Member state of the EU" (European Movement Website).	<a href="http://www.mouvement-europeen.org/">www.mouvement-europeen.org/</a> (url for signing the petition) <a href="http://www.europeanmovement.org">www.europeanmovement.org</a>

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