

European Citizens Initiative: a legal (political) instrument for advocating the protection of national minorities in the European Union?

The European Citizens' Initiative (ECI), introduced by [Regulation No 211/2011/EU](#), is of high significance in the political system created by the founding treaties of the European Union (EU). The involvement of citizens in the EU decision-making process as a constitutional principle appears already amongst the objectives and values of the EU enshrined in Articles 1, 2 and 3(1) of the [Treaty on the European Union](#) (TEU). More precisely, this very principle is underpinned by the provisions on democratic principles in Article 8(3) TEU ("*[e]very citizen shall have the right to participate in the democratic life of the Union*"). The legal basis establishing the European Citizens' Initiative (Article 11(4) TEU) is located in that context.

However, despite the ECI's constitutional foundations and importance, this innovative instrument of transnational participatory democracy is quite an "underachiever" so far: its potential has not been fully explored and exploited during the first three years of its existence (since April 2012). Statistical figures on its practical application speak loudly: overall, 51 ECIs had been proposed, out of which 31 were registered by the European Commission, thus 20 were refused (equalling to 40 %). As of now, only three successful ECIs have been submitted to the Commission since the entry into force of this instrument. These three ECIs ("*Right2Water*", "*One of us*" and "*Stop Vivisection*"), having exceeded the minimum threshold of one million signatures from at least seven Member States, have then been followed by communications from the Commission, but interestingly, and sadly, enough any of the three communications contains legislative proposals.

As far as the ECI's legal and institutional significance is concerned, two major constitutional implications are worth mentioning.

First, it is a tool for participatory democracy, i.e. an addition to existing "opportunity structures for citizens participation" ([Nentwich](#)). However, in practice, many burdens, uncertainties as well as too strict and bureaucratic formalities make it difficult for citizens to efficiently use this instrument. This cumbersome reality is in striking contrast with the aims set out in the preamble of the ECI Regulation, calling for "*clear, simple, user friendly and proportionate*" procedure and conditions. Further to that, the Commission's half-hearted and braking attitude constitutes a further obstacle in this regard. As a result, the following dilemma emerges. If the current trend continues in practice, the solemn objectives of participatory democracy within the EU can be hardly attained as well as the aim to bring European citizens closer to the EU and to increase

citizens' willingness to participate in the decision making process may be negatively affected.

Secondly, the European Citizens' Initiative might have considerable impact on the post-Lisbon Community method (decision-making process). The purpose of the ECI is initiating a legislative proposal, and then producing EU legislation. In that sense, it can be conceived as a "hard", primarily legal instrument, which character is emphasized by Article 11(4) TEU as follows: "*the Commission [is called] to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties*". This interpretation is not shared by all commentators, and some argue that ECI represents just an agenda setting tool in order to raise issues of concern for citizens (being rather a "soft", political instrument). Departing from the wording of Article 11(4) TEU, the ECI's purpose is to directly affect the EU's decision-making process, where the so-called Community method plays a dominant role. In two pre-Lisbon communications of the Commission on the future of European governance (2001),¹ it was highlighted that the Community method should be reformed, with "less top-down approach", notably by strengthening its democratic legitimacy. As a consequence, the need for an instrument designed primarily to involve citizens in decision-making was expressed, which would increase democratic legitimacy. Similarly, the often-criticized input legitimacy process of the Community method can be considerably enhanced and improved by efficient and successful use of the ECI. One may ask whether this narrative, i.e. the ECI capable of having a significant impact on the Community method, is the main reason for the "jealousy" of the Commission and its restrictive approach towards this tool, since it can affect its monopoly of initiative and slightly change the current status quo.

Against this backdrop, what might be the way forward, from the legal perspective?

First, the European Citizens' Initiative should become a real and effectively functioning instrument, adding directly citizens' will to the EU's decision-making *trias politica*. In other words, not only the European Institutions (mainly the Commission) should be the agenda-setters, but the EU citizens, too.

Further to that, so as to explore its full potential, the ECI should be open to new topics, falling under the material scope of the Treaties but not yet taken up by the Union legislators. These new topics should undisputedly fit into core EU policies or objectives, so it is of outmost importance that they shall be formulated in that logic, by identifying the appropriate EU legal basis, accompanied by legally precise and succinct drafting. When it comes to table new topics on the EU agenda, the ECI could complement Article

¹ Commission of the European Communities, '*European Governance: A White Paper*' [2001] COM 428 final; Commission of the European Communities, '*Communication on the Future of the European Union – European Governance: Renewing the Community Method*', [2001] COM 727 final.

265 of [the Treaty on the functioning of the European Union](#) (TFEU) (procedure before the EU Court of Justice if Institutions fail to act) and the so-called flexibility cause contained in Article 352 TFEU (requiring unanimity by the Council to regulate a new domain, so the threshold is really high to trigger this mechanism). On the other hand, it definitely goes beyond the simple petition mechanism to the European Parliament under Article 227 TFEU.

Let us take one example: the “*protection of persons belonging to minorities*” is found amongst EU values since the Treaty of Lisbon (Article 2 TEU) and the [EU Charter of Fundamental Rights](#) likewise contains important references in this respect (Article 21). Nevertheless, no implementing secondary EU legislation has been adopted yet concerning this specific subject-matter. Such a topic, if conceptually well presented, can be one of those new issues being able to reach the EU decision-making agenda via the ECI. While the legal and judicial mechanisms mentioned above represent a top-down approach to address such a new issue and initiate EU action (with restricted access, limited mainly to Institutions), the ECI denotes a bottom-to-the-top approach, based on wide democratic participation (strengthening democratic legitimacy).

As of now, two related ECIs have been submitted aiming at enhancing the protection of minorities under different EU policy domains. First, the Federal Union of European Minorities (FUEN) has made use of the ECI with a view to putting the issue of protecting national minorities on the EU’s agenda. FUEN submitted the “[MinoritySafePack – one million signatures for diversity in Europe](#)” initiative to the European Commission in July 2013. Its main objective is the adoption by the EU of a set of legal acts to improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union (many Articles from the TFEU as well as Articles 2, 3 TEU and Articles 21, 22 of the Charter of Fundamental Rights have been specified as legal bases). However, the Commission refused the registration of this proposed initiative on the grounds that it has fallen manifestly outside the framework of its powers to submit a proposal for an EU legal act for the purpose of implementing the EU founding treaties. In reaction to this refusal, FUEN brought proceedings before the Court of Justice of the European Union (CJEU) in November 2013 seeking the annulment of the Commission’s decision on rejection ([case T-646/13](#)). In its submission, FUEN argues, first, that the Commission infringed essential procedural requirements contained in the TFEU and in the ECI Regulation (e.g. it failed to identify among the eleven topics proposed those which fall outside the framework of its powers, and it did not provide the motivation either). Secondly, the applicants state that none of the topics in relation to which the Commission is to be called upon to submit proposals lies manifestly outside the framework of the Commission’s powers to submit such a proposal. They claim that, even if one of the topics were to fall outside that framework,

the Commission should have registered the planned citizens' initiative in respect of the topics which in its opinion did not fall manifestly outside that framework. Besides FUEN's action, two private persons belonging to the Hungarian minority in Romania (in Transylvania), namely Mr. Balázs-Árpád Izsák and Mr. Attila Dabis elaborated an initiative in June 2013 entitled "[*Cohesion policy for the equality of the regions and sustainability of the regional cultures*](#)". Its main objective is to ensure the equality of the regions and the sustainability of regional cultures by paying special attention to regions with national, ethnic, cultural, religious or linguistic characteristics that are different from those of the surrounding regions. Several TFEU Articles as well as Articles 2 and 3 TEU were indicated as legal bases for adopting such EU legislation. Unfortunately, this proposed initiative was also rejected by the Commission on account of no legal basis in the founding treaties which would allow for a proposal for a legal act with the content it envisaged. Therefore the Commission concluded that the Izsák-Dabis initiative has fallen manifestly outside the framework of its powers to submit a proposal for an EU legal act for the purpose of implementing the founding Treaties. The two initiators, however, also brought an action for annulment before the CJEU in September 2013 ([*case T-529/13*](#)). They argue that their citizens' initiative fulfils all the requirements for registration and they reject as unfounded the Commission's allegation that the proposed ECI manifestly falls outside the framework of the Commission's powers. According to the applicants, the initiative put forward a proposal which fell within the powers defined by the TFEU, namely economic, social and territorial cohesion. The applicants consider, moreover, that regions which have particular national, linguistic and cultural characteristics belong in any event to the category of "regions concerned" indicated in Article 174 TFEU to which the EU's policy on cohesion is applicable, given that, under secondary legislation, culture is an important factor in territorial, social and economic cohesion. The applicants also argue that under Article 167 TFEU, the EU is to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity. The applicants finally contend that the Commission misinterprets the initiative in stating that the boost to the situation of national minorities cannot be seen as helping to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions in accordance with Article 174 TFEU. To the contrary, the two initiators allege that they are not seeking to improve the situation of national minorities, but to ensure that the cohesion policy of the EU could not be used to eliminate or weaken the national linguistic and cultural characteristics of those regions, and that that the economic resources and objectives of the Union could not be converted into instruments, however indirect, of policies against national minorities. As of now, both cases are still pending before the EU Court, and the awaited judgments will be most likely delivered by the end of the year or the beginning of 2016.

In conclusion, after more than three years of existence, the European Citizens' Initiative is at crossroads. Either it will open a new democratic chapter in the life of EU's decision-making system (which signifies an ECI having sharp teeth and exercising real influence), or it will remain a symbolic declaration of faith in the European citizens, not more than a democratic illusion (which makes the ECI an "empty shell"). Given that the Commission is in the driving seat in relation to ECI's functioning, the success of the story largely depends on this institution. Nonetheless, the Commission cannot just pursue its own agenda, independently of other Institutions and the general EU interests, since the duty of sincere cooperation to achieve EU's objectives (as enshrined in Articles 4(3) and 13(2) TEU) equally applies to it. Last, but not at least, the Court of Justice of the European Union can also have a significant say, as the ultimate arbitrator in EU law matters. The above pending cases presented just a glimpse of this role. This is highlighted by the fact that, as of now, five ECI organisers challenged the Commission's refusal before the EU Court, corresponding to 25 % of all rejections. All in all, this is just the beginning of a beautiful friendship between the ECI and the EU and let us hope that the best is yet to come.