



EUROPEAN CITIZENS^(s) (MAY SOON TAKE THE) INITIATIVE

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On November 3, 2009, the ultimate stronghold of opposition to the Treaty of Lisbon,¹ seated above one of the river Vltava's meanders,² succumbed, and it became clear that the Treaty would come into force on December 1, 2009. The European Commission did not hesitate long in deciding which of the array of new Treaty provisions would be symbolically best suited for the initiation of consultation, with a view towards early implementation. On November 11, 2009, the Commission presented the Green Paper on a European Citizens' Initiative³ (the Green Paper), and so launched the first consultation on the Treaty of Lisbon's implementation.

I. THE ECI IN THE TREATY ON EUROPEAN UNION

In one of a series of attempts to tackle the pervasive beast of the Union's democratic deficit, the Treaty on European Union as amended by the Treaty of Lisbon⁴ provides in Article 11 for a new tool of direct democracy⁵—the European Citizens' Initiative (ECI):

Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.⁶

The procedures and conditions required for such a continent-wide citizens' initiative are to be determined by regulation passed by ordinary legislative procedure.⁷ The Green Paper presents and solicits ideas on how the implementing regulation should fine-tune the ECI mechanism.⁸

* Many thanks to Jana Sochorcová for the thought-provoking transatlantic chat over the ECI's merits and prospects.

¹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 (Dec. 1, 2009) [hereinafter Treaty].

² For less Lisbon-immersed readers, the self-declared ultimate "protector of nation-state sovereignty" was the Czech President Václav Klaus.

³ *Commission Green Paper on a European Citizens' Initiative*, COM (2009) 622 final (Nov. 11, 2009) [hereinafter ECI].

⁴ Consolidated Version of the Treaty on European Union, Feb. 7, 1992, 2008 O.J. (C 115) 13 [hereinafter EU Treaty].

⁵ Like many innovations of the Treaty of Lisbon, the ECI first saw light in the turbulent waters of the European Convention. Closer search for its origins within the Convention's rich archives reveals that the proposal came about in a very late stage of the debates, when the provision now enshrined in Article 11 of the Treaty on European Union found its way into Article 46 of the Draft Treaty Establishing a Constitution for Europe, July 18, 2003, 2003 O.J. (C 169) 19.

⁶ EU Treaty art. 11, ¶ 4.

⁷ *Id.*

⁸ *See ECI, supra* note 3.

II. THE GREEN PAPER

The ECI is a perfect example of a potentially far-reaching primary law provision that can be rendered useless if the implementing provisions get bogged down in special single-purpose rules and administrative twists. The Commission seems to be aware of that and thus presents ten issues, resolutions of which should provide the core of the implementing instrument. In pondering them, a balance needs to be found between assuring the representativeness of any initiative and avoiding an excessive burden on participants, together with administrative feasibility—and all this while accommodating half a billion potential citizen initiators.

A. Representativeness

The Green Paper starts by addressing how many citizens have to sign up to an initiative: what should the “significant number of Member States” be (Issue 1), and at what number should the “minimum signatures per Member State” be set (Issue 2)?⁹

These two questions are, of course, the most salient. Finding the right answer to them will make the difference between initiatives that will be impossible to bring about on one extreme and a proliferation of spurious initiatives degrading the instrument and overwhelming the Commission’s apparatus on the other. In response to the first question, the Commission sees a majority of Member States as too high a threshold and a quarter as too low. It suggests one third as “strik[ing] the right balance.”¹⁰ The Commission justifies this figure by referring to two treaty provisions working with such a threshold¹¹ and to some national provisions on popular initiatives.¹²

Important incidental questions remain. Do we want a lot of initiatives in general? Do we want initiatives on issues that may concern only several (maybe geographically defined) Member States? Or is it necessary for the initiative to emanate a “genuine European flavour” as the Commission puts it?¹³ While one third is a reasonable—though, not to be denied, rule of thumb—threshold, it will make it very hard for citizens of, for example, the Baltic region (comprising, say, five Member States) to present an initiative on a topic such as regulation of polluting maritime traffic. Is that in line with the ECI’s purposes?

The Commission maintains that in order for representativeness to be assured, it is important not only to set a threshold for participating Member States, but also to require a minimum number of

⁹ *Id.* at 4–5.

¹⁰ *Id.* at 5.

¹¹ The Commission mentions the “enhanced cooperation” threshold which requires “at least nine Member States” to participate. EU Treaty art. 20, ¶ 2. This threshold is not defined by fraction but by absolute number. The number of national Parliament votes needed to set in motion the “yellow card” subsidiarity procedure provided for in Article 7(2) of the Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaty of Lisbon is also one third. 2008 O.J. (C 115) 206, 208. There is another provision working with a one-third threshold which the Commission does not mention, where a proposal for determination of serious (and persistent) breach of the Treaty on European Union Article 2 values on the part of a Member State may (also) be made by one third of the Member States. EU Treaty art. 7, ¶¶ 1–2.

¹² See ECI, *supra* note 3, at 5 for discussion of the Austrian and Swiss provisions for popular initiatives.

¹³ *Id.*

citizens to support a given petition “in each of the Member States involved.”¹⁴ As setting an absolute number would disadvantage smaller Member States, a number in relation to population is the favored option. The Commission defines the needed percentage threshold very neatly. It calculates what percentage of the E.U. population equals one million and proposes that number—0.2%—to be the Member State threshold.¹⁵

Requiring a minimum is sensible, and 0.2% is in the lower range of thresholds used in popular initiatives¹⁶ in European countries that use them.¹⁷ But it is not clear whether the votes from a Member State that remain below the 0.2% threshold (say 75,000 of the 89,000 needed in Spain) get counted into the total, provided that the necessary number of Member States reaching the threshold is met. Such a limitation, which can be read from the Green Paper’s phrasing,¹⁸ would clearly go against the transnational nature of the initiative, which would then become a series of separate referendums on the same issue.

B. Administration—Easy Answers

The remaining issues deal with technical aspects. The minimum age requirement for eligibility to participate (Issue 3) and procedures for collection, verification, and authentication of signatures (Issue 5) are best left to national voting age rules for the European Parliament elections and national authorities, respectively.¹⁹ The Commission contemplates full harmonization of procedural requirements, but recognizes that such a choice would be costly and confusing.²⁰ Formal requirements (Issue 4) should be minimal, just enough so as to assure that there is an initiative with a cause and that the cause is clear.²¹ Naturally, the more comprehensive an initiative is, the more persuasive an “invitation” it may be to the Commission to propose it. Imposing a time limit for signature collection is a common practice when it comes to petitions, which protects citizens from having given their voice in favor of an initiative when times have changed (Issue 6).²² The proposed one year time limit²³ is a little harsh on citizens, considering the average time the institutions take to pass legislation, but it should not pose difficulties to the petitioners. Possible duplication of initiatives (Issue 10)²⁴ need not be seen as a problem. While it may be politically difficult for the Commission to reject successive initiatives on the same issue,

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Nine Member States have larger minimum thresholds, ranging from 0.8% in Italy to 10% in Latvia. Victor Cuesta, *The Future of the European Citizen Initiative* 4, http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/cuesta_victor_2_en.pdf.

¹⁷ Inconveniently, the beacon of modern-time direct democracy—Switzerland, where the first recorded direct (select, male) citizen vote took place in 1294—is (still) not a Member State.

¹⁸ “In view of the fact that the Treaty requires that a citizens’ initiative be supported by no less than a million citizens coming from a significant number of Member States, the Commission considers that it is necessary to set a minimum number of citizens that are required to support an initiative in each of the Member States involved.” ECI, *supra* note 3, at 5.

¹⁹ *See id.* at 6–8.

²⁰ *See id.* at 6, 8.

²¹ *See id.* at 7.

²² *See id.* at 9–10.

²³ *See id.* at 10.

²⁴ *See id.* at 13.

such a practice would certainly highlight the saliency of the matter. The ability to ask the Commission to reconsider must be allowed as a tool of the popular will.

C. Administration—Harder Answers

There are several seemingly technical choices with larger potential impact on the policy goals of the ECI. Registration of proposed initiatives (Issue 7) and examination of petitions by the Commission (Issue 9) are good examples. The Green Paper proposes that a web-based registration process, requiring each initiative to upload information such as who the organizers are or the subject and objectives of an initiative, would “set the clock ticking.”²⁵ The Commission does not want to make any admissibility decisions at this early stage and would only examine the initiative after it reaches the signature threshold,²⁶ but the reasons it gives for this—delay and procedural and substantive confusion²⁷—are not very persuasive. Instead, the Commission would like to make all decisions with regard to initiatives only after any given initiative has matured.²⁸ The Commission identifies a time limit of six months to determine whether the following requirements have been met: procedural requirements (was it registered correctly, was the right amount and correct signature distribution attained), admissibility (does the subject matter fall within the remit of the Commission’s powers), and substantive evaluation (does the Commission like it and will it act on it).²⁹

Such an approach is justified in terms of efficiency, as it protects the Commission from having to invest resources when it is unclear whether a petition will gain popular support. However, such an approach may lead to considerable citizen frustration. Not only may the Commission, though stating reasons, decide not to act upon a million-signature petition, but it may actually rule that the initiative was futile from the beginning because it falls outside the Commission’s competence. As the ordinary European (and, looking at the European Court of Justice case law,³⁰ even the institutional stakeholders or the Court itself) has a hard time discerning where the given competence lies, it would be worth considering having the Commission resolve these issues at the beginning,³¹ with the petition organizers having possible recourse to the Court. Such an approach would save resources, bad publicity, and resentment from those who signed in vain. Because Article 11 of the Treaty on European Union treats the ECI essentially in the same way as the European Parliament’s secondary legislative initiative is treated under the Treaty on the

²⁵ *Id.* at 10; see also discussion of Issue 6 *supra* Part II.B.

²⁶ See ECI, *supra* note 3, at 10.

²⁷ *Id.*

²⁸ See *id.* at 10, 12.

²⁹ See *id.* at 12–13.

³⁰ For an elementary set of legal base controversies, see, e.g., BERMAN ET AL., *The Sphere of Community Law and Policy*, in CASES AND MATERIALS ON EUROPEAN UNION LAW 104–28 (2nd ed. 2004).

³¹ See, e.g., European Parliament Resolution of 7 May 2009 Requesting the Commission to Submit a Proposal for a Regulation of the European Parliament and of the Council on the Implementation of the Citizens’ Initiative, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0389&language=EN&ring=A6-2009-0043> (calling for an admissibility assessment by the Commission prior to collection of signatures).

Functioning of the European Union,³² the Commission should generally commit to similar treatment of both processes.³³

The final issue concerns transparency and funding (Issue 8).³⁴ To gather one million signatures across at least nine countries, organizational means and finances will be essential. For the sake of the independence of initiatives, no public funding is presumed by the Commission.³⁵ There will be no conditions regulating the type of entity that can initiate a petition,³⁶ but, due to these funding constraints, most entities will necessarily be already- or *ad hoc*-organized interests. It is, therefore, sensible to require full disclosure of supporters and campaign means so that the risk of misuse of the initiative by disguised special interests is limited.³⁷

III. WILL THE ECI DELIVER?

The consultation attracted a good number of contributions,³⁸ a lot of food for thought for the Commission to feast on before it rushes to submit a draft proposal³⁹ on the ECI as invited by the European Council.⁴⁰ Never before has an entity of this size attempted to introduce a popular initiative, which is traditionally a local means of generating policy decisions. Such instruments, which may have polity-building capability,⁴¹ will likely be triggered as a reaction to the responsiveness failure of domestic or European political representation, or both. And that is its main value.

³² “The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.” Consolidated Version of the Treaty on the Functioning of the European Union, art. 225, Mar. 25, 1957, 2008 O.J. (C 115) 150.

³³ The European Parliament is already negotiating on how its “requests” to initiate legislation will be treated by the Commission within the frame of debates over the revised EP-Commission Framework Agreement. Press Release, European Parliament, Framework Agreement Between the Parliament and Commission: Key Elements in the Revision of the Framework Agreement.

³⁴ See ECI, *supra* note 3, at 11–12.

³⁵ See *id.*, at 11.

³⁶ See *id.*

³⁷ The Czech Republic Senate raises an interesting suggestion: interlinking the Commission Register of Interest Representatives with data in the ECI registration website. *230th Resolution of the Committee on E.U. Affairs on Green Paper on a European Citizens’ Initiative*, Parliament of the Czech Republic—Senate, Senate Press No. K 090/07, ¶ 2(4) (Jan. 27, 2010), available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/senate_czech_republic_cs.pdf.

³⁸ The consultation period ended on January 31, 2010. See http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/contributions_en.htm for all contributions.

³⁹ After this Article was written, the Commission published its *Proposal for a Regulation on the Citizens’ Initiative*, COM(2010) 119 final (Mar. 31, 2010). The proposal, which does not address several of the issues treated in this brief Article, introduces some interesting compromises both toward big Members States and the European Parliament, while seeming to leave considerable room for the Commission to maneuver in the legislative process. The Proposal is available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/com_2010_119_en.pdf.

⁴⁰ European Council Conclusions, at ¶ 4, EUCO 6/09 (Dec. 11, 2009), available at http://www.se2009.eu/polopoly_fs/1.27455!menu/standard/file/Europeancouncilconclusions%2011%20December.pdf.

⁴¹ For a sober analysis of the Swiss experience of demos-through-direct-democracy and why it may (not) relate to the European Union, see Lars P. Feld & Gebhard Kirchgässner, *The Role of Direct Democracy in the European Union*, in *A CONSTITUTION FOR THE EUROPEAN UNION* 203, 216–17 (Charles B. Blankart & Dennis C. Mueller eds., 2004).

Subsidiarity should be the guiding principle in answering administrative questions such as eligibility and signature verification, possibly with “good standards” set in the implementing instrument. It must be remembered that gathering one million signatures across a continent could become an organizational nightmare, and, the more stringent the rules are, the fewer the entities that will have the capacity to run a petition campaign. The question then becomes, “Who will be able to benefit?” As it is likely that there will be no public funding available for initiatives, entities with established networks and secured finances will be advantaged, whether those be political parties, NGOs, or private interests. We might, therefore, need to brace ourselves for initiatives on issues that are taboo in high politics. Fringe parties that have a xenophobic agenda and fall short of election thresholds may unite in proposing anti-immigration measures just as much as—or even more than—say, traveling European citizens frustrated by the diversity of electrical outlets.

Led by the same drive to tackle the Union’s democratic deficit, national Parliaments were entrusted with an enhanced role in the E.U. legislative process.⁴² Most notably, as watchdogs of the subsidiarity principle,⁴³ they, not unlike soccer referees, can raise “yellow cards” in warning after a subsidiarity-foul is committed. However, just like citizens with their initiative, they cannot go all the way. In most cases, for the proposal to be sent off the pitch, they will need the Council or the European Parliament to join them. It would have been worth considering, either in the Convention or in the Intergovernmental Conference, whether the national Parliaments (too) ought to be given the right to invite the Commission to propose E.U. laws. National Parliaments are directly and locally elected, parliamentarians live in their constituencies in contact with citizens, there is a working inter-parliamentary network that can facilitate production of an initiative,⁴⁴ and parliamentarians are experienced legislators. If the National Parliaments were found incapable of increasing the responsiveness of Union politics, perhaps that would have been the better time to experiment with continent-size referenda on petitions.⁴⁵

Whether the ECI proves to be no more than hot air, or whether it will mark the beginning of the end to the European Union’s democratic deficit, this first attempt to establish transnational direct democracy should not be wasted. What is not encouraging is that we already have a test case of a European initiative. In 2006, more than a million signatures were gathered in support of ending

⁴² EU Treaty art. 12.

⁴³ Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaty of Lisbon, art. 7, Dec. 13, 2007, 2008 O.J. (C 115) 206, 207–08.

⁴⁴ See, e.g., Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC), <http://www.cosac.eu> (last visited Apr. 7, 2010).

⁴⁵ It is remarkable that such an important instrument as the ECI was incorporated in the Treaty of European Union with so little preceding policy debate. See *supra* note 5; for the “elaborateness” of explanatory notes to the amendments that introduced the ECI at the Convention, see also Borrell, Carnero & López Garrido, Suggestion for Amendment to Article 34 of the Treaty Establishing a Constitution for Europe, <http://european-convention.eu.int/Docs/Treaty/pdf/34/Art34bisBorrell.pdf>; Alain Lamassoure, Suggestion for Amendment to Article 34 of the Treaty Establishing a Constitution for Europe, <http://european-convention.eu.int/Docs/Treaty/pdf/34/art34bisLamassoure.pdf>; Voggenhuber, Lichtenberger, MacCormick, Nagy & Voggenhuber, Suggestion for Amendment to Article 34 of the Treaty Establishing a Constitution for Europe, <http://european-convention.eu.int/Docs/Treaty/pdf/34/Art34Voggenhuber.pdf>; Jürgen Meyer, Suggestion for Amendment to Article I-46 of the Treaty Establishing a Constitution for Europe, http://european-convention.eu.int/Docs/Treaty/pdf/34/34_Art%20I%2046%20Meyer%20EN.pdf.

the outlandishly wasteful monthly commute of the European Parliament between Brussels and Strasbourg costing some €200 million every year.⁴⁶ And . . . it merrily shuttles on . . .

⁴⁶ Press Release, One-Seat Parliament Campaign in E.U. Treaty Pitfall (Sept. 22, 2006), *available at* <http://www.euractiv.com/en/priorities/seat-parliament-campaign-eu-treaty-pitfall/article-158058>.