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Representative and Participatory Democracy in the EU after the Treaty of Lisbon

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Introduction

In recent years, the institutionalisation of representative democracy vis-à-vis the role of the European Parliament (EP) in representing EU citizens' interests has been contested. The Treaty of Lisbon (ToL) has increased the powers of the EP by extending, for instance, its legislative role. Yet, the augmentation of the EP's functions has not fully addressed the need for input legitimacy in the EU decision-making system. As such, the ToL attempts to further the possibility of direct democracy via other means. For instance, Article 11 TEU encompasses a host of different platforms which give voice to the EU citizens to influence EU legislation. Similarly, Article 11(4)TEU and Regulation 211/2011 provide for the European Citizens' Initiative (ECI), enabling European citizens to invite the Commission to propose new legislation. According to the relevant provisions, a million signatures supporting an ECI may lead to it becoming the basis of a legislative proposal. In light of the Lisbon emphasis on participatory democracy, this paper will examine the relation between representative democracy, which has always been manifest in EU law through the role of the EP, and participatory democracy as a new dimension to EU's profile as a democratic quasi-federal organisation.

This contribution is roughly divided into two parts. The first section of the paper analyses the role of representative democracy in the EU and the gradual increasing of the legislative powers of the EP, which continues under the Treaty of Lisbon. An extensive description of the particulars vis-a-vis the increase of EP's powers falls outside the scope of this paper. The focus is rather placed on the enhanced role of the EP in the co-decision procedure (now ordinary legislative procedure). Subsequently, section two introduces the ECI as the new transnational instrument of civic participation in the EU. It analyses its legislative framework and identifies the legal issues affecting the implementation and application of the ECI. In conclusion, the paper illustrates the fact that the ECI constitutes an innovative form of participatory democracy which complements representative democracy in the EU. ECIs ultimate efficacy, however, is widely dependent on the reaction of the EU institutions-and in particular the reaction of the Commission-towards the first registered ECIs.

A.The European Parliament and the role of representative democracy in the EU

The original European Economic Community focused primarily on market building. As such, enhancing the former Community's democratic profile did not constitute the highest priority for the founding father of European integration.¹ Nonetheless, the gradual increase of EU's powers and impact since its inception, coupled with the establishment of the (judge made) principles of direct effect and primacy of EU law by The Court of Justice (CJEU), generated an increasing need for 'input legitimacy' in the EU.² The argument behind the need for legitimacy at EU level stems from the general assumption that without democratic institutional structure and decision-making processes, the EU cannot exercise its powers legitimately.³ In other words, the idea is that the incremental evolution of the EU as an international organisation and the political choices of its Institutions (the legislature, in particular) need to reflect the will of the people.⁴ Legitimacy, therefore, presupposed a system which provides to European citizens an adequate degree of participation over EU affairs.⁵ As Jean Monnet, one of the architects of European integration, commented, 'in a world where government authority is derived from representative parliamentary assemblies, Europe cannot be built without such an assembly.'⁶ It was only natural that the attempts to establish legitimacy in the EU relied on the nation-state model of representative democracy, according to which citizens authorise representatives through elections to act on behalf of their interests.⁷

The first direct elections of Members of the EP (MEPs) in 1979, gave the European citizenry the opportunity for the first time to become involved in the EU political system and transformed the EP into a full-time, directly elected body with MEPs becoming the citizens' representatives. Although never enshrined in the Treaties before the Treaty of Lisbon, it was

¹ Ralf Dahrendorf 'The Challenge for Democracy' (2008) 14(4) JOD 101

² Stijn Smismans 'Should participatory democracy become the normative model for EU governance?' <http://www.re-public.gr/en/?p=481> accessed 12 January 2013

³ Agustin Jose Menendez 'The European Democratic Challenge: The forging of a Supranational Volonte Generale' (2009) 15(3) ELJ 277, 278

⁴ Fritz Scharpf *Governing in Europe: Effective and Democratic?* (OUP 1999) 6

⁵ Agustin Jose Menendez 'The European Democratic Challenge: The forging of a Supranational Volonte Generale' (2009) 15(3) ELJ 277, 278

⁶ Quoted by Berthlod Rittberger 'Removing conceptual blinders: Under what conditions does the "democratic deficit" affect institutional design decisions?' (WebCon 2003/5) https://www.wiso.uni-hamburg.de/fileadmin/sowi/politik/governance/ConWeb_Papers/conweb5-2003.pdf accessed 8 April 2013

⁷ Ben Crun 'Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit?' (2005) 11(4) ELJ 452,453

commonly accepted that the democratic principle in the EU is expressed through the notion of representative democracy. The CJEU made express reference to the democratic commitment of the EU in its so-called ‘*Isoglucose*’ judgment.⁸ The CJEU emphasised that that ‘the effective participation of the European Parliament in the legislative process of the [EU] (...) reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly.’⁹ Textually, the preamble of the Single European Act included the first reference to democracy ever found in an EU Treaty.¹⁰ Furthermore, the Amsterdam Treaty confirmed in former Article 6 EU that the democratic principle was one of the founding principles of the EU.¹¹ Institutionally, democratic representation through the EP constitutes the basic canon of democracy at EU level.¹² Beyond the Member States the democratic role of the EP has further been acknowledged by the EU’s partner organisations. To mention but one example, in 1999, the European Court of Human Rights (ECtHR) opined that ‘the European Parliament is sufficiently involved in the specific legislative processes leading to the passage of legislation and in the general democratic supervision of the activities of the [EU] to constitute part of the legislature for the purposes of Article 3 of Protocol No.1’ on the right to regular, fair and free elections.¹³

When it comes to democratic representation in the EU, it was long assumed that direct elections would provide adequate scope for input legitimacy by EU citizens.¹⁴ However, deficiencies regarding the direct elections of the EP, such as the persisting low turnout which has fallen continuously, gave rise to concerns. The low turnout in the first elections almost thirty years ago could be justified considering that the EP elections were held in ‘a relatively new and unfamiliar arena.’¹⁵ It has been noted that it was expected that, after seven elections, EU citizens would have witnessed the impact of the elections on the political life of the EU and of their Member States and that they would have become more involved with the

⁸ C 138-79 *Roquette Freres v Council* [1980] ECR 3333

⁹ *ibid* para 33 The case concerned a regulation adopted by the Council without the opinion of the Parliament on the draft regulation.

¹⁰ Single European Act, 17 February 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506

¹¹ Treaty of Amsterdam 2 October 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56.

¹² Flora Goudappel *The effects of EU citizenship: Economic, Social and Political rights in a time of constitutional change* (TMC Asser Press, 2010)

¹³ ECHR in *Matthews v UK* (18 February 1999) 28 ECHR 361

¹⁴ Julie Smith ‘Democracy and Legitimacy in the European Union’ (2005) 16 *The Federal Trust* 1

¹⁵ Karlheinz Reif, Hermann Schmitt ‘Nine Second Order National Elections. A Conceptual Framework for the Analysis of European Elections Results.’ (1980) 8(1) *EJPR* 3 p11

political life of the EU.¹⁶ Nevertheless, the turnout in the last EP elections in 2009 reached an all-time low of 43%. By way of comparison, turnout in EP elections has traditionally been higher than US Congressional elections but remains lower than turnout usually recorded in EU Member States for national Parliamentary elections.¹⁷ According to the ‘second-order elections’ theory, pioneered by Reif and Schmitt most citizens cast their vote in EP elections based on their attitude towards the national parties rather than based on important European issues.¹⁸ What is more, it has been contended that the existing European political parties are too weak to link the EU Institutions with the European citizenry.¹⁹ European political parties are considered to be extensions of their national parties, without having coherent positions on crucial issues such as the sovereign debt-crisis and unemployment. As a result, not only doubt is casted upon the effectiveness of the EU’s representative system of governance but, perhaps most importantly, Euro-scepticism and resurgence of nationalism. Academic literature often points to the traditionally limited extent of the EP’s competences as the main shortfall of the EU’s democratic output.²⁰ In this vein, each and every EU Treaty amendment has been portrayed, inter alia, as an effort from the part of the Member States to increase the powers of the EP. This statement includes a significant dose of truth, especially since the EP in recent years evolved from ‘a somewhat ineffective institution’ to an equal partner to the Commission and the Council in EU law-making.²¹ The Treaty of Lisbon continues this trend mainly by extending the legislative, budgetary and oversight powers of the EP.²²

Before examining the latest extension of EP’s legislative powers, let us briefly illustrate why the low and ever decreasing turnout at elections for the EP is a concern for its representative role and the EU’s legitimacy in general. Input legitimacy is a strong feature of

¹⁶ Alexander Treschsel ‘How much “second-order” were the European Parliament elections 2009?’ in Wojciech Gagatsek (ed) *The 2009 Elections to the European Parliament-Country Reports* (European University Institute 2010) p4

¹⁷ Richard Corbett, Francis Jacobs, Michael Shackleton ‘European Parliament at Fifty: A View from the Inside’ (2003) 41(2) *JCMS* 353 p359

¹⁸ Karlheinz Reif, Hermann Schmitt (n 15)

¹⁹ Brendan Donnelly and Mathias Jopp ‘European Political Parties and Democracy in the EU’ in Gianni Bonvicini (ed) *Democracy in the EU and the role of the European Parliament: A study and a Call* (English Series, IAI 2009) p23

²⁰ John Coultrap ‘From Parliamentarism to Pluralism. Models of Democracy and the EU’s Democratic Deficit’ (1999) 11 *JTheorPolit* 107 p109

²¹ Andreas Mauer ‘The European Parliament between Policy-making and control’ in Beate Kochler-Koch, Berthold Rittberger *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield Publishers, 2007) p90

²² See Richard Corbett, ‘The Evolving Roles of the European Parliament and of National Parliaments’ in A Biondi et al *EU After Lisbon* (OUP 2012) Chapter 12

representative democracy. It provides that elections constitute the main institutional channel through which the public directly participates in political decision-making. As such, electoral turnout is often considered to be ‘the main indicator of democratisation’ and elections are a central indicator of the legitimacy of a political system.²³ What is more, turnout in elections is an accepted precondition of a democratic system which ensures that each citizen has equal influence in democratic elections.²⁴ In line with the above, the abstention or no voting of European electorate in EP elections indicates that the actions and decisions of the elected representatives do not express the political preferences of the entirety of the EU population.²⁵ By contrast, the system in place does not fulfil the ‘equal influence precondition.’²⁶ For instance, it can be argued that the continuous decline of voter’s participation in the elections suggests that ‘the EP has a weak claim to be representative of the [European] public opinion.’²⁷

As mentioned above, one can establish a link between the low turnout in EP elections and the traditionally limited role played by the EP in the EU decision-making process. Thus the gradual increase of EP’s powers that took place in the course of Treaty reforms can be translated as a move towards engaging citizens in EU affairs.²⁸ With regard to the EP’s legislative competence, initially, the Single European Act (1986) introduced the co-operation procedure, according to which the EP had the right to a second reading of proposed legislation and the ability to accept, reject or modify it by absolute majority. Subsequently, the Treaty of Maastricht (1992) introduced the co-decision procedure (currently ordinary procedure), according to which the EP was able to co-legislate with the Council.²⁹ Co-decision also involved power to veto any decision adopted by the Council.³⁰ Furthermore, the Amsterdam Treaty in 1999 simplified the co-decision procedure and widened it to cover

²³ Yosef Bhatti, Kasper M Hansen ‘The effect of generation and age on turnout to the European Parliament-How turnout will continue to decline in the future.’ (2012) 31 ES 262 , David Beetham *Defining and Measuring Democracy* (SAGE 1995) p91

²⁴ Robert Dahl *Democracy and its Critics* (Yale University Press 1989)

²⁵ Agnieszka Walczak, Wouter van der Brug ‘Representation in the European Parliament: Factors affecting the attitude congruence of voters and candidates in the EP elections’ *European Union Politics* (22 October 2012) http://www.elecDEM.eu/media/universityofexeter/elecDEM/pdfs/florence/Walczak_vdBug_Representation_in_the_European_Parliament.pdf accessed 10 December 2012

²⁶ *ibid*

²⁷ Theodore Konstadinides *Division of Powers in the European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (European Monographs, Kluwer Law International 2009) p60

²⁸ Simon Hix *What is wrong with the European Union & how to fix it* (Polity 2008) p51

²⁹ Berthold Rittberger (n 6)

³⁰ Article 189b EC

thirty-eight Treaty provisions, including all legislation on the regulation of the internal market.

The EP is often presented as the winner of the Lisbon Treaty reforms. An extensive description of the particulars vis-a-vis the increase of EP's powers falls outside the scope of this paper. Suffice to mention here that Articles 16(1) TEU and 289 TFEU have renamed the co-decision procedure into 'ordinary legislative procedure' and provide that the EP and the Council shall jointly adopt a legislative act on a proposal from the Commission. Such equal contribution by the EP and the Council on the adoption of EU legislation chimes well with the 'dual basis of democratic legitimacy' proclaimed in Article 10 TEU.³¹ This provision states that 'citizens are directly represented at EU level in the European Parliament and Member States are represented in the Council.' Nonetheless, other than extending the number of areas falling under the ordinary legislative procedure to include forty more areas, the ToL has not made any systemic changes to the former co-decision procedure. Yet the increase of the number of policy areas to include common agricultural and fisheries policies, the issuing of residence permits and judicial cooperation in criminal matters, to mention but only a few areas, implies that more matters of direct concern to EU citizens and their families fall under the legislative scope of the EP.³² Boosting procedural accountability would allegedly win back the citizens' confidence in EU democratic legitimacy.³³

In terms of the EP's representativeness, the ToL is explicit in Articles 10(1) and 10(2) TEU that 'the functioning of the Union shall be founded on representative democracy' and that 'citizens are directly represented at Union level in the European Parliament.' Moreover, Article 14(2) TEU provides that 'the European Parliament shall be composed of representatives of the Union's citizens.' In contrast, pre-Lisbon, Articles 189 EC and 190(1) EC referred to the EP as a body representing 'the peoples of the States brought together in the Community.'³⁴ Although an attenuate change, the specification that the MEPs represent *citizens* of the EU instead of *people of the States* has not remained unnoticed by commentators. Dougan, for instance, argues that this linguistic modification is more

³¹ Michael Dougan 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' (2008) 45(3) CMLR 617 p640

³² Bruno de Witte, Alexander H Trechsel et al 'Legislating after Lisbon: New Opportunities for the European Parliament' (EUDO Study 2010) <<http://www.eui.eu/Projects/EUDO/Documents/EUDO-LegislatingafterLisbon%28SD%29.pdf>> accessed 1 June 2013

³³ Jean-Claude Piris *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) p122

³⁴ Article 189 EC provided that 'The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty'

important than it seems in that it clarifies the uncertainty with regard to who the MEPs are supposed to represent.³⁵ He refers in particular to the case of *Spain v United Kingdom*, in which the CJEU refrained from defining who could stand or vote in EP elections or whether third country nationals were entitled to do so, and left the issue in the discretion of the Member States.³⁶ It seems that under the new dispensation of Article 14(2) TEU, such issues would be easily resolved.³⁷ Furthermore, Bredt notes that the formation of Article 10 TEU indicates that the notion of national representative democracy figures as the main theoretical underpinning of the democratic nature of the EU.³⁸ He comments that the direct inclusion of the principle of representative democracy in the Treaty is indicative of the parallel strengthening of the role of the EP.³⁹

To sum up, the above analysis indicates that the EP has benefited by the ToL reforms. Nevertheless, such reforms shall not form any rushed conclusions as to the extent to which the increase of EP's powers have enhanced its representative character. Important limitations still remain in place regarding the role of the EP. For instance, the EP's influence does not extend to taxation. This is in sharp contrast with the function of national parliaments which enjoy, for instance, the power to propose government's tax measures and spending priorities. Most significantly, the EP is still unable to propose legislation because the monopoly of legislative initiative belongs to the Commission under Article 17(2) TEU and the areas where the EP actually has legislative impact are those where it shares decisions with the Council. Second, increases in EP's powers so far have had little impact upon voters' interest as shown by the persisting low turnout. Thus, it would be premature to argue that the augmentation of EP's legislative powers after the Treaty of Lisbon would substantially contribute in providing EU citizens with a collective voice in the decision making of the EU. This section has also illustrated that low voting turnout has raised concerns about the lack of communication between the EU and its citizens. Such detachment between the two has attracted criticism regarding the success of the EP as a representative body. In order to bridge the legitimacy gap the EU has established a host of instruments over the years which aim at enhancing

³⁵ Michael Dougan (n 31) p634

³⁶ Case C 145/04 *Spain v United Kingdom* [2006] ECR I-7917

³⁷ Michael Dougan (n 31) p634

³⁸ Stephan Bredt 'Prospects and Limits of Democratic Governance in the EU' (2011) 17(1) ELJ 35, p37

³⁹ *ibid* p37

participatory democracy at supranational level.⁴⁰ These include, *inter alia*, petitions to the EP, the right to complain directly to the European Ombudsman and consultation campaigns by the European Commission before the launching of the formal legislative process.⁴¹ These mechanisms constitute substantial elements of participatory democracy in the EU but they do not provide citizens with the opportunity to directly participate in EU decision-making.⁴² Nonetheless, for the first time, the Treaty of Lisbon in Article 11(4) TEU introduces a mechanism of direct participation, the ECI, according to which one million signatures from seven Member States could allow a group of EU citizens to put considerable pressure upon the Commission to give serious consideration to their request and submit a legislative proposal to that effect. As argued, the ECI exceeds the scope of other participatory instruments by establishing ‘a direct and formally institutionalised channel between the EU citizens and the European Commission.’⁴³

B. Participatory Democracy in the EU and the European Citizens’ Initiative

i. Representative and Participatory Democracy in the EU

Articles 10 and 11 TEU constitute part of the ‘Provisions on Democratic Principles’ of the Treaty of Lisbon. As explained in the previous section, Article 10 TEU provides for the principles of representative democracy. Subsequently, the first three paragraphs of Article 11 TEU conceive participation in terms of the involvement of civil society, civil consultation and representative associations. Such participatory practices, whereby civil society organisations function as mediators between the institutions and the citizenry, have been in existence in the EU for years.⁴⁴ In contrast, Article 11(4) TEU is directly addressed to EU citizens, and for this reason it is often characterised as the only innovative element of Article 11 TEU.⁴⁵ Acknowledging that the elements of Articles 10 and 11 TEU assemble a coherent whole and that Article 10(1) TEU provides that the foundation of the EU legitimacy is representative democracy, it is apparent that instruments of participatory democracy are a

⁴⁰ Bruno Kaufmann ‘Active Citizenship and Representation in Europe: Towards Transnational Democracy?’ <<http://www.iri-europe.org/files/9513/6140/0060/EU-CH-Citizenship-Booklet.pdf>> accessed 12 April 2013

⁴¹ See Articles 227 TFEU, 228 TFEU, 11(3) TEU respectively

⁴² Maximilian Conrad ‘The European Citizens’ Initiative. Transnational Democracy in the EU at last?’ (2011) *Stjornmal & Stornsysla* 5, p14

⁴³ *ibid* p14

⁴⁴ Francesco Maiani ‘Citizen Participation and the Lisbon Treaty: A legal Perspective’ (2011) SPP 484 p19

⁴⁵ Elisabeth Monaghan ‘Assessing Participation and Democracy in the EU: The case of the European Citizens’ Initiative’ (2012) 13(3) *Perspectives on European Politics and Society* 285, p291

complementary source of input legitimacy.⁴⁶ Hence, the ECI is said to be ‘the latest part of a movement towards establishing participatory democracy as a complement to existing forms of representative democracy in the EU.’⁴⁷ As Warleigh-Lack comments, ‘the establishment of participatory democracy as one of the EU’s normative bedrocks is a potentially important step because it makes clear that representation (...) cannot be the sole means to a legitimate regime in the EU.’⁴⁸

This section will critically analyse the legal framework of the ECI, addressing certain criticisms expressed during its brief life. Rather than describing every aspect of the legal framework, the aim is rather to assess the legal issues pertaining to the functioning of the ECI. The section outlines the procedure for an effective ECI before discussing the main concerns regarding the requirements for the submission of a successful Initiative. At the same time, the section assesses how these issues affect the potential value of the ECI as a mechanism for citizens’ participation in the EU. The last part of this section consists of a brief evaluation of the first year of operation of the ECIs.

ii. *The Legislative Framework of the ECI*

Whilst Article 11(4) provides the legal basis for the ECI, Article 24 TFEU required the adoption of a Regulation on the ECI in accordance with the ordinary legislative procedure. Consequently, the ‘ECI Regulation 211/2011’⁴⁹ was adopted on 16th February 2011 after a procedure of public consultation and proposals from the EU Institutions, and entered into force with the formal registration of ECIs on the 1st April 2012. In a nutshell, the organisers of an Initiative need to set up a ‘Citizens’ Committee’ comprised by seven citizens from different Member States and form their initiative as either a draft legal proposal or as general principles. They must then register their Initiative with the Commission, which has two months to accept or reject the registration. If the Commission accepts the initiative, a

⁴⁶ Rudolf Hrbek ‘National and European Parties and the European Citizens’ Initiative’ (2012) 13(3) Perspectives on European Politics and Society 370 p372

⁴⁷ Julia De Clerck-Sachsse ‘Civil Society and Democracy in the EU: The Paradox of the European Citizens’ Initiative’ (2012) 13(3) Perspectives on EU Politics and Society 299 , Dorota Szeligowska, Elitsa Mincheva ‘The European Citizens’ Initiative- Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis’ (2012) 13(3) Perspectives on European Politics and Society 270, p271

⁴⁸ Alex Warleigh-Lack ‘On the path to legitimacy? A critical deliberativist perspective on the right to the citizens’ initiative’ in C Ruzza & Della Sala (eds) *Governance and Civil Society in the European Union: Normative Perspectives* (Manchester University Press 2007) p64

⁴⁹ Regulation 211/2011 of the European Parliament and of the Council of 16th February 2011 on the Citizens’ Initiative (2011) OJ L 65/1

one-year limit begins during which the organisers of the ECI need to gather one million signatures to support their proposal. The signatures, gathered either online or on paper, should emanate from seven Member States. It should be noted that there is a threshold of signatures for each Member State which is the number of each country's MEPs multiplied by 750. Once the signatures have been gathered, they have to be certified by national authorities. The European Commission is then obliged to examine the initiative but it is not forced to take any form of action; it has absolute discretion on how to proceed with an ECI.

iii. Legal requirements for the submission of a successful ECI

The creation of an ECI begins with the establishment of 'a Citizens' Committee' as required by Article 3(2) of the Regulation. The team must be composed of seven individuals from at least seven Member States; one of them must be designated as spokesman and one as substitute. Their responsibility is to liaise with the institutions of the EU throughout the process. Although the constitution of an ad hoc committee is a requirement of similar initiatives at national level, the territorial distribution of organisers is a unique requirement of the ECI.⁵⁰ This provision ensures a transnational element in the organisation of an ECI by stimulating communication between potential initiators of an ECI. In addition, it guarantees that the topic of the proposed ECI is not a country-specific concern but that it is a topic capable of triggering interest throughout the EU and thus has reasonable possibilities of success. According to the opinion of the European Parliament, the initiative should be proposed by such a committee 'in order to facilitate the emergence of real European-wide issues, the reflection on those issues, and the collection of signatures throughout the EU.'⁵¹ Most notably, the provision aims to function as a filter to ensure the grassroots nature of the proposed ECI by prevailing the 'hijacking' of the ECI by interest groups.⁵²

However, it is argued that the filter may not be efficient enough having in mind that consultancy firms are already promoting the ECI as a tool which can be used 'both by NGOs and by corporations.'⁵³ As Conrad correctly points out, members of civil society organisations are also individual citizens and nothing stops them from launching an ECI. On the contrary, it is easier for these organisations to launch ECIs than for non-organised

⁵⁰ Victor Cuesta Lopez 'A Comparative Approach to the Regulation on the European Citizens' Initiative' (2012) 13(3) *Perspectives on European Politics and Society* 257, p262

⁵¹ European Parliament *Report on the proposal for a regulation on citizens' initiative* A7-0350/2010

⁵² D Szeligowska , E Mincheva (n 47) p276

⁵³ *ibid*

individuals.⁵⁴ Furthermore, the requirement for a Committee itself may actually necessitate the involvement of intermediary actors.⁵⁵ In particular, the creation of a Committee implies the need for contacts and collaborators from at least seven Member State as well as networks with the media in order to cultivate support for the proposed ECI. Intermediary actors such as NGOs, Civil Society Organisations and even political parties already have established relations with transnational organisations and therefore are in a position where they can intervene to support citizens that intend to launch an initiative.⁵⁶ On the basis of experience from California where an initiative with similar requirements exists and in view of the 12 month period given to organisers to mobilise 1 million signatures, Smith argues that it is almost impossible to achieve the threshold without professional knowledge on similar petitions.⁵⁷ Thus, he notes that organised civil society bodies, political parties and businesses are the ones capable of making effective use of the ECI, the consequence of which will be ECIs channelled through the agendas of already powerful organised interest and not used as intended; namely as mechanism for citizens' participation.⁵⁸

Further doubts on the ability of ordinary citizens to effectively bring an ECI are cast by the nature of the requirements for the initial registration of an Initiative. After the Citizens' Committee has been formed, its members are responsible to register their Initiative with the Commission. The organisers have to provide information in relation to the subject matter and the objectives of their proposed Initiative (Article 4(1) and Annex II of the Regulation) by formulating the Initiative proposal in general terms. There is the possibility for citizens to annex a draft legal act if they wish. The lack of an obligation to formulate a draft legal act on the proposed idea is generally considered appropriate and particularly user-friendly given the complexity of the EU legal system.⁵⁹ The EU institutions should be applauded for refraining from including such a burdensome requirement. However, it has been commented that the flexible format of an ECI maximises the possibilities of the Commission to qualify the general goals of the initiative in case it decides to formulate a legislative proposal.⁶⁰

⁵⁴ Maximilian Conrad (n 42) p17

⁵⁵ Rudolf Hrbek (n 46) p376

⁵⁶ Ibid p377

⁵⁷ Graham Smith 'Trans-national democratic innovation in the European Union: Flirting with deliberative and plebiscitary design' (Paper presented for the Political Studies Association Annual Conference, Cardiff, March 2013) <http://www.studyingpolitics.com/2013/UploadedPaperPDFs/108_88.pdf> p14

⁵⁸ Ibid

⁵⁹ Victor Cuesta Lopez (n 50) p263

⁶⁰ Bruno De Witte, Alexander H Trechsel et al (n 32) p8

Accordingly, the Commission could be able to lead the wording of the eventual legislative proposal according to its own preferences and agenda.

Despite the sound absence of a requirement for a draft legal act, the Regulation requires that the organisers need to indicate ‘the provisions of the Treaties considered relevant for the proposed action’ (Annex II(4)). Most notably, there are minimal legal criteria in place for an ECI to be registered by the Commission, which are set out in Article 4(2) of the Regulation. First, an ECI cannot be registered if its subject matter manifestly falls outside the Commission’s competences. The limitation is reasonable and proportionate considering that the Commission cannot act beyond its competences. Nevertheless, the task could prove extremely difficult for laymen who are not acquainted with the TFEU’s competence typology; knowledge of the Treaty is not commonplace and the determination of the proper legal bases of EU action often involves complex legal questions.⁶¹ Also, the invariably changing nature of the inter-institutional relations in the EU requires constantly updated knowledge.⁶² Therefore, in order to ensure the correct wording of their proposals and the appropriate legal basis, organisers probably need legal advice, which increases the required funding, and may ultimately distance the ECI from its ‘citizens’ oriented’ nature.

The second and third criteria are provided by Article 4(2)(c) and 4(2)(d). The former is that an ECI cannot be registered if it is *manifestly* abusive, frivolous or vexatious and the latter is that an ECI will not be registered if it is *manifestly* contrary to the values of the EU as these are set out in Article 2 TEU. For instance, a proposed initiative is not going to be registered if it violates the Charter of Fundamental Rights or if it is discriminatory against the rights of minorities. None of the provisions defines the ‘manifestly’ threshold and there is no list of issues that are excluded from the scope of an ECI. Cuesta-Lopez argues that the absence of such list is a positive aspect of the Regulation because it allows organisers to promote matters of utmost interest to citizens.⁶³ At the same time, however, the Commission seems to have been vested substantial discretion to reject an ECI on the basis of political considerations regarding the EU’s competences.⁶⁴ Furthermore, the Commission is given discretion to interpret the limits of the two provisions; for instance to interpret what

⁶¹ Francesco Maiani (n 44) p14

⁶² Bruno de Witte, Alexander H Treschel et al (n 32) p9

⁶³ Victor Cuesta Lopez (n 50) p264

⁶⁴ Bleddyn Davies ‘Giving EU Citizens a voice: Regulation 211/2011 on the EU Citizens’ Initiative’ (2011) 33(3) JSWFL 289, p290

constitutes a violation of the values of the EU.⁶⁵ Although a decision to reject an Initiative is subject to judicial oversight, the CJEU is unlikely to intervene with the political judgment of the Commission.⁶⁶

In addition, it is open to dispute whether the Regulation allows for ECIs whose subject matter requires the alteration of Treaty provisions. As Dougan explains, the dispute does not arise because of a question on whether the Commission has the power to propose an amendment to the Treaties.⁶⁷ Article 48 TEU clearly identifies the Commission's power to submit proposals for Treaty changes either through the ordinary revision procedure (Article 48(2)-(5) TEU) or through the simplified revision procedure (Article 48(6) TEU). The issue rather arises because of the wording of Article 11(4) TEU which refers to *legal acts of the Union required for the purpose of implementing the Treaties*. The European Parliament and Civil Society organisations support the view that ECIs should be used for this purpose since the Treaties concern vital topics of great interest to EU citizens. It has even been commented that excluding Treaty amendments is 'a significant departure from the *effect utile* of the ECIs.'⁶⁸ However, most Member States interpret the ECI Regulation as referring to Initiatives aimed at amending existing secondary legislation but not changing the Treaties. Indeed this interpretation limits the scope of an ECI, for example by not allowing European citizens to put public pressure in order to affect EU integration.⁶⁹

Furthermore, the interpretation of Article 11(4) TEU, which provides that an initiative requires at least one million signatures 'from a significant number of Member States' was a point of concern and arguably raises issues of inequalities in citizens' participation.⁷⁰ Article 24(1) TFEU envisages that the definition of 'a significant number' should be made explicit by the EU legislature. Accordingly, Article 7(1) interprets it as a threshold of one quarter of the Member States. In order to ensure that a proposed Initiative reflects the opinion of citizens across the EU, a degressively proportional threshold was set regarding the signatures that must come from each Member State. In particular, Article 7(2) of the Regulation sets out

⁶⁵ Bruno de Witte, Alexander H Treschel et all (n 28) p10

⁶⁶ Bleddyn Davies (n 60) p290

⁶⁷ Michael Dougan 'What are we to make of the Citizens' Initiative?' 48 CMLR 1807 p1835

⁶⁸ Michael Efler 'ECI: Legal options for implementation below the constitutional level' <http://www.democracy-international.org/index.php?id=1342&type=98> accessed 10 December 2012

⁶⁹ Emmanuel Sigalas 'The European Citizens' Initiative: A New Era for Democratic Politics in the EU' (The Federalist Debate 2013) <<http://www.federalist-debate.org/index.php/component/k2/item/776-the-european-citizen%E2%80%99s-initiative>> p3

⁷⁰ Elizabeth Monaghan (n 45) p294

that there must be a minimum number of signatories for each Member State; the figure equals to the number of MEPs in each Member State multiplied by the total number of MEPs which is currently 750. The creation of such formula is expected because ‘it would be contrary to the spirit of the Treaty if an initiative could be presented by a large group of citizens from one Member State and only a purely nominal number of citizens coming from other Member States.’⁷¹ As an example, the ECI organisers currently have to gather 74 250 signatures from Germany but only 3750 signatories from Malta for these countries to be included to the one million of total statements of support. The criterion for allocation of signatures has been decided on the same basis with the allocation of seats in the EP between the Member States. As a result, it is understandable that the threshold chosen by the legislature regarding the ECI may potentially reinforce the critique of EU democracy expressed in the Lisbon Judgment.⁷² The critique expressed by the German Constitutional Court in the relevant case considered the EU institutions and in particular the fact that the EU does not comply with the standards of democratic equality.⁷³ Dougan explains the way in which this criticism applies to the ECI by bringing the example that, under ‘Article 7(1) and (2) of the Regulation the voice of two citizens from Germany is practically worth less than one German and one Finn and less than the voice of two Finns.’⁷⁴

Worthy of note is that the ECI Regulation contains only two prerequisites in the definition of eligible signatories which have also triggered discussion as to whether they limit the scope of the ECI. Article 3(4) provides that, in order to be eligible to sign an ECI, signatories shall be citizens of the EU and be of the age to vote in EP elections. As a result, third-country nationals and legal persons are not able to organise or sign an ECI even if they are lawfully resident within the EU or qualify for long-term residency status. Accordingly, a contradiction is created between the right to an ECI and other political rights such as the right to complain to the European Ombudsman under Article 228 TFEU or even the right to petition the EP according to Article 227 TFEU, both of which are available for lawfully resident third country nationals. The case of *Spain v United Kingdom*⁷⁵ illustrates the alleged contradiction.⁷⁶ In that case, the CJEU ruled that UK law which provided that

⁷¹ Commission, ‘Green Paper on a European Citizens’ Initiative’ COM (2009) 622 final

⁷² Michael Dougan (n 67)

⁷³ Lisbon Judgment on 30 June 2009, Bundesverfassungsgericht, BVerfG, 2 BvE 2/08

⁷⁴ Michael Dougan (n 67) p1824

⁷⁵ C- 145/04 *Spain v United Kingdom* [2006] ECR I-7917

⁷⁶ Michael Dougan (n 67) p1821

Commonwealth citizens living in Gibraltar which are not Member State nationals have the right to vote and stand as candidates to the EP was not in breach of the EC Treaty.⁷⁷ If this ruling of the CJEU were to be upheld under the Lisbon Treaty, certain third country nationals would be entitled to participate in voting for EP elections but no third country national would be entitled to participate in the more informal, democratic right of supporting an ECI.⁷⁸ Therefore, the non-inclusive character of the ECI mechanism ultimately creates a narrow concept of political participation which does not reflect the broad aim of the EU to offer new channels of public engagement.⁷⁹ ECI organisers have raised concerns about the issue of ECI exclusiveness of application to EU citizens by arguing that the current formulation leaves out a substantial percentage of the target audience from supporting an Initiative.

Criticisms have also been raised regarding the age limit of the suitable signatories which, as mentioned above, is the same with that set by Member States for citizens to be able to vote in EP elections. The voting age in all Member States is 18, with the exception of Austria where it is set at 16.⁸⁰ Pairing the age limit of the ECI with that of the EP elections can be considered a sensible choice because the ECI bestows the same right of legislative initiative to one million citizens as that provided to the EP under Article 225 TFEU. According to Article 225 TFEU, the EP may request the Commission to submit a legislative proposal on matters on which a majority of the EP considers that an act is required. In addition, the Commission noted that, if the minimum age limit was set at 16, the current systems for voting registration could not have been used for registering statements of support and thus a significant administrative burden would be imposed on the Member States. The Commission also noted that if the minimum age limit was set at 18, Austrian citizens who are already voting at 16 would be excluded.⁸¹ Nevertheless, it has been argued that the choice of an age limit was wrongly chosen on the basis of existing practice for the EP elections. The agenda-setting mechanism of the ECI is not the same with the higher right of electing a representative to a legislative chamber, so different considerations should apply to each.⁸² Since the ECI is not a referendum with a binding outcome, participation should not be linked

⁷⁷ C-145/04

⁷⁸ Michael Dougan (n 67) p1821

⁷⁹ *ibid*

⁸⁰ 'The European Parliament: Electoral Procedures' Fact Sheets on the European Union 2013

<http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.4.pdf> accessed 1 May 2013

⁸¹ Commission Green Paper (n 67) p6

⁸² Bleddyn Davies (n 64) p291

to the voting age.⁸³ Furthermore, supporters of a lower age threshold argue that young people should have been given the opportunity to get involved and express their request and, for these reasons, the age limit should arguably have been set at 16.⁸⁴

After an ECI is registered, a 12 month time period begins (Article 5(5)) in which the organisers have to collect at least one million statements of support. Although the requirement of one million signatures can be seen as proportionate in the current EU of approximately 500 million citizens, a host of bureaucratic issues has raised concerns among various organisers vis-à-vis the effectiveness of the ECI. For instance, Annex III of the Regulation provides that the rules for collecting signatures shall be drawn up by the national governments. As a result, different signature requirements exist across the EU creating inequalities in citizens' opportunity to support an ECI.⁸⁵ In particular, eighteen countries require signatories' ID or passport number in order for the signatory forms to be valid. For instance, Belgium citizens need to give their date and place of birth when signing the relevant statement of support whilst in Greece signatories also have to give their maiden name. A survey conducted by European Citizen Action Service, a Brussels-based non-profit organisation, indicates that there is strong resistance from the majority of the respondents to providing such personal data out of fear for their privacy.⁸⁶ In addition, the European Data Protection Supervisor confirmed that ID cards are not necessary in collecting statements of support.⁸⁷ Carsten Berg, director of an ECI Campaign, a coalition of democracy advocates and NGOs, has urged for the removal of such restrictive requirements. His view has been shared by most ECI organisers.⁸⁸ Very recently, five countries have announced that they will reduce cumbersome requirements for ECIs after July 1st.⁸⁹ Luxembourg is abolishing the ID number requirement, whilst France, Spain, The Netherlands and Ireland are reviewing their

⁸³ Gerald Hafner 'A glimpse at legislation cookery' in 'The European Citizens' Initiative Handbook' (Green European Foundation) <http://gef.eu/fileadmin/user_upload/GEF-09-64_European_Citizens_Initiative_web_final.pdf> accessed 12 October 2013

⁸⁴ European Parliament (2010) *Report on the proposal for a Regulation on Citizens' Initiative of the Committee on Constitutional Affairs* (A7-0350/2010) Brussels, Belgium

⁸⁵ Elizabeth Monaghan (n 45) p294

⁸⁶ 'EU citizens strongly dissatisfied with the personal data requirement in the Citizens' Initiative draft regulation, survey reveals' ECAS Report <http://www.citizens-initiative.eu/?p=395> accessed 10 March 2013

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⁸⁸ 'ECI Day 2013: Sign Up to It!' European Economic and Social Committee Conference, 9 April 2013, see <http://www.eesc.europa.eu/?i=portal.en.events-and-activities-eci-day-2013>

⁸⁹ Carsten Berg 'Good news for ECI organisers' <<http://www.citizens-initiative.eu/?p=1607#more-1607>> accessed 14 May 2013

criteria.⁹⁰ According to what has hereby been argued, it is submitted that both ECI organisers and EU citizens would be benefited if such modification of the necessary ID requirements was followed by other Member States because it would automatically make the provisions of the Regulation more user-friendly.

The final stage of an ECI is the examination of the Initiative by the Commission (Article 10), which takes place after the validation of the statements of support by the relevant authorities of the Member States from which the statements have been gathered (Article 8(1)). The Commission is obliged to organise a meeting with the ECI organisers where they should be able to explain in detail the matters raised by their Initiative. After this meeting, the Commission is obliged under Article 11 of the Regulation to present the citizens' initiative at a public hearing in the EP. On the one hand, the merit of this provision is that it reinforces at political level the ECI and offers the opportunity to the organisers to come in touch with the EU institutions and discuss their idea in depth.⁹¹ On the other hand, the unlimited Commission's discretion in deciding on the future of an ECI confirms that the ECI does not give citizens any final decision making powers. Although the Commission has three months to set out a communication with the legal and political conclusions on the ECI and the action it intends to take or not take (Article 10(1)(c)), its legal obligations under the Regulation stop there. If the Commission decides to act upon a particular ECI, it will still need to carry out the appropriate consultation and impact assessments in order to submit a legislative proposal.⁹² However, in case the Commission announces that it will take no action on a submitted ECI, there are no judicial or extrajudicial remedies for the organisers.

iv. ECI : One Year On

The past year has seen the registration of ECIs covering a range of policy areas from education (Fraternité 2020, High Quality EU Education for All) to human rights (One of Us) and from voting rights (Let Me Vote) to environmental issues (Waste Management, End Ecocide in Europe) and more.⁹³ To date, twenty-five initiatives have requested registration to the Commission, of which sixteen have been registered. Two of them have been withdrawn,

⁹⁰ *ibid*

⁹¹ Francesco Maiani (n 44) p18

⁹² The Commission is obliged to undertake such consultations and impact assessments under Articles 2 and 5 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaty on European Union

⁹³ Find all the Initiatives here <http://ec.europa.eu/citizens-initiative/public/welcome>

so there are currently fifteen open Initiatives. Recently the Right2Water ECI, which proposes that water supply should not be subject to internal market rules, became the first ECI which has managed to collect the minimum number of signatures in nine countries. It is also noteworthy that eight Initiatives have been refused registration because they covered areas which fall outside the powers of the Commission.

Current experience shows that there are still issues to be dealt with for the ECI to become an easily accessible and user-friendly instrument of participatory democracy. The analysis of the legislative framework of the ECI in this paper has illustrated that the implementing rules adopted by the EP and the Council have raised hurdles on the way to submitting a valid ECI. As a result, there are concerns regarding the ‘citizen nature’ of the ECI. Due to the amount of human and financial resources needed, it is doubted whether the ECI will manage to be established as a tool for the engagement of ordinary citizens or rather result in being sponsored by already powerful organisations. The analysis has also explored criticisms regarding the limited scope of the ECI and the inequalities in citizens’ participation caused by restrictive provisions of the Regulation 211/2011, such as the age limit, the threshold of statements of support that should come from each Member State and the different ID requirements for each Member State.

Taking stock of the problems emerging at this early stage as well as the criticisms of the Regulation, there have already been numerous recommendations for the review of the ECI Regulation which is planned to take place in 2015. For example, proposals have been made for the extension of the period of signature collection and enlargement of access to sign an ECI.⁹⁴ Additional recommendations stress the need to provide legal advice and assistance with the translation of the Initiatives to the ECI organisers. As the rejected ECIs indicate, the chosen legal basis makes the difference between whether or not an ECI is registered. One only has to consider that, in the Commission, issues of legal basis are handled by a fully-fledged legal service in order to estimate how difficult it could be for ordinary citizens to judge the issue only with their own resources.⁹⁵ Nonetheless, it is noteworthy that the European Citizen Action Service in collaboration with Democracy International and Initiative and Referendum Institute Europe, two organisations which have had a principal role in promoting the inclusion of the ECI mechanism in the Treaty, have created an ECI Support

⁹⁴ ‘ECIs: A case for orientation or re-orientation? Report of the ECAS seminar organized on the 19th March 2013’ <http://www.eesc.europa.eu/resources/docs/eci-19-03-2013-report.pdf> accessed 10 April 2013

⁹⁵ Bruno de Witte, Alexander H Treschel et al (n 32)

centre that provides general information and support to ECI organisers.⁹⁶ In general, the reform recommendations focus on the user-friendly character of the new instrument since the design of ECI is considered vital for its success.

⁹⁶ See for more:

http://www.citizenhouse.eu/index.php?option=com_content&view=article&id=42&Itemid=123&lang=en

Conclusion

The ECI does not give EU citizens any final decision-making powers. Nonetheless, by giving EU citizens the opportunity to assist in setting the EU political agenda, the new mechanism can be characterised as an important step forward for transnational democracy in the EU. The very inclusion of Article 11(4) in the Treaty points the way to the EU's renewed commitment to democracy whereby input legitimacy through participatory mechanisms complements citizens' representation by the EP.⁹⁷ However, the Commission's discretion from the moment of registration until the decision of the outcome of an ECI should not be underestimated. One can only imagine the disappointment of organisers who, after having devoted endless amount of time and effort to gathering one million signatures, may find that their initiative has not made any substantial difference in the legislative framework of the EU. As noted, 'democratic tools which raise expectations that cannot be met lead to passive disengagement at best and destructive protest at worst.'⁹⁸ It is thereby submitted that the positive attitude of the European Commission is perhaps the most important factor in the success of the ECI mechanism. In turn, the EP, the national governments and political actors should think carefully before rejecting any legislative proposal which results from an ECI and thus expresses the will of at least one million European citizens. It would be extremely harmful for the perception of the new instrument by EU citizens to see current ECIs turning from instruments of enthusiasm and engagement to reasons of frustration for the ECI organisers. The actual use of the ECI will determine its value as an additional means of citizens' participation in the EU able to promote a transnational political debate and thus to affect input legitimacy in the EU system.

⁹⁷ Anne Peters 'European Democracy after the 2003 Convention' (2004) 41 CMLR 37, p44, 68, 83

⁹⁸ Janice Thomson "A space inside Europe for the public" before "A European Public Space": The European Citizens' Initiative and the future of EU public engagement' <<http://www.involve.org.uk/wp-content/uploads/2011/03/ECI-A-Space-Inside-Europe-for-the-Public.pdf>> accessed 30 March 2013