

Reconsidering the follow-up stage of the European Citizens' Initiative

Position Paper for the Public Consultation on the European Citizens' Initiative, July 2017

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One of the sections of the public consultation on the European Citizens' Initiative (ECI) deals with the submission of a successfully completed ECI to the Commission and the subsequent examination stage (i.e. the follow-up stage of the ECI). This follow-up stage currently includes a public hearing at the European Parliament followed by an official response from the Commission to the ECI organisers in the form of a Communication. In its Communication, the Commission must express its legal and political conclusions on the ECI, "the action it intends to take, if any, and its reasons for taking or not taking that action" (Art. 10(1)(c) ECI Regulation).

As mentioned in the public consultation, stakeholders have raised concerns about the public hearing and the preparation of the Commission's reply to a successfully submitted ECI. We could add here as an additional observation that there is currently a mismatch between the expectations of ECI organisers (or, more generally its stakeholders) and the way in which the ECI has manifested itself in practice so far as a mechanism to influence EU lawmaking.¹ This mismatch becomes apparent when one considers the reaction of the organisers of successfully submitted ECIs to the respective Commission's Communications. For example, the organisers of the 'Right to Water' ECI, who arguably received the most positive reply out of the three campaigns, stated that the Commission did not appropriately respond to the expectations of the ECI's signatories.² The organisers of 'Stop Vivisection' complained to the Ombudsman that the Commission's response to their ECI was inadequate³, whilst the organisers of 'One of Us' have brought a case before the Court of Justice of the European Union against the Commission, the European Parliament, and the Council.⁴ The 'One of Us' organisers argued that the Commission should have an obligation to submit a proposal for a legal act based on a successfully submitted ECI. In their view, if we accept that the ECI Regulation *does not oblige* the Commission to submit a legislative proposal based on a successful ECI, then the ECI Regulation itself should be seen as incompatible with EU

¹ I have argued more extensively elsewhere that there is currently a mismatch between, on the one hand, the expectations of EU citizens from the ECI and, on the other hand, the ECI's capacity to lead to legislative output: see A.Karatzia "The European Citizens' Initiative and the EU Institutional balance: on Realism and the Possibilities of Affecting EU Lawmaking" (2017) 54(1) Common Market Law Review 177-208, p.197-201.

² Press Release from the "Right 2 Water" Citizens' Committee, 19 March 2014, <www.right2water.eu/news/press-release-commission-lacks-ambition-replying-first-european-citizens%E2%80%99-initiative>

³ See Decision in case 1609/2016/JAS on the European Commission's response and follow-up to the European Citizens' Initiative "Stop Vivisection" <www.ombudsman.europa.eu/en/cases/decision.faces/en/78182/html.bookmark> The Ombudsman found that the Commission had explained clearly its position and the political choices it made regarding the objectives and proposals of the ECI. Thus the Ombudsman concluded that there was no maladministration by the Commission.

⁴ Case T-561/14, *One of Us*, pending.

law.⁵ Generally speaking, in the first few years of the ECI's experience we can observe a prevalent feeling of frustration from the ECI organisers with regard to the follow-up of their ECIs.

Against the above background, this contribution seeks to add to the debate on the revision of the ECI Regulation by focusing on the need to revisit the follow-up stage of the ECI.⁶ It presents a number of procedural suggestions for addressing the concerns set out in the text of the consultation and mitigating the risks to the credibility of the ECI that arise from the mismatch between expectations and (current) reality in the practice of the ECI. Such procedural modifications could, for example address the challenges currently facing the final stage of an ECI by clarifying the sources of interests that the Commission takes into consideration when deciding how to respond to an ECI. Making the ECI's follow-up stage more transparent than it is at the moment would potentially make the Commission's responses more detailed, demonstrating the rationale behind the Commission's final decisions and exposing citizens to both sides of the debate on the subject matter of an ECI.

The extent of the procedural changes to the ECI's follow-up stage will largely depend on the willingness of the EU institutions to modify the ECI Regulation. Beyond the willingness to modify secondary EU law, however, limitations imposed by the EU Treaties in revising the ECI should also be considered. These limitations are particularly relevant when it comes to formally giving an enhanced role to the European Parliament and the Council in the decision of whether to proceed on an Initiative's proposals. It has been argued that a successfully submitted ECI should automatically lead to a legislative proposal by the Commission, which would be immediately transmitted to the European Parliament and the Council for voting.⁷ If the Parliament and Council vote in favour of the ECI, the Commission should be obliged to submit a formal proposal for a legal act.⁸ Nonetheless, a formal and binding obligation on the Commission to submit a legislative initiative based on an ECI would seem to contradict the express wording of the EU Treaties: according to the Treaties, ECI organisers can 'invite' the ECI to propose legislation whilst the Commission is the sole initiator of legislation.

Having said that, it would be beneficial if the Commission ensures that its decisions and justifications of its decisions are not – and are not perceived as – arbitrary, undermining a successful ECI. Including the formal input of the European

⁵ The organizers also submitted that the Commission did not adequately substantiate the reasons behind its final decision.

⁶ The contribution builds on suggestions for the modification of the ECI follow-up stage that I first expressed in an article published in the *Common Market Law Review*: A.Karatzia, "The European Citizens' Initiative and the EU Institutional balance: on Realism and the Possibilities of Affecting EU Lawmaking" (2017) 54(1) *Common Market Law Review* 177-208.

⁷ Bouza Garcia, "How could the new Article 11 TEU contribute to reduce the EU's democratic malaise?" in Dougan, Nic Shuibhne and Spaventa (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart, 2012), pp. 277–290, p.285

⁸ See here European Parliament Resolution of 28 Oct. 2015 on the European Citizens' Initiative (2014/2257(INI)), P8_TA(2015)0382, para 30.

Parliament and potentially the Council to the examination stage of the ECI may be a good way to increase the credibility of the ECI as a participatory mechanism. Even though a formal option of a parliamentary vote may be off the table due to EU primary law limitations, an alternative suggestion would be to allow input from the European Parliament (and potentially the Council) in a less formalistic way. The Ombudsman has already suggested that the Parliament and the Council could provide their opinions on the existence of political support for an ECI before the Commission drafts its final Communication.⁹ Taking the Ombudsman's suggestion one step further, it is submitted that consultations with the two co-legislators should be published. This practice would give a voice to the European Parliament, which is the only directly elected EU institution, in the outcome of an ECI, and would expose citizens to the influence of the two EU co-legislators to the Commission's final decision.

The ECI Regulation could be revised accordingly to give effect to the above suggestions. For instance, the time limit between the public hearing and the final decision of the Commission could be expanded, whilst an obligation could be included for the Commission to publish the positions of the two other EU institutions in the central ECI website. These modifications would also work as an incentive for the Commission to explain in more detail in its final Communication its choice to follow or to deviate from the views of the two EU co-legislators.

An additional modification would aim at exposing the ECI's follow-up stage to a plurality of interests and views. At present, actors that may wish to express a contrasting view from that of ECI supporters do not have an official platform to make their views known to the public. Changing the ECI process to allow more actors to express their view on successfully submitted ECI would shape the ECI as an instrument for fostering public debate in addition to adding topics to the agenda of the EU institutions.

The Commission and the European Parliament have supported the view that stakeholders with different views and perspectives on the topic of each ECI should be heard during the public hearings.¹⁰ Admittedly, this practice would indeed have the potential to encourage public debate. Nonetheless, we should also be attentive to the fact that the public hearings exist primarily as a platform for the ECI organisers to promote their cause. The organisers of an ECI may be unwilling to share their momentum with those who challenge their proposals. After all, the organising team of an ECI spends more than one year preparing, organising, and executing their campaign, not to mention the costs of collecting one million signatures. Hence, the participation in

⁹ Decision of the European Ombudsman OI/9/2013/TN concerning the European Commission, 4 March 2015, para 17.

¹⁰ European Commission, Follow up to the European Parliament resolution on the European Citizens' Initiative (2014/2239(INI)), 2 February 2016 p.10; European Parliament Resolution on the European Citizens' Initiative (2014/2257(INI)), P8_TA(2015)0382) para 31.

the ECI public hearings of actors other than those chosen by the ECI organisers could be left to the discretion of the ECI organising team.

Public consultations on a successfully submitted ECI could be an alternative option to the direct participation of opposing voices in the ECI public hearings. The current public consultation on the ECI already enquires whether the Commission should be given more time before its reply so that it can consult widely and transparently on the subject of an ECI. Given that the 3-month deadline for the Commission's reply to an ECI is stipulated in the ECI Regulation,¹¹ however, an expansion of that timeframe would require a review of the Regulation. If such a revision is on the table, attention should be given to the amount of time by which the response of the Commission is extended. While it is important to give additional time to the Commission to consult widely on the subject of an ECI, it is equally important not to jeopardise the momentum of an ECI. Some ECIs may be dealing with topical issues that may become out-dated by the time the Commission provides its response.¹² In this sense, a solution should be found which gives the Commission the time needed to complete an all-encompassing consultation giving platform to multiple voices, while maintaining the momentum of an ECI.

The revision of the ECI Regulation as described above can be complemented by another feature that involves the creation of a centralised website or an electronic platform. The Commission has already completed a survey on the creation of a collaborative platform on the ECI that would bring together ECI stakeholders and allow them to interact regarding the ECI process. Beyond the useful functions that are stipulated in the survey, the electronic platform could also be used to publish letters received by the EU institutions from organisations or groups of citizens who support or contest the objectives of an ECI. The platform should be built in such a way as to actively foster a wider spirit of debate coming from all the registered ECIs. For instance, it could take the shape of a website that provides not only information, but also the possibility for the website's visitors to comment on an ECI proposal, and the possibility for ECI organisers to insert their own information or updates (e.g. upcoming events) about their ECIs. The website could also be linked, in some way, to social media, thus increasing the visibility of all the ECI campaigns. In this way, the platform would simultaneously increase the transparency of the whole process and would add to the legitimacy of the Commission when taking the final decision as to how to respond to a successfully submitted ECI as it would expose the various interests and voices that

¹¹ Article 10(1)(c)

¹² Take here as an example the organisers of the rejected "Stop TTIP" ECI, who brought a case before the Court of Justice of the European Union and waited for 3 years for the judgment. By the time the General Court annulled the decision of the Commission, CETA had already been signed, which is the exact opposite outcome of what the organisers were advocating. Whilst it is unlikely, of course, that the Commission would take three years to complete a consultation and give its answer on a successful ECI, the example of "Stop TTIP" illustrates that the momentum of an ECI should be taken into consideration when revising the deadline for the Commission to provide its response.

should be considered in the process. Moreover, creating a space for public dialogue and debate would increase the visibility of the ECI campaigns that do not manage or do not solely aim to collect the necessary one million signatures. The current official ECI website could be used as the basis for this electronic platform. This modification could be stipulated in the ECI Regulation, depending on the shape of the platform.

Finally, we should note that the pending judgment of the General Court in the abovementioned case of 'One Of Us' is undoubtedly expected to shed light on the Commission's discretion at the final stage of the ECI. The Commission seems to have taken into consideration the judgments of the EU Court in previous ECI-related cases when modifying its approach towards the ECI legal admissibility test.¹³ Therefore, it is likely that the Court's judgment in 'One of Us' will affect any potential modification of the ECI's follow-up stage. The outcome of the cases will be illustrative of the limits to the Commission's discretion even if the General Court finds the cases inadmissible or dismisses the claims of the organisers on the merits.

Even assuming that the Court will, indeed, take a position in defining the Commission's obligations when responding to a successful ECI, this does not prevent the EU Institutions from acting beyond the confines of the Court's judgment. Increasing the transparency of the ECI follow-up stage would open up the process to citizens by illustrating the multiplicity of actors and interests that should be taken into account by the Commission when deciding how to react to an ECI. Based on this argument, this short contribution to the public consultation has sought to provide some practical suggestions for the modification of the ECI follow-up stage, including changes that can be achieved through the revision of the ECI Regulation, as well as additional suggestions that do not necessarily require such a revision.

¹³ I have commented on two of those judgments in posts in the EU Law Analysis blog: "European Citizens' Initiative: General Court rules on the Commission's obligation to give reasons for refusing to register proposals. Case Comment on Case T-646/13 *Minority SafePack v Commission*", February 2017 <http://eulawanalysis.blogspot.nl/2017/02/european-citizens-initiative-general.html> ; "New Developments in the context of the European Citizens' Initiative: General Court rules on 'Stop TTIP'" Case Comment on Case T-754/14 *Efler v Commission*, May 2017 <http://eulawanalysis.blogspot.com.cy/2017/05/new-developments-in-context-of-european.html>