

ORIGINAL MANUSCRIPT

Between discretion and control: Reflections on the institutional position of the Commission within the European citizens' initiative process

Nikos Vogiatzis* **Abstract**

This article considers the institutional position of the Commission within the European citizens' initiative (ECI) process, with particular emphasis on its decision regarding the admissibility/registration of a proposed ECI, and its final decision on the outcome of an ECI which has met the necessary levels of support. The purpose of this contribution is to juxtapose the case-law of the Court on the Commission's discretion and the relevant provisions of the Treaties with the evolution of European integration and, more specifically, the evolution of the Commission's role therein. Viewed under this prism, the Commission's powers at the registration stage (which in any event clearly fall under the scope of judicial review) are compatible with the constitutionalisation of the Union, whereas the Commission's width of discretion at the follow-up stage, while compatible with the Commission's prerogatives, cannot easily be reconciled, nonetheless, with the Commission's limited legitimacy when compared to that of the co-legislators, the fact that it may not always represent the Union interest, and the latter's pragmatic losses within the EU institutional balance.

1 | INTRODUCTION

Even the most optimistic proponents of participatory democracy in the European Union (EU) would probably hesitate to claim that the European citizens' initiative (ECI), including its Regulation,¹ has generally been a success. The ECI has been criticised on various grounds, including the following: the procedure is unnecessarily complicated and

^{*}Lecturer in Law, University of Liverpool. I am grateful to Agustín José Menéndez, Anastasia Karatzia and the anonymous reviewers for their valuable comments and suggestions. Earlier versions of this article (or parts thereof) were presented at the UACES Annual Conference in Bilbao (2015), the Fifth Conference on European Law and Policy in Context at the University of Birmingham (2016), and the EUSA Fifteenth Biennial Conference in Miami (2017); I thank all the participants in these events for insightful discussions and observations. The usual disclaimer applies.

¹Regulation (EU) no. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65 (hereinafter the 'ECI Regulation' or 'Regulation').

formalistic;² the Commission's faculty to reject a proposal supported by at least one million citizens should be reconsidered;³ an ECI both procedurally complex and simultaneously non-binding to the Commission cannot increase the EU's democratic credentials;⁴ the exclusion of EU residents from supporting an ECI may give rise to problems of consistency;⁵ further on the procedural complexities, the ECI Regulation appears to 'penalise' certain categories of EU nationals exercising free movement and residence rights.⁶ To that end, a Resolution was adopted by the European Parliament in 2015 inviting the Commission to simplify the ECI process.⁷ Despite its initial hesitation to amend the Regulation in 2016,⁸ more recently the Commission has launched an online consultation with a view to receiving feedback on possible amendments to the Regulation.⁹

The ECI clearly operates under the overall aegis of the Commission. More specifically, the latter has to make two crucial decisions that will determine the 'life' of a proposed ECI. First, the decision as to whether or not it will register the initiative (what may otherwise be called the 'admissibility stage'),¹⁰ further to which the collection of signatures begins, and the decision as to whether or not it will forward the proposals of a successful ECI campaign to the EU legislature (the 'follow-up stage').¹¹

Regarding the above-mentioned two steps in the ECI process, so far the criticism has primarily centred on the Commission's stance during the admissibility stage: many perhaps would favour a more relaxed approach, on the part of the Commission, when deciding on the registration of the proposal.¹² This article takes a different approach. By juxtaposing the provisions of the Treaties and relevant case-law with the evolution of European integration and, more specifically, the evolution of the institutional position of the Commission, the article argues, first, that the Commission's control during the admissibility stage is necessary, compatible with the progressive constitutionalisation of the Union's legal order and in any event judicially reviewable; and second, that if the Commission's width of discretion at the final stage of the ECI is viewed from the perspective of the evolution of the Commission's position within the EU architecture, then such discretion cannot be easily reconciled with the Commission's limited (perceived) legitimacy, the fact that the latter may not always represent the Union interest, and the shift in the dynamics of the relevant actors within the decision-making process. Thus, a claim is advanced towards the end of this contribution that attention should now focus on the desirable ambit of discretion that the Commission should enjoy at the follow-up stage, namely when deciding on how to proceed with an otherwise successful, in terms of collection of signatures, ECI.

In this context, the article touches upon further preferences of constitutional nature and institutional design, which may well extend beyond the ECI process as such: indeed, to what extent should the EU legislative process be 'disrupted' by instruments such as the ECI, and, more generally, how far citizens' views should be given due consideration? Regarding the Commission's final decision, to what extent is it constitutionally, but also politically, appropriate to qualify the Commission's legislative prerogative? The above issues necessitate an examination as to whether the Commission's

²European Parliamentary Research Service, 'Implementation of the European Citizens' Initiative: The Experience of the First Three Years', European Implementation Assessment, PE 536.343 (2015).

³Miguel Sousa Ferro, 'Popular Legislative Initiative in the EU: *Alea lacta Est*' (2007) 26 *Yearbook of European Law*, 355.

⁴Nikos Vogiatzis, 'Is the European Citizens' Initiative a Serious Threat for the Community Method?' (2013) 6 *European Journal of Legal Studies*, 90.

⁵Michael Dougan, 'What Are We to Make of the Citizens' Initiative?' (2011) 48 *Common Market Law Review*, 1807, at 1821–1822, with reference to the case-law regarding the right of certain third country nationals to vote for the European elections.

⁶*Ibid.*, at 1827–1828.

⁷European Parliament Resolution of 28 October 2015 on the European Citizens' Initiative (2014/2257(INI)).

⁸See 'Commission unlikely to revise ECI Regulation this year' (2016), available at: www.citizens-initiative.eu/commission-unlikely-to-revise-eci-regulation-this-year/.

⁹See 'Public consultation on the European citizens' initiative', available at: ec.europa.eu/info/consultations/public-consultation-european-citizens-initiative_en#about-this-consultation.

¹⁰See Art. 4(2) of Regulation.

¹¹See Art. 10(1)(c) of Regulation.

¹²Cf., e.g., European Parliamentary Research Service, above, n. 2; European Parliament Resolution, above, n. 7.

discretion at both stages should be controlled judicially, quasi-judicially or politically.¹³ In accordance with the above-mentioned scope of the article, claims related to the Commission's legitimacy, its defence of the Union interest, and the shifting dynamics within the institutional balance suggesting the weakening of the Commission's influence, as well as the constitutionalisation of the EU legal order, will be discussed. Prior to this, the Commission's discretion under EU law, with a particular emphasis on its right to initiate legislation, is presented.

2 | THE COMMISSION'S DISCRETION WHEN INITIATING LEGISLATION: THE VIEW FROM THE TREATIES AND THE CASE-LAW OF THE CJEU

Obvious reasons pertain to the discussion of this fundamental aspect of the Commission's institutional activity as it is clear that the power to initiate legislation is closely related, if not potentially affected, by the ECI. This monopoly of the Commission is safeguarded by the Treaties,¹⁴ that provision should be read alongside Article 17(1) TEU, which states that the Commission serves and promotes the Union interest.¹⁵ The breadth of the Commission's prerogative has been confirmed by well-established case-law. By doing so, the Court has sought to secure the Commission's independence and, consequently, to remain as faithful as possible to the principle of institutional balance.¹⁶ Delays of two decades to enable the formation of a common position were justified under the Commission's wide discretion and could not give rise to action for damages.¹⁷ Accordingly, the motion of censure may not be used by Parliament as a threat to force the Commission to submit a legislative proposal as this would undermine the Commission's independence.¹⁸

Simultaneously, Article 293(2) TFEU grants the Commission the right to amend its proposal as long as the Council has not acted (the first paragraph of the same Article grants the Council the power to amend the proposal by unanimity). In a case which received considerable attention, the Council contested the Commission's discretion to *withdraw* a proposal—in cases other than when the proposal becomes obsolete or when new circumstances or data has emerged or when clearly the prospects of a successful adoption of the proposed instrument are limited—arguing that this practice infringes the principle of institutional balance.¹⁹ The Court confirmed that the Commission's legislative prerogative indeed extends to the power to withdraw the proposal, but in that case the Commission has to provide its *reasons* to the Council and the European Parliament (but including during the Council's working groups or during the tripartite meetings between the Parliament, the Council and the Commission).²⁰ What the Court essentially left unaddressed was the Commission's power to withdraw the proposal *after the first reading*.²¹

¹³Due to space limitations, the notion of discretion (generally, but also under EU law) cannot be discussed here, but see, e.g., Sacha Prechal and Bert van Roermund (eds.), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008), Part III (chapters 8–14).

¹⁴See Art. 17(2) TEU: 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.' The exemptions primarily concern the Common Foreign and Security Policy, where the Commission cannot propose legislation, and judicial cooperation in criminal matters and police cooperation, where this right is shared with one quarter of Member States.

¹⁵Art. 17(1) TEU states that the Commission 'shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to the Treaties. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.'

¹⁶On which see, e.g., Jean-Paul Jacqué, 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review*, 383; Case C-70/88, *European Parliament v. Council*, ECLI:EU:C:1990:217, para. 22. The principle is now enshrined under Art. 13(2) TEU.

¹⁷T-571/93, *Lefebvre frères et sœurs v. Commission*, ECLI:EU:T:1995:163, in particular paras. 37–39.

¹⁸See Koen Lenaerts, 'Some Reflections on the Separation of Powers in the European Community' (1991) 28 *Common Market Law Review*, 11, at 24–25, referring by analogy to *European Parliament v. Council*, above, n. 16, para. 19.

¹⁹Case C-409/13, *Council v Commission*, ECLI:EU:C:2015:217. See, further, Steve Peers, 'The Commission's Power of Initiative: The CJEU Sets Important Constraints' (2015), available at: eulawanalysis.blogspot.be/2015/04/the-commissions-power-of-initiative.html; Merijn Chamon, 'Upholding the "Community Method": Limits to the Commission's Power to Withdraw Legislative Proposals—Council v. Commission (Case C-409/13)' (2015) 40 *European Law Review*, 895.

²⁰*Council v. Commission*, above, n. 19, paras. 63–109.

²¹Chamon, above, n. 19, at 901.

Furthermore, under the relevant TFEU provisions both the European Parliament and the Council may submit proposals for consideration to the Commission. The Commission is not obliged to accept the proposal, but if it remains inactive, it should provide reasons.²² An inter-institutional agreement between the European Parliament and the Commission suggests that the latter takes the reason-giving requirement seriously: it commits itself 'to report[ing] on the concrete follow-up of any request to submit a proposal pursuant to Article 225 TFEU ... within 3 months ... If the Commission does not submit a proposal, it shall give Parliament detailed explanations of the reasons'.²³

Albeit a power that is different in nature, yet one also associated with the Commission's role to represent or defend the Union interest, the latter observes the uniform application of Union law across the Member States as the 'guardian of the Treaties'. If the Commission believes that a Member State has not fulfilled its obligations, it may bring the case before the CJEU.²⁴ The infringement procedure is generally characterised by secrecy, whereby the Commission and the Member State allegedly in violation of EU law negotiate the best feasible outcome and evade, if possible, the intervention of the CJEU.²⁵ Simultaneously, the CJEU's case-law on the Commission's decision-making during the administrative stage clearly points to the conclusion that the latter's decisions are 'not amenable to judicial review', thus confirming their 'political nature'.²⁶ To that end, the Court has affirmed that the Commission alone should decide on whether (and when) an action against a Member State should be initiated and/or (subsequently) be brought before the Court.²⁷ The Commission's 'rigour (or lack thereof) in its responses to alleged violations in different policy areas' may be informed by 'policy considerations and priorities', as well as by a possible calculation of the CJEU's response.²⁸ The Commission may take into account effectiveness or efficiency concerns or even consider that, by initiating the procedure, enforcement could essentially be undermined by the possible demonstration of some sort of mistrust vis-à-vis the national judiciary.²⁹ The scope of the Commission's discretion in the infraction process is returned to below, where it is examined to what extent the European Ombudsman may rely on his or her approach in this area with a view to confining the Commission's discretion at the follow-up stage of the ECI process.

3 | THE INSTITUTIONAL POSITION OF THE COMMISSION AGAINST THE EVOLUTION OF THE UNION

3.1 | In search of legitimacy

As is well known, the delegation of powers to non-representative institutions serves multiple purposes, including expertise, credibility of policy commitments, reduced costs, avoiding blame or shifting responsibility for policy failure,

²²See Arts. 225 and 241 TFEU.

²³Framework Agreement on Relations between the European Parliament and the European Commission [2010] OJ L 304/47, point 16.

²⁴Art. 258 TFEU.

²⁵Melanie Smith, 'Enforcement, Monitoring, Verification, Outsourcing: The Decline and Decline of the Infringement Process' (2008) 33 *European Law Review*, 777, at 779 *et seq.* It has been argued, however, that after 2002 the Commission has improved the transparency of the infringement procedure; see Luca Prete and Ben Smulders, 'The Coming of Age of Infringement Proceedings' (2010) 47 *Common Market Law Review*, 9.

²⁶Smith, above, n. 25, at 784.

²⁷See, e.g., Case 7/71, *Commission v. France*, ECLI:EU:C:1971:121; Case C-87/89, *Sonito v. Commission*, ECLI:EU:C:1990:213, paras. 6–7; Case C-431/92, *Commission v. Germany*, ECLI:EU:C:1995:260, para. 22; Case C-471/98, *Commission v. Belgium*, ECLI:EU:C:2002:628, para. 39; Case C-476/98, *Commission v. Germany*, ECLI:EU:C:2002:631, para. 38; Joined Cases C-20/01 and C-28/01, *Commission v. Germany*, ECLI:EU:C:2003:220, para. 30; C-76/08, *Commission v. Malta*, ECLI:EU:C:2009:535, para. 23. As Prete and Smulders (above, n. 25, at 16) observe, with reference to Case C-523/04, *Commission v. Netherlands*, ECLI:EU:C:2007:244, the excessive duration of infringement proceedings may be problematic only if the Member State can prove that its rights of defence have been compromised.

²⁸Maria Mendrinou, 'Non-Compliance and the European Commission's Role in Integration' (1996) 3 *Journal of European Public Policy*, 1, at 9.

²⁹A.C. Evans, 'The Enforcement Procedure of Article 169 EEC: Commission Discretion' (1979) 4 *European Law Review*, 442, at 456.

among others.³⁰ Such thoughts (effectively underpinning considerations of effectiveness and efficiency) prompted Monnet's design of the High Authority of the Coal and Steel Community, which later on became the European Commission. Thus, technocratic expertise and step-by-step integration (which included the Commission's right of initiative) would achieve the goals of 'European unity' and 'economic prosperity' and, through this, legitimacy.³¹ Especially post-Maastricht, however, the Commission's prerogatives are increasingly being criticised on the basis of its limited legitimacy and the need to secure diversity, the division of competences, the Commission's insufficient accountability or responsiveness to citizens, and, ultimately, the shift of the aims of European integration from the establishment of an internal market to the creation of an 'ever closer Union'.³² It is therefore arguable that the Lisbon Treaty echoes such concerns when referring to the EU's dual channel of legitimacy³³ and to participatory democracy.³⁴ Further, the new procedure for the election of the Commission President under Article 17(7) TEU contributes, somewhat, to the legitimacy³⁵ of that institution.

3.2 | Pragmatic losses within the EU institutional balance

As already mentioned, a particular feature of European integration (and of the Community method³⁶) is the Commission's prerogative to initiate the legislative process. To understand the Commission's prerogative in absolute terms, however, is largely an illusion: the Commission is under pressure (and increasingly so) by the European Council and the Council to submit proposals, to the point where the former is not left with much room for manoeuvre.³⁷ Studies have shown that the legislative process can become 'Council-centric'.³⁸ Thus, the Commission's legislative prerogative has been transformed from a right of initiative into the privilege of being a 'veto-player', a 'gate keeper' or even an 'honest broker'.³⁹ Even the gate-keeping thesis is compromised by the fact that the Commission will rarely reject a proposal from the intergovernmental institutions.⁴⁰

These developments have been captured by 'new intergovernmentalist' accounts. During the crisis, in particular, this new form of intergovernmentalism has taken a 'deliberative dimension' as 'collective policy responses' are not assigned to supranational institutions, but are decided on the basis of elite-driven deliberations.⁴¹ In this context,

³⁰See, e.g., Giandomenico Majone, 'The Regulatory State and Its Legitimacy Problems' (1999) 22 *West European Politics*, 1.

³¹See Myrto Tsakatika, 'Claims to Legitimacy: The European Commission between Continuity and Change' (2005) 43 *Journal of Common Market Studies*, 193, at 196–199.

³²*Ibid.*, at 200–203.

³³Art. 10(2) TEU. This 'dual channel' consists of the national elections and the formation of the Council/ European Council, and the European elections and the direct representation at the European Parliament.

³⁴Arts. 10(3) and 11 TEU.

³⁵See, e.g., Desmond Dinan, 'Governance and Institutions: A More Political Commission' (2016) 54 *Journal of Common Market Studies (Annual Review)*, 101, at 103, 113–114.

³⁶On which see, generally, Renaud Dehousse (ed.), *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan, 2011).

³⁷See Paolo Ponzano, Costanza Hermanin and Daniela Corona, *The Power of Initiative of the European Commission: A Progressive Erosion?* (Notre Europe, 2012); Jean-Paul Jacqu , 'Lost in Transition: The European Commission between Intergovernmentalism and Integration', in D. Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press, 2016), 15, at 33 *et seq*; Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-crisis' (2013) 76 *Modern Law Review*, 817. Others propose a joint agenda-setting practice; nonetheless, in response to crises the European Council is more likely to act as principal and the Commission as agent: see Pierre Bocquillon and Mathias Dobbels, 'An Elephant on the 13th Floor of the Berlaymont? European Council and Commission Relations in Legislative Agenda Setting' (2014) 21 *Journal of European Public Policy*, 20.

³⁸Robert Thomson and Madeleine Hosli, 'Who Has Power in the EU? The Commission, Council and Parliament in Legislative Decision-Making' (2006) 44 *Journal of Common Market Studies*, 391.

³⁹See, generally, Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (Cambridge University Press, 2014), at 72–73; John Peterson and Michael Shackleton, *The Institutions of the European Union* (Oxford University Press, 2012), at 120.

⁴⁰Ponzano et al., above, n. 37; see also Stefanie Bailer, 'An Agent Dependent on the EU Member States? The Determinants of the European Commission's Legislative Success in the European Union' (2014) 36 *Journal of European Integration*, 37.

⁴¹Uwe Puetter, 'Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance' (2012) 19 *Journal of European Public Policy*, 161.

the 'centre of new intergovernmentalism', the European Council, 'regularly deal[s] with detailed policy decisions and no longer focus[es] predominantly on providing political guidance'; simultaneously, the Commission 'as a traditional supranational actor is not hard-wired for the pursuit of ever closer Union according to the model of the classic Community method'.⁴²

3.3 | Representing the 'Union interest'?

The foundation of the Commission's monopoly to initiate legislation and its independence⁴³ is the tenet that it acts on behalf of the Union interest as a supranational institution. The Commission believes that it is legitimised to represent the Union interest⁴⁴ for two main reasons: it is impartial and neutral vis-à-vis the positions of Member States (the role of mediator); and it possesses expert knowledge that stems from input received by various stakeholders.⁴⁵ It is questionable, nonetheless, whether the Commission (the College itself or the administration working for the Commission) is *always* acting on behalf of the Union interest, thereby keeping intact its institutional independence primarily from Member States.⁴⁶ The pursuit of careers at the domestic level before or after service at the Commission, the control via comitology,⁴⁷ or instances where Commission decisions appear to '[privilege] home country rules',⁴⁸ point to the fragility of the thesis that the Commission by definition always represents the Union interest. To return to decision-making, it is equally questionable whether the widely endorsed practice of 'trilogues'⁴⁹ (informal meetings between representatives from the Commission, the European Parliament and the Council aiming at reaching an agreement on forthcoming legislation) fits comfortably into the Commission's required neutrality as representative of the Union interest. True, such developments might increase the efficiency of the 'conciliation' process introduced by the Maastricht Treaty,⁵⁰ but the extent of the use of trilogues raises concerns not only on transparency grounds,⁵¹ but also on grounds of identifying the nature of representation at the EU decision-making level.

3.4 | The constitutionalisation of the Union

The progressive constitutionalisation of the EU requires little elaboration. Owing to well-known case-law and various treaty revisions, it is now common to talk about an *autonomous* legal order (no doubt a concept the CJEU is often too

⁴²Uwe Puetter, 'The European Council: The Centre of New Intergovernmentalism', in Christopher Bickerton, Dermot Hodson and Uwe Puetter (eds.), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015), 165, at 182.

⁴³See now Art. 245 TFEU.

⁴⁴While being a heterogeneous and increasingly politicised bureaucracy, as many have observed; see, e.g., Thomas Christiansen, 'Tensions of European Governance: Politicised Bureaucracy and Multiple Accountability in the European Commission' (1997) 4 *Journal of European Public Policy*, 73.

⁴⁵Tsakatika, above, n. 31, at 199–200.

⁴⁶See, e.g., Liesbet Hooge, 'Images of Europe: How Commission Officials Conceive their Institution's Role' (2012) 50 *Journal of Common Market Studies*, 87; Hussein Kassim and Anand Menon, 'EU Member States and the Prodi Commission', in Dionyssis Dimitrakopoulos (ed.), *The Changing European Commission* (Manchester University Press, 2004), at 89.

⁴⁷Christiansen, above, n. 44, at 83–85.

⁴⁸Vivien Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 *Political Studies*, 2, at 11, with reference to the Commission's services initiative.

⁴⁹For a more general discussion, see, among others, Christilla Roederer-Rynning and Justin Greenwood, 'The Culture of Trilogues' (2015) 22 *Journal of European Public Policy*, 1148; Christine Reh, 'Is Informal Politics Undemocratic? Trilogues, Early Agreements and the Selection Model of Representation' (2014) 21 *Journal of European Public Policy*, 822.

⁵⁰Roederer-Rynning and Greenwood, above, n. 49, at 1149.

⁵¹On this point, see the European Ombudsman's own-initiative inquiry on the transparency of 'trilogue' meetings: Case OI/8/2015/JAS.

keen to rehearse⁵²) with its own, particular, constitutional architecture. Adherence to the EU rule of law,⁵³ principles such as proportionality, subsidiarity, and effective judicial protection, the classification of competences, a legally binding Charter of Fundamental Rights, are familiar developments. The increase in Union competence does not signify an augmentation in the powers of the supranational Commission: the latter increasingly needs to rely on national authorities since most of the competences are either shared or complementary, it lacks financial and administrative resources for effective supervision, and also takes into account the regulatory and administrative idiosyncrasies of the Member States.⁵⁴ Overall, the conception of the Commission as the 'guardian of the Treaties' is compatible with (if not closely associated with) the constitutionalisation of the EU legal order.

This section assessed the position of the Commission in the broader institutional, political, and constitutional EU framework. Quite evidently, the text of the Treaties does not always accord with institutional practice. This point is returned to below; it is now appropriate to explore the precise role of the Commission in the ECI process.

4 | THE ROLE OF THE COMMISSION UNDER THE ECI REGULATION: PRELIMINARY REMARKS

Before the commencement of the collection of signatures stemming from at least one quarter of Member States,⁵⁵ the organisers should submit their proposal (i.e., the subject matter and the objectives of the proposed ECI) to the Commission for approval; this is the *registration* or *admissibility* stage.⁵⁶ The Commission will refuse registration only under one of the following four conditions: the contact persons and the citizens' committee have not been formed; the proposal 'manifestly fall[s] outside the framework of the Commission's powers to submit a proposal for a legal act of the Union'; the ECI is 'manifestly abusive, frivolous or vexatious'; and the proposal is against Article 2 TEU and the EU's values.⁵⁷ Importantly, if the Commission refuses to register the initiative, beyond providing its reasons, it has the additional obligation to inform organisers of the available remedies, notably the possibility to initiate court proceedings against the Commission or to submit a complaint to the European Ombudsman.⁵⁸

Article 10 of the Regulation effectively stipulates that after the successful collection of signatures and the verification by Member State authorities, the Commission is not bound to accept the content of a proposed ECI, but should publish in a communication 'its legal and political conclusions' and 'the action it intends to take, *if any*, and its reasons for taking or not taking that action.' Within the realm of the Commission's duties during this second stage falls an obligation to meet with the organisers so that they explain the aims of the ECI,⁵⁹ and work with the European Parliament so that a public hearing be organised at the premises of the latter, with the participation of the Commission, the organisers and other EU institutions and bodies of the Union wishing to be involved.⁶⁰ The Commission has committed

⁵²See, e.g., the widely criticised CJEU's Opinion 2/13, ECLI:EU:C:2014:2454, on the compatibility of the Draft Agreement on the EU accession to the ECHR with Union law.

⁵³For an account inviting the Commission to be more active in the enforcement of the rule of law, see Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review*, 512.

⁵⁴Giandomenico Majone, 'The European Commission: The Limits of Centralisation and the Perils of Parliamentarisation' (2002) 15 *Governance*, 375, at 380–383.

⁵⁵Art. 2(1) of Regulation. According to Art. 3, the signatories and the organisers of the ECI should be Union citizens.

⁵⁶Art. 4 of Regulation. For further discussion, see Anastasia Karatzia, 'The European Citizens' Initiative in Practice: Legal Admissibility Concerns' (2015) 40 *European Law Review*, 509; James Organ, 'Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens' Initiative Proposals' (2014) 10 *European Constitutional Law Review*, 422.

⁵⁷See Arts. 4(2)(a)–(d) of Regulation.

⁵⁸See Art. 4(3) of Regulation.

⁵⁹Art. 10(1)(b) of Regulation.

⁶⁰Art. 11 of Regulation.

itself 'to a close and early cooperation with Parliament on any legislative initiative requests emanating from citizens' initiatives'.⁶¹

The margin of discretion that the Commission enjoys during the two aforementioned stages varies considerably. The common element (and perhaps the only one) is the explicit obligation to provide reasons. However, at the registration stage the Commission is essentially bound to register the ECI unless there is a procedural error, lack of Union competence or deviation from the Union's values. There is no doubt that an assessment of this sort may entail some degree of discretion: for example, the values of the Union are broadly construed, providing the Union courts, as well as the EU legislature, with broader directions as to the interpretation of legislation or the general objectives that need to be pursued by Union action.⁶² More generally, as Dougan observed, the danger at the admissibility/registration stage is this: '[I]f certain essentially political questions about the desirability of a given proposal are cast instead as legal issues concerning its admissibility for registration, the Commission's influence over the agenda-setting potential of the new [E]CI system is potentially both enlarged and shielded from public view'.⁶³

In any case, the reference in the Regulation to the Commission's obligation to inform organisers of judicial and extra-judicial remedies evidences that the decision on registration is subject to review, including when the Commission assesses the competence question or the compatibility with the Union's values. This point is returned to in the next section. The same cannot be claimed with regard to the Commission's final decision; here, the Regulation is silent on possible remedies, while the Commission, when providing reasons, has to specify 'its legal and political conclusions' and the 'actions it intends to take, *if any*'. This very wide discretion is certainly remindful of (or possibly originates in) the leeway it enjoys with regard to forwarding (or not) legislative proposals to the European Parliament and the Council (when the ordinary legislative procedure applies), and thus it has been observed that the Commission's decision at the final stage of the ECI is 'unlikely ... [to] be amenable to judicial review'.⁶⁴ The Commission's conclusions should be publicly released.⁶⁵ The decision to grant such leeway to the Commission was effectively agreed during the days of the Constitutional Convention, when the ECI was included in the text as a last-minute amendment,⁶⁶ the rationale being that the Convention members did not want to introduce a 'popular legislative initiative' (that is, a procedure obliging the Commission to forward the proposal to the EU legislature) without extending this right to the European Parliament.⁶⁷ It is not difficult to imagine that, had this proposal been placed on the agenda, the Commission would not be particularly enthusiastic about 'sacrificing' its legislative prerogative, even under the infrequent circumstance of an ECI that would successfully pass through all the necessary procedural requirements.

5 | A CLOSER LOOK INTO THE ECI PROCESS (I): THE REGISTRATION AND THE PERIOD UNTIL THE COMMISSION'S FINAL DECISION

Clearly, the decision to register or not the proposed initiative further to an examination of the conditions of Article 4(2) of the Regulation is a matter subject to judicial review. To date, the Commission has refused to register 19 proposals,⁶⁸ while, as will be explained below, in two additional cases the General Court annulled the Commission's

⁶¹Framework Agreement, above, n. 23, point 16.

⁶²For von Bogdandy, since Art. 2 TEU produces legal consequences, the 'tenets' contained therein should be understood as 'legal norms and principles, as founding principles', instead of 'fundamental ethical convictions' (values). See Armin von Bogdandy, 'Founding Principles', in Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law* (Hart and Verlag CH Beck, 2011), 11, at 22.

⁶³Dougan, above, n. 5, at 1839.

⁶⁴*Ibid.*, at 1843.

⁶⁵Art. 10(2) of Regulation.

⁶⁶See Art. I-47(4) of the Constitutional Treaty.

⁶⁷Sousa Ferro, above, n. 3, at 375.

⁶⁸See these proposals at: ec.europa.eu/citizens-initiative/public/initiatives/non-registered.

rejection, and therefore these two proposals have now been registered on the Commission's website.⁶⁹ In all of these cases the Commission did provide reasons (yet unsuccessfully on two occasions, as already noted), while informing the organisers (under Article 4(3) of the Regulation) of the possibility to contact the Court or the European Ombudsman. Importantly, in all of these cases the rationale behind the rejection was that the proposed initiative fell 'manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties'.⁷⁰ The refusal of registration on the basis of lack of Union competence (instead of the remaining conditions of Article 4(2) of the Regulation) entails that the Court will be called upon to cast light on the Commission's legal obligations during the registration stage, but perhaps also on the perennial question of the division of competences between the EU and the Member States.⁷¹

The Commission's decision not to register the 'Stop TTIP' initiative has been widely debated, not least because it appears that the rejection has, in fact, 'energised' the campaign, which used that rejection 'as a basis to attract substantial petition signatures'.⁷² The campaign managed to collect over three million signatures and the organisers submitted them to the European Parliament 'demanding a parliamentary hearing on the issue'.⁷³ Eventually, the General Court annulled the Commission's decision, effectively adopting a broad approach to the term 'legal act' as it features in Article 11(4) TEU and making an explicit link with the principle of democracy, as follows:

[T]he principle of democracy, ... one of the fundamental values of the European Union, as is the objective specifically pursued by the ECI mechanism, which consists in improving the democratic functioning of the European Union by granting every citizen a general right to participate in democratic life ... requires an interpretation of the concept of legal act which covers legal acts such as a decision to open negotiations with a view to concluding an international agreement, which manifestly seeks to modify the legal order of the European Union.

*The Commission's position, according to which it and the Council have sufficient indirect democratic legitimacy in order to adopt the other legal acts which do not produce legal effects vis-à-vis third parties, has the consequence of limiting considerably recourse to the ECI mechanism as an instrument of European Union citizen participation in the European Union's normative activity as carried out by means of the conclusion of international agreements.*⁷⁴

In the 'Minority SafePack' judgment, the General Court annulled the Commission's decision to refuse the registration of the ECI on the basis of insufficient reasoning.⁷⁵ Indeed, the Court expects the Commission to identify which of the proposed legal acts manifestly fall outside its powers, and to sufficiently substantiate such an assessment.⁷⁶ By

⁶⁹These proposals were the 'Minority SafePack' and 'Stop TTIP'. The Commission adopted fresh decisions in order to comply with the judgments of the General Court; thus, these proposals were registered and are currently open for support.

⁷⁰See Art. 4(2)(b) of Regulation.

⁷¹This is not the place to discuss Union competence but see, among others, Loïc Azoulay (ed.), *The Question of Competence in the European Union* (Oxford University Press, 2014); Theodore Konstantinidis, *Division of Powers in European Union Law: The Delimitation of Internal Competence Between the EU and the Member States* (Kluwer, 2009); Stephen Weatherill, 'The Limits of Legislative Harmonisation Ten Years After Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 *German Law Journal*, 827, and relevant case-law discussed in these contributions.

⁷²Justin Greenwood and Katja Tuokko, 'The European Citizens' Initiative: The Territorial Extension of a European Political Public Sphere?' (2017) 18 *European Politics and Society*, 166, at 175.

⁷³Maximilian Conrad and Annette Knaut, 'Bridging the Gap? Concluding Remarks on Various Contributions of the ECI', in Maximilian Conrad, Annette Knaut and Katrin Böttger (eds.), *Bridging the Gap? Opportunities and Constraints of the European Citizens' Initiative* (Nomos, 2016), 219, at 221.

⁷⁴Case T-754/14, *Efler and Others v. Commission*, EU:T:2017:323, paras. 37–38. See, further, Anastasia Karatzia, 'New Developments in the Context of the European Citizens' Initiative: General Court Rules on "Stop TTIP"', available at: eulawanalysis.blogspot.co.uk/2017/05/new-developments-in-context-of-european.html.

⁷⁵Case T-646/13, *Bürgerausschuss für die Bürgerinitiative Minority SafePack v. Commission*, ECLI:EU:T:2017:59.

⁷⁶*Ibid.*, para. 27.

contrast, in the earlier case of *Anagnostakis*, the General Court had decided that the Commission's decision to reject the registration of the ECI 'One Million Signatures for a "Europe of Solidarity"' was justified.⁷⁷ The Court explained—with reference to its general case-law on Article 296 TFEU⁷⁸—that the statement of reasons must be appropriate to the nature of the measure in question. In that case, the Commission:

*clearly indicated that neither the provisions relating to economic and monetary policy to which the applicant had referred ... nor any other legal basis conferred competence on the institution to submit to the Council ... a proposal for an act which would enable the objective of the proposed ECI to be attained. ... The Commission [could not], therefore, be criticised for failing to analyse in detail ... the various [TFEU] provisions ... that were referred to in general fashion in the proposed ECI or for merely observing that those provisions were not relevant.*⁷⁹

In *Izsák and Dabis*, the General Court found that the Commission rightly took into account additional submitted information beyond the requirements of Annex II and Article 4(1) of the ECI Regulation before deciding on registration.⁸⁰ Importantly, the General Court confirmed that Article 4(2)(b) of the Regulation should be situated in the context of the principles of conferral under Article 5(2) TEU and institutional balance under Article 13(2) TEU.⁸¹ In *Constantini*, and following established case-law, the General Court held that Article 352 TFEU may be used in the context of an ECI, but this does not mean that it can serve as a basis for widening the scope of EU powers or amending the Treaties.⁸² Thus, 'the objective of democratic participation of Union citizens underlying the ECI mechanism cannot frustrate the principle of conferred powers'.⁸³ It therefore appears that the organisers of certain inadmissible ECIs relied on a broad understanding of the EU's aims or a plethora of legal bases.

Questions of this sort also fall within the remit of the European Ombudsman.⁸⁴ In essence, the Regulation gives organisers a choice between the judicial and the extra-judicial remedy. The Ombudsman's contribution will most likely be seen, however, during the period between the registration and until the Commission's final decision. Beyond the Commission's compliance with Article 4(2) of the Regulation, the Ombudsman may therefore examine complaints on possible delays on the part of the Commission, lack of communication with organisers, transparency matters, among others. One cannot, of course, predetermine all the areas of possible maladministration that may arise during this rather complex and lengthy process. In one case the Ombudsman opined that the Commission's decision not to extend the deadline for the collection of signatures did not constitute maladministration; one should note, however, that the deadline had already been extended by four additional months and that, in the end, and despite its initial refusal, the Commission decided to consider the initiative in question ('Stop Vivisection', discussed in the next section) once the threshold had been reached.⁸⁵ The case was rather exceptional as it occurred during the early stages of the implementation of the Regulation and the (unavoidable) problems in launching the first ECIs. In forthcoming cases, the

⁷⁷Case T-450/12, *Anagnostakis v. Commission*, ECLI:EU:T:2015:739.

⁷⁸That article states that '[l]egal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties'.

⁷⁹*Anagnostakis*, above, n. 77, paras. 28–31.

⁸⁰Case T-529/13, *Izsák and Dabis*, ECLI:EU:T:2016:282.

⁸¹*Ibid.*, para. 59.

⁸²Case T-44/14, *Contantini v. Commission*, ECLI:EU:T:2016:223, paras. 50–56.

⁸³*Ibid.*, para. 53.

⁸⁴By virtue of Art. 228 TFEU, the Ombudsman examines complaints on alleged maladministration or conducts own-initiative inquiries related to the activities of the EU institutions, bodies, offices and agencies. Importantly, the Ombudsman does not have the power to examine complaints on maladministration against national authorities, even when they are implementing Union law: for example, the Ombudsman would declare inadmissible complaints concerning the activities of the national authorities responsible for the verification of signatures of an ECI campaign under Articles 8, 12, 15 of Regulation 211/2011. The Ombudsman's decisions are non-binding.

⁸⁵European Ombudsman Case 2071/2013/EIS.

argument advanced by the Commission—that granting additional time on an *ad hoc* basis would be against the principle of equal treatment between the different initiatives—is reasonable.⁸⁶

Further issues unravelled via an own-initiative inquiry on the ECI can concern transparency in funding matters; the improvement of the online collection system, including the needs of persons with disabilities; and the translation of the proposal in the official languages of the Union, among others.⁸⁷ The Ombudsman's general assessment of the Commission's role in the ECI was not overly critical, especially with regard to the steps taken by the Commission to aid organisers during the different stages of the procedure (e.g., the Commission provided its own servers for the collection of signatures). In the same inquiry, regarding the admissibility stage proper, the Ombudsman did encourage the Commission to 'provide reasoning for rejecting ECIs that is more robust, consistent and comprehensible to the citizen'.⁸⁸ Simultaneously, she noted that the publication of the Commission's reasons on the ECI website is a 'commendable first step' serving transparency and enabling public scrutiny.⁸⁹

So far, and perhaps quite surprisingly, the debate on the ECI has mainly centred on the Commission's stance during the admissibility stage.⁹⁰ The point that the Commission's admissibility check, followed by a possible rejection, could eventually render difficult the generation of certain debates on salient issues⁹¹ is, from a participatory-democracy perspective, understandable. However, several additional observations can be made in this regard. To begin with, other participatory instruments have their own limitations, too. For example, the right to petition the Parliament under Article 227 TFEU concerns a 'matter which comes within the Union's fields of activity'. In addition, the legal check at the admissibility stage is not unknown to popular initiatives⁹² in Member States; by contrast, it 'is a widespread pre-requisite that is commonly commended to administrative or parliamentary bodies', which do not '[judge the] political opportunity [but] operate on the basis of strict regulatory criteria'.⁹³ Third, the Commission's check does not or should not include matters such as the 'unity of subject matter' as, for example, in Switzerland.⁹⁴ Fourth, the Commission's initial idea of a minimum of 300,000 signatures before the consideration of the admissibility question was eventually dropped.⁹⁵ Fifth, and more importantly perhaps, the Commission is not immune from scrutiny during that stage: as shown above, the General Court had no hesitation to annul the Commission's decisions with regard to the 'Minority SafePack' and 'Stop TTIP' ECIs.

To recall, the purpose of this article is to assess the role of the Commission in the ECI process, also taking into account the evolution of European integration, including the Commission's role therein. In this context, although the Commission's assessment during the admissibility stage on its competence or lack thereof involves some discretionary appraisal on its part, the author does not believe that the Commission's *ex ante* control is unnecessary. Indeed, no convincing reasons exist to give the green light to proposals undermining the EU's values or requesting the Commission to overstep the existing division of competences. Doing so (e.g., allowing ECIs that would undermine fundamental human rights, the rule of law or democracy) would obviously go against the constitutionalisation of the Union and, in addition, the responsibility of the Commission to act as a guardian of the Treaties. It is emphasised that the judicial and extra-judicial control that may follow ensures or should ensure that the Commission's powers are

⁸⁶A point the Ombudsman shared; see *ibid.*, point 22.

⁸⁷See European Ombudsman Case OI/9/2013/TN.

⁸⁸Case OI/9/2013/TN, point 2 of the 'Conclusion'.

⁸⁹*Ibid.*, point 16.

⁹⁰Compare, e.g., European Parliamentary Research Service, above, n. 2.

⁹¹*Ibid.*, at 13–15.

⁹²Although the ECI cannot be classified as a popular initiative, as the proposal will not necessarily be forwarded to the legislature; see Sousa Ferro, above, n. 3.

⁹³See Víctor Cuesta-López, 'A Comparative Approach to the Regulation on the European Citizens' Initiative' (2012) 13 *Perspectives on European Politics and Society*, 257, at 263.

⁹⁴*Ibid.*, at 263–264.

⁹⁵Luis Bouza García, 'How Could the New Article 11 TEU Contribute to Reduce the EU's Democratic Malaise?', in Michael Dougan and Niamh Nic Shuibhne (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart, 2012), 253, at 268.

exercised appropriately. To be sure, this contribution does not, of course, claim that the Commission will always 'get it right' (and it is clear by now that on two occasions the Commission's decision was found to be problematic by the General Court) but that the solution in such cases is not to waive the Commission's control altogether, but rather to rely (primarily) on the Court to remedy (or not) any possible objections.

6 | A CLOSER LOOK INTO THE ECI PROCESS (II): THE COMMISSION'S FINAL DECISION

The Commission's decision on the follow-up to a successful ECI is discretionary, and that discretion is, indeed, very wide. To date, in three instances⁹⁶ the Commission provided its legal and political conclusions under Article 10 of the Regulation. Perhaps the common element in the Commission's response was its reluctance to adhere to the specific requests of the organisers and, consequently, to forward their proposals to the legislature. The first ECI to meet the requirements of the Regulation was 'Right2Water'. The organisers asked the Commission to implement policies and adopt legislation with a view to ensuring public access to safe drinking water and sanitation.⁹⁷ The Commission's initial response was arguably rather vague, primarily focusing on the existing legal framework which might be of relevance to the initiative, but being silent (at the time) on any plans to propose legislation along the aims of the initiative.⁹⁸ The Commission also refused to pursue further the second ECI, 'One of Us', calling for the EU to 'ban and end the financing of activities which presuppose the destruction of human embryos', providing this time a more detailed and thorough response.⁹⁹ The third rejection concerned the ECI 'Stop Vivisection'; the organisers urged the Commission to abolish the practice of animal experimentation by 2020.¹⁰⁰ Despite sharing the organisers' general objectives, the Commission articulated at length its objections, and promised to undertake actions 'to accelerate the development and uptake of non-animal approaches in research and testing'.¹⁰¹ The quality of the Commission's reasoning is progressively increasing.

Nonetheless, commentators have observed that the actual level of the Commission's engagement with the aforementioned three proposals has varied. Thus, for the 'least controversial' 'Right2Water' campaign, the Commission 'proposed some follow-up actions', including an impact assessment, also taking into account the support by the European Parliament.¹⁰² Importantly, the Commission removed water services from the Concessions Directive before the completion of the collection of signatures,¹⁰³ and stated in its 2017 work programme that it 'will ... come forward with a legislative proposal on minimum quality requirements for reused water and a revision of the Directive on drinking water following up on [also] ... the' ECI.¹⁰⁴ A fruitful debate was generated at the European Parliament, albeit one with a dual (and possibly unclear) aim: to 'hold an expert hearing on the ECI's topic' and to 'scrutinise the Commission's policy in this field'.¹⁰⁵

⁹⁶Beyond the Commission's decision not to register the initiative, other possible unsuccessful outcomes for the organisers include the inability to collect the minimum number of the required signatures or the withdrawal of the proposal by the organisers for various reasons.

⁹⁷See <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-177-EN-F1-1.Pdf>.

⁹⁸Something the organisers duly noted in a press release: www.right2water.eu/news/press-release-commission-lacks-ambition-replying-first-european-citizens%E2%80%99-initiative.

⁹⁹See <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-177-EN-F1-1.Pdf>.

¹⁰⁰See <http://ec.europa.eu/transparency/regdoc/rep/3/2015/EN/3-2015-3773-EN-F1-1.PDF>.

¹⁰¹*Ibid.*, 8–9.

¹⁰²Anastasia Karatzia, 'The European Citizens' Initiative and the EU Institutional Balance: On Realism and the Possibilities of Affecting EU Lawmaking' (2017) 54 *Common Market Law Review*, 177, at 187–190.

¹⁰³Conrad and Knaut, above, n. 73, at 11.

¹⁰⁴Commission Work Programme 2017: Delivering a Europe that Protects, Empowers and Defends (2016) COM(2016) 710 final, at 5.

¹⁰⁵Katrin Böttger and Julian Plottka, 'The ECI—An Overview of Opportunities and Constraints', in Conrad et al., above, n. 73, 16, at 26.

The general stance of the Commission vis-à-vis the 'One of Us' campaign has been characterised as a 'very polite justification of why the Commission does not consider any action',¹⁰⁶ namely a polite refusal to engage further with the aims of the organisers. As Karatzia argues, the driving force behind the Commission's position was that 'the two EU co-legislators had only recently voted for the current legislation', an argument that the Commission stressed in its response.¹⁰⁷ Still, the initiative 'stimulat[ed] counter mobilisation', centring on the possible impact of the proposal on medical research.¹⁰⁸ Insofar as the 'Stop Vivisection' campaign is concerned, the Commission underlined 'the efficiency of the current legislative framework for the protection of those animals' but promised some actions, notably a 'debate between the scientific community and relevant stakeholders, including the ECI organizers, on developing alternative methods of experimentation'.¹⁰⁹

In this context, the author cannot but subscribe to the view that, overall, and at least on the basis of the existing sample of successful ECIs available to date, 'the ECI is not a very successful tool in terms of initiating legislation'.¹¹⁰ This point is returned to below; it is now appropriate to examine the possibilities of control over the Commission's discretionary decision on the follow-up to a successful ECI.

6.1 | The judicial avenue

The ambit of the Commission's discretion in the final stage of the ECI probably means that such decisions would fall outside the scope of judicial review.¹¹¹ Beyond the Court's case-law on the Commission's legislative initiative (discussed above), one might also add to the picture the Court's general reluctance to recognise participation rights¹¹² or the uncertainty surrounding the legal nature of the 'Provisions on Democratic Principles',¹¹³ among which features the ECI in Article 11(4) TEU. The Court was provided with an opportunity to engage with the democratic principles in the aforementioned case concerning the faculty of the Commission to withdraw its proposal.¹¹⁴ The Council alleged that the Commission had failed to respect the principle of representativeness as enshrined in Articles 10(1) and 10(2) TEU. The Court did not elaborate on this matter, pointing out that since the Commission's power 'to withdraw a proposal is inseparable from the right of initiative with which that institution is vested and its exercise is circumscribed by the provisions of the abovementioned articles of the TEU Treaty, there can be no question, in this instance, of an infringement of [the principle of democracy]'.¹¹⁵

The General Court is presently examining the Commission's Communication (effectively the rejection) regarding the ECI 'One of Us'.¹¹⁶ The first—yet very crucial—question that the Court will have to answer is whether that communication produces legal effects vis-à-vis third parties. In its submissions, the Commission clearly believes that

¹⁰⁶*Ibid.*

¹⁰⁷Karatzia, above, n. 102, at 192.

¹⁰⁸Luis Bouza Garcia and Justin Greenwood, 'What is a Successful ECI?', in Conrad et al., above, n. 73, 149, at 165.

¹⁰⁹Karatzia, above, n. 102, at 196.

¹¹⁰Bouza Garcia and Greenwood, above, n. 108, at 159.

¹¹¹Dougan, above, n. 5, at 1843.

¹¹²See, e.g., Case C-104/97 P, *Atlanta v. European Community*, ECLI:EU:C:1999:498; Case T-135/96, *UEAPME v. Council of the European Union*, ECLI:EU:T:1998:128. Compare also Joana Mendes, 'Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU' (2011) 48 *Common Market Law Review*, 1849.

¹¹³It is generally understood that these provisions do not contain subjective rights enforceable in the Court; see, further, Victor Cuesta Lopez, 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy' (2010) 16 *European Public Law*, 123.

¹¹⁴*Council v. Commission*, above, n. 19.

¹¹⁵*Ibid.*, para. 96. It is to be noted, though, that the CJEU's decision in Case C-650/13, *Delvigne*, ECLI:EU:C:2015:648 on the restrictions to the right to vote for the European Parliament elections has prompted commentary that the Court is making 'explicit the link between EU citizenship and the democratic governance of the EU'; see Koen Lenaerts, 'Editorial Note: Linking EU Citizenship to Democracy' (2015) 11 *Croatian Yearbook of European Law and Policy*, VII, at XIII.

¹¹⁶Case T-561/14, *One of US and Others v. Commission* (pending).

the communication is not an act intended to produce such effects within the meaning of Article 263 TFEU, but 'an act of the Commission which reflects only the latter's intention to follow a particular line of conduct'.¹¹⁷ It will be interesting to see whether the application will pass the admissibility stage, thereby leading the Court to deal with the applicants' *substantive* claims (and the Commission's extensive engagement with these claims¹¹⁸).

6.2 | The extra-judicial avenue: Control by the European Ombudsman

The European Ombudsman *could* prove a more meaningful avenue to control the Commission's final decision on the future of the ECI, but under a number of conditions discussed below. As a preliminary remark, it is noted that the Ombudsman has consistently adopted the position that the notion of maladministration is wider than illegality: what might escape judicial review may still fall under the Ombudsman's scrutiny.¹¹⁹ As is known, the Ombudsman's decisions are not legally binding.

The interesting question for present purposes is whether the Ombudsman could apply his or her approach when overseeing the Commission's role as the guardian of the Treaties (another area where the Commission enjoys, under the case-law of the Court, very broad discretion) to the Commission's follow-up decision within the ECI process. The stark difference is, of course, that insofar as infringement proceedings are concerned, there is an *administrative stage* before litigation, and it was during that administrative stage that the Ombudsman's impact was felt, as will be shown in a moment. By contrast, the Commission's decision on the follow-up to an ECI obviously may touch upon the legislative process, thereby bringing the matter closer to the sphere of political decisions that the Ombudsman will generally refrain from examining.

In infringement proceedings, the Commission has been criticised for subscribing to 'elite regulatory bargaining', and for being reluctant to expose procedures, negotiations and findings to the public and, more specifically, to complainants¹²⁰ (that is, to natural and legal persons approaching the Commission on alleged violations of EU law by Member States). It was with a view to redressing the disadvantageous position of the individual during the administrative stage of the infraction process that the Ombudsman decided to accept complaints against the Commission on the application of what is now Article 258 TFEU.¹²¹

*The Ombudsman can deal with both procedural and substantive aspects of the Commission's treatment of such cases. With regard to the substantive aspects, the Ombudsman's review aims at verifying whether the conclusions reached by the Commission are reasonable and whether they are well argued and thoroughly explained to complainants. With regard to procedural aspects, the main point of reference in the Ombudsman's inquiries is the Commission's Communication [...].*¹²²

¹¹⁷Commission's defence in Case T-561/14, paras. 17–20. Available at: www.citizens-initiative.eu/wp-content/uploads/2015/03/R%C3%A9plique-Commission-1.pdf.

¹¹⁸See *ibid.*, paras. 27–60.

¹¹⁹See, e.g., European Ombudsman, Annual Report 2008, at 29.

¹²⁰Richard Rawlings, 'Engaged Elites: Citizen Action And Institutional Attitudes in Commission Enforcement' (2000) 6 *European Law Journal*, 4.

¹²¹Smith, above, n. 25, at 788–789. See also European Ombudsman, Annual Report 2008, 29, where the Ombudsman explained that the Commission's discretion is confined by—among others—consistency and good faith; proportionality and legitimate expectations; fundamental rights; and non-discrimination. Unsurprisingly, the Ombudsman's decision to interfere with an area where the Commission was cleared by the Court to make discretionary decisions was not met (initially, at least) with enthusiasm in Brussels; see, further, Nikos Vogiatzis, 'Communicating the European Ombudsman's Mandate: An Overview of the Annual Reports' (2014) 10 *Journal of Contemporary European Research*, 105, in particular, at 114.

¹²²European Ombudsman, Annual Report 2008, 18–19. The Ombudsman regularly refers to the (now updated) Commission's Communication to the Council and the European Parliament, 'Updating the Handling of Relations with the Complainant in Respect of the Application of Union Law' COM (2012) 154 final. See, further, Nikiforos Diamandouros, 'The European Ombudsman and the Application of EU Law by the Member States' (2008) 1 *Review of European Administrative Law*, 5, in particular at 13–19.

The strategic decision of the office to look into the substance of the decision and, in particular, whether the conclusions of the Commission are *reasonable, well-argued* and *thoroughly explained* was a bold step, and simultaneously a choice opening the door for the Ombudsman's scrutiny over the merits of the Commission's handling of complaints of this sort. Magonette was quick to notice this:

Theoretically, [the Ombudsman] examines the way the Commission makes its decision not to bring infringement proceedings against a member state. Though the control is only about the procedure, it may radically alter the content of the decision. In fact, the difference between content and form is very difficult to make out. [...] There have been instances when the Ombudsman has accused the Commission of not having 'correctly assessed' the situation before making a decision. He has based his argumentation on the fact that the Commission examined some arguments and not others. In another case, the Ombudsman reproached the Commission with having failed to 'really balance the interests of the opposing parties'.¹²³

To return to the role of the Commission in the initiation of legislation, the Ombudsman has generally acknowledged that 'in evaluating the actions of the Commission in formulating legislative proposals, the Ombudsman's role is not to substitute his judgement for that of the Commission but to check that correct procedures were followed and that there was no manifest error of appraisal'.¹²⁴ Thus, *the merits* of 'legislative proposals that are before the European Parliament' fall outside the scope of maladministration.¹²⁵ More recently, the Commission questioned the Ombudsman's competence to examine a delegated act under Article 290 TFEU as the Delegated Regulation in question was, according to the Commission, of a 'quasi-legislative nature'.¹²⁶ The Ombudsman, underlining that the Commission's right to adopt a delegated act determining the non-essential elements of legislation was unquestionable, resolved the matter by pointing out that 'both branches of the EU legislature [the European Parliament and the Council] ... made the political choice to endorse, either actively or tacitly, the manner in which the Commission had decided to fill in the details of the relevant legislation in its Delegated Regulation'.¹²⁷ It was *this endorsement* that attributed, according to the Ombudsman, the status of quasi-legislation to that act, thereby bringing it outside the scope of the Ombudsman's mandate.¹²⁸

Moving on to the ECI, in a press release in 2012 the Ombudsman specified that 'whether the Commission's conclusions are reasonable and thoroughly explained' is something that could fall under the Ombudsman's mandate.¹²⁹ This is reminiscent of the Ombudsman's practice vis-à-vis the infringement procedure, with the caveat that the ECI process has the potential to touch upon legislation. Further, in the abovementioned own-initiative inquiry, the Ombudsman invited the Commission to make the ECI *politically salient*. To that end, she provided a number of recommendations: the Commission's political choices should be explained to the public in a detailed and transparent manner; studies could be carried out and experts could be consulted (often a time-consuming process, one must admit); the possible support by the Council and the European Parliament on the proposed initiative could be identified in advance and, on the basis of the received input, the Commission's position could be reconsidered (this point is returned to below); its response should be seen as an opportunity for a wider debate, thereby strengthening the European public sphere and democracy at the EU level.¹³⁰

¹²³Paul Magonette, 'Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union' (2003) 10 *Journal of European Public Policy*, 677, at 687.

¹²⁴European Ombudsman Case 875/2011/JF, point 20.

¹²⁵*Ibid.*

¹²⁶European Ombudsman Case 417/2015/NF, point 11.

¹²⁷*Ibid.*, point 35.

¹²⁸*Ibid.*

¹²⁹See Press Release No. 5/2012, 'The European Citizens' Initiative: the Ombudsman is Ready to Help, if Problems Arise', available at: www.ombudsman.europa.eu/en/press/release.faces/en/11342/html.bookmark.

¹³⁰European Ombudsman Case OI/9/2013/TN, points 17–24.

More recently, the Ombudsman has had the opportunity to examine a complaint concerning the Commission's response to the 'Stop Vivisection' ECI.¹³¹ The Ombudsman found that the Commission's explanations in the Communication were not 'incoherent', even if in discord with what the organisers were aiming for.¹³² The Ombudsman also underlined a number of actions undertaken by the Commission 'in response to the ECI', which did not directly correspond to what the organisers wanted (an immediate end to animal testing), but did demonstrate, according to the Ombudsman, that the ECI 'has had an impact on the Commission's actions in this area'.¹³³ Although no maladministration was identified in this case, the fact that the Ombudsman did examine the substance of the complaint is not an insignificant development. In fact, and following her recommendations in the aforementioned broader own-initiative inquiry, the Ombudsman made it clear in the 'Stop Vivisection' complaint that the Commission has a 'duty to explain, in a clear, comprehensible and detailed manner, its position and political choices regarding the objectives of the ECI'.¹³⁴

It follows from the above that while the Ombudsman cannot, of course, review the Commission's political choices at the follow-up stage, this does not nonetheless mean that the Ombudsman is not prepared to carefully examine the detail of the Commission's response and the quality or coherence of its reasons. Whether such extra-judicial review will eventually match the 'reasonableness' requirement applied in infringement proceedings is a question that cannot be answered at this stage. The 'Stop Vivisection' complaint and the conclusions to the Ombudsman's own-initiative inquiry arguably evidence the Ombudsman's belief that 'the Commission coming forward with a legislative proposal should not be the only measure of success'.¹³⁵ Beyond the additional actions that the Commission may take after the successful collection of signatures,¹³⁶ more generally and regardless of whether such collection is successful, 'the process itself is of major significance'.¹³⁷ In any event, while one should be mindful of the limitations of the Ombudsman's possible role at the final stage of the ECI, the scrutiny of the Commission's reasons not only leaves the door open for a more substantive review, but admittedly is also something that the organisers might not achieve if they choose the judicial avenue.¹³⁸

6.3 | Political control: The limited role of the European Parliament

The very limited role of the European Parliament in the ECI process cannot remain unnoticed. The European Parliament is only responsible for organising a hearing after the collection of signatures.¹³⁹ The Ombudsman—perhaps quite optimistically—believes that the hearing is a marvellous opportunity for a political debate and 'democracy in action', and has (rightly) invited the Commission to ensure that the two arms of the EU legislature, the Council and the European Parliament, take part therein.¹⁴⁰ The hearing is organised by the legislative committee responsible for the subject matter of the ECI, in collaboration with the Petitions' Committee,¹⁴¹ and is an opportunity for the organisers to liaise with the Commission, the European Parliament, and other institutions or stakeholders, but does not ensure an *ex-post* review of the Commission's final decision, given that the latter is provided after the hearing.

¹³¹European Ombudsman Case 1609/2016/JAS.

¹³²*Ibid.*, points 14–15.

¹³³*Ibid.*, point 18.

¹³⁴*Ibid.*, point 22 (emphasis added).

¹³⁵Case OI/9/2013/TN, point 20.

¹³⁶Case 1609/2016/JAS, point 18.

¹³⁷Case OI/9/2013/TN, point 20.

¹³⁸Beyond the pending *One of Us* case, above, n. 116, see also the Court's restrictive approach concerning the scope of the right to petition the Parliament in Case C-261/13 P, *Schönberger v. European Parliament* ECLI:EU:C:2014:2423.

¹³⁹See Art. 11 of Regulation.

¹⁴⁰Case OI/9/2013/TN, point 22.

¹⁴¹Rule 211 of the Rules of Procedure of the European Parliament, available at: www.europarl.europa.eu/sipade/rulesleg8/Rulesleg8.EN.pdf.

Rule 218 of Parliament's procedural rules leaves more room for (indirect) political control. It states that the Petitions' Committee may follow up an ECI (drafting an own-initiative report) which had been registered but did not manage to meet the requirements of the Regulation. This seems logical as each ECI signature could also have been registered as a separate petition. This can also apply to the Commission's final decision: nothing prevents the committee responsible for the subject matter of the ECI from exercising pressure upon the Commission when it believes that the organisers and signatories have a case worth pursuing. The own-initiative report may lead to the activation of Article 225 TFEU, Parliament's faculty to propose legislation to the Commission.¹⁴² In fact, the European Parliament committees for environment and development produced reports criticising the Commission's unwillingness to propose legislation on the basis of the 'Right2Water' ECI.¹⁴³

7 | SHOULD THE COMMISSION ENJOY VERY BROAD DISCRETION AT THE FOLLOW-UP STAGE OF THE ECI?

This article argues that the debate on the ECI should shift towards the final stage of the process, when the Commission makes a decision as to whether or not the proposal will be forwarded to the EU legislature. This inevitably brings to the fore the desirable ambit of discretion that the Commission should enjoy therein. Undeniably, the Commission's prerogative to initiate legislation is constitutionally guaranteed under Article 17 TEU, and the case-law of the Court does not seem to indicate that such discretion can be seriously qualified. However, if the role of the Commission is assessed in light of the broader political and social context of European integration, then the answer becomes less straightforward. Likewise, if normative reasons for strengthening participatory or direct democracy within the EU are considered, then the Commission's power to reject the voice of at least one million citizens becomes somewhat problematic.

As an initial observation, if one considers the Commission's two main decisions within the ECI process, one cannot then expect the Commission to accept everything at the registration stage, and then merely forward the proposals to the legislature when (or shortly after) presenting its conclusions. This is not realistic and it would probably be undesirable, too. Now, to assume that a relaxed degree of scrutiny, on the part of the Commission, at the registration stage, coupled with the Commission's existing broad discretion at the last stage, will boost the democratic prospects of the ECI is a very optimistic hypothesis which does not (sufficiently) take into account that a rejected ECI on the basis of Article 10 of the Regulation is likely to disappoint citizens and civil society organisations, and eventually undermine the overall effectiveness of the instrument. There is a widespread conclusion now that the ECI 'does not work',¹⁴⁴ and even more optimistic accounts recognise that the number of requests for registration with the Commission has recently declined:¹⁴⁵ is this because the Commission has been overly strict during the admissibility stage or because there is no mechanism to control the Commission's decision during the final stage of the process?

Legally, of course, plausible reasons exist to preserve Article 10 of the Regulation in its present form, including the formulation under Article 11(4) TEU that citizens can *invite* the Commission to submit a proposal; it is indeed questionable whether the Regulation could go significantly further.¹⁴⁶ Likewise, and without pre-empting the Court's

¹⁴²The own-initiative reports are produced in accordance with Rule 52 of Parliament's Rules on Procedure; see also Rule 46 on Art. 225 TFEU.

¹⁴³See Report of 15 July 2015 on the follow-up to the European Citizens' Initiative Right2Water (2014/2239(INI)). To that end, a Resolution was adopted by the European Parliament in support of the organisers' claims; see European Parliament Resolution of 8 September 2015 on the follow-up to the European Citizens' Initiative Right2Water (2014/2239(INI)).

¹⁴⁴See a collection of essays, 'An ECI that Works! Learning from the First Two Years of the European Citizens' Initiative' (2014), available at: ecithatworks.org.

¹⁴⁵Conrad and Knaut, above, n. 73, at 222.

¹⁴⁶Andreas Auer, 'The European Citizens' Initiative' (2005) 1 *European Constitutional Law Review*, 79, at 83.

answer to this question, it is difficult to see how the Court will find that the Commission's explanations—for example—to the three abovementioned successful ECIs do not meet the Commission's reason-giving requirements. Conversely, the Commission is not expected to provide insufficient (from the point of view of judicial review, even assuming that such 'decision' is reviewable) reasoning when rejecting an ECI, and even more so since the Commission now knows that the Ombudsman is willing to examine complaints of this sort (yet under the abovementioned limitations).

However compatible with the Treaties and the CJEU's case-law, the Commission's possible unwillingness to even partially sacrifice its legislative prerogative cannot be immune from scrutiny. Of relevance here is the Commission's response to the 'green card' by national parliaments on food waste.¹⁴⁷ Sixteen national parliaments invited the Commission 'when tabling a new circular economy package, to adopt a strategic approach to the reduction of food waste within the EU'; simultaneously, they emphasised that:

*[they did] not seek to infringe upon the Commission's right of initiative, but to complement it; nor [did they] seek to challenge the existing role of the European Parliament, or the duties of the co-legislators in agreeing legislation. But ... given that 16 national parliaments and chambers have come together in support of this proposal ... the Commission should give it due weight, and respond appropriately.*¹⁴⁸

The Commission committed itself to duly consider the proposals, but simultaneously underlined that 'as the circular economy package [was] under preparation and [had] yet to be discussed by the College, it [was] not possible at [that] stage to comment on specific initiatives' that could be included in the package.¹⁴⁹

The CJEU's views on the Commission's power to withdraw a proposal certainly demonstrate that (under some constraints—e.g. the reason-giving requirements) the Commission 'does not cease to act in the EU interest after it submits the proposal'.¹⁵⁰ But more interesting, perhaps, is the Commission's own view on this matter: the latter believes that 'its right to withdraw a proposal is the corollary to its right of initiative. Withdrawal must therefore be guided by the same criterion as the exercise of its right of initiative, i.e. the Community interest'.¹⁵¹ The Commission's views withstanding, the earlier discussion sought to explain that throughout the evolution of the Union the Commission's prerogative has been confined (with some commentators even observing that co-decision has had a detrimental impact upon the Commission's 'control over the legislative process', and notably its power to withdraw proposals¹⁵²), while the assumption that it *always* acts on behalf of the Union interest is an oversimplification. Moreover, convincing normative reasons exist to increase the EU's legitimacy via participation and, consequently, via a stronger ECI. These arguments will be considered in turn.

In light of the Commission's limited legitimacy, reducing the scope of the Commission's discretion when presenting its conclusions would increase input legitimacy,¹⁵³ and would render the ECI closer to a direct democracy EU instrument. One should also consider whether a pan-European debate is more likely to be generated if the Commission actually forwards certain proposals to the EU legislature, which simultaneously means that such matters will be further discussed within the European Parliament and the Council, the two institutions representing directly

¹⁴⁷See 'Food Waste: A Proposal by National Parliaments to the European Commission' (2015), available at: www.parliament.uk/documents/lords-committees/eu-select/green-card/green-card-on-food-waste.pdf.

¹⁴⁸*Ibid.*, at 1. Much of the discussion on national parliaments has focused on Protocol No. 2 of the Lisbon Treaty, and their role in monitoring the subsidiarity principle. This matter falls outside the scope of the present contribution.

¹⁴⁹See the Commission's response of 17 November 2015, at: www.parliament.uk/documents/lords-committees/eu-select/green-card/EUCommission-response-to-HoL.PDF.

¹⁵⁰Chamon, above, n. 19, at 908.

¹⁵¹*Ibid.*, fn 46, citing the Commission's answer to MEP Herman [1987] OJ C220/7. In the recent *Council v. Commission* case, the Court confirmed that the Commission's power 'to withdraw a proposal is inseparable from the right of initiative' (above, n. 114).

¹⁵²Jacqué, above, n. 37, at 36–37.

¹⁵³For the classic distinction between input and output legitimacy, see Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

and indirectly European citizens.¹⁵⁴ In addition, the Commission's legislative prerogative is grounded, among others, in a perception that the Commission represents the Union interest. If such representation of the 'common good' often becomes questionable, it is less clear on which normative basis the Commission will reject the ECI. The choice of at least one fourth of Member States was based precisely on the tenet that such composition of the proposal would sufficiently represent the Union interest.¹⁵⁵ Now, nothing prevents the European Parliament and the Council from activating Articles 225 and 241 TFEU respectively, with a view to forwarding a proposal to the Commission when the latter decides to remain inactive; in fact, this might be a necessary compromise between the simultaneous presence of the principles of representation and participation in the EU Treaty.¹⁵⁶ One should not forget that even if the Commission forwards the proposal, this does not entail that the initiative will be passed by the two institutions. Importantly, in light of the 'dual representation' basis under which the EU operates, and regarding a controversial ECI that has to be rejected, it would be preferable if such rejection (or modification) would stem from the institutions representing citizens at the national/EU level.

In addition, compelling normative considerations suggest that increasing participation in the EU would entail gains in legitimacy. Participation supplements representative democracy as 'those affected by policy are able to directly take part in issue-specific policy processes' without anticipating the next general election to hold the government to account.¹⁵⁷ Turning to the EU, due to its 'size, diversity, distance between elected politicians and citizens, and [...] the very institutional complexity of the Union', the EU has to rely also on participation to complement representation.¹⁵⁸ Thus, the latter's legitimacy is a matter of *democratic* legitimacy: 'the constitutional identity of both the Union and its member states is premised on the *coupling* of legitimacy and democracy'.¹⁵⁹ This is all the more important as the evolution of the Union into a polity with particular features entails that 'the *democratic* quality of the EU' can no longer be perceived to 'derive from the democratic quality of the member states', and so the 'indirect model of legitimisation is inadequate'.¹⁶⁰ From a technocratic organisation seeking to complete the internal market, the EU has evolved into an autonomous order in need to improve its democratic performance and relate with citizens. Besides, participation strengthens the European public sphere and the European demos.¹⁶¹ In this context, the ECI brings to the fore very powerfully the role of the Commission because, no matter how restrained its design through primary and—importantly—secondary law is, the very idea of involving citizens directly in the decision-making process has a clear aim to improve (to the degree that they can be improved via the ECI process) the EU's democratic credentials.

The above should not be read as implying that the Commission's legislative prerogative has lost its constitutional significance, and therefore a revised ECI Regulation should straightforwardly re-write Article 10 and disregard the EU

¹⁵⁴The equal weight of the Council and the European Parliament under the ordinary legislative procedure is a reflection of the EU's dual basis of legitimacy under Article 10 TEU; see Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *Common Market Law Review*, 617, at 639–640.

¹⁵⁵European Commission, 'Green Paper on a European Citizens' Initiative', COM (2009) 622 final, p. 4. Note that the Commission's initial proposal was a higher threshold, namely one-third of Member States.

¹⁵⁶Dougan, above, n. 5, at 1843–1844.

¹⁵⁷Beate Kohler-Koch and Christine Quittkat, *De-mystification of Participatory Democracy: EU Governance and Civil Society* (Oxford University Press, 2013), at 1.

¹⁵⁸Mendes, above, n. 112, at 1858.

¹⁵⁹Agustín José Menéndez, 'The European Democratic Challenge: The Forging of a Supranational *Volonté Générale*' (2009) 15 *European Law Journal*, 277, in particular at 280.

¹⁶⁰Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds.), *Developing a Constitution for Europe* (Routledge, 2004), at 6. After all, ministerial participation in the Council meetings should not be taken for granted; see an interesting study in Caroline Howard Grøn and Heidi Houlberg Salomonsen, 'Who's at the Table? An Analysis of Ministers' Participation in EU Council of Ministers Meetings' (2015) 22 *Journal of European Public Policy*, 1071.

¹⁶¹Elizabeth Monaghan, 'Assessing Participation and Democracy in the EU: The Case of the European Citizens' Initiative' (2012) 13 *Perspectives on European Politics and Society*, 285, at 295.

Treaties. Rather, it is submitted that the lack of thorough debate on the Commission's role at the final stage of the ECI sticks overly to the Treaty text and the longstanding axioms concerning the Commission's institutional role. Insufficient attention is being paid to the evolution of European integration, and especially to the Commission's role therein. And yet the surrounding institutional reality suggests that, for better or worse, the Commission's legislative prerogative is progressively fading. Further, despite recent (and welcome) efforts to involve the European Parliament under Article 17(7) TEU, the Commission is still being perceived as insufficiently accountable. Thus, the debate on the Commission's role within the ECI does not duly consider the perennial discussion on the democratic deficit and the need to complement representation with meaningful instruments of participatory or direct democracy. Simply put: the discrepancy between the law (and especially the Treaties) and the established institutional practice in the EU is, without doubt, substantial.

In this context, if reasons exist to involve the supranational voice at the final stage of the ECI process, then it is essential to reflect on the possible instruments that will ensure that the Commission actually promotes the general interest of the EU when making such discretionary decision. One possible avenue to increase the level of political scrutiny could be via the involvement of the European Parliament. In its Resolution, the latter underlined 'its concerns about a potential conflict of interest, given that the Commission itself has the exclusive responsibility to carry out the admissibility check, and asks that this situation be properly addressed in the future'.¹⁶²

In the author's view, particularly attractive are claims that the Commission should be *politically* encouraged to give successful initiatives 'a *de facto* mandatory force in terms of bringing forward proposals for Union action even when they are manifestly against its own political agenda'.¹⁶³ This is a plausible way to increase the ECI's politicisation and salience. In such a scenario, the proposal itself would be subject to the laborious negotiations between the Parliament and the Council (when the ordinary legislative procedure applies), and the argument can be made that because of their increased legitimacy, these institutions are better placed than the Commission to reject an otherwise controversial proposal stemming from an ECI.

Accordingly, the Ombudsman's own-initiative inquiry interestingly pointed out that the Commission could gauge the possible support by the Council and the European Parliament on the proposed initiative before reaching a conclusion.¹⁶⁴ To date, nonetheless, the Commission has not undertaken such a political commitment. One could even speculate that even the slightest 'sacrifice' of its legislative prerogative (slightest in the sense that the formalities of the ECI Regulation render the collection of the necessary level of support an uncommon scenario) would be too high a 'price' to be paid by the Commission, despite the obvious gains in legitimacy and participation that such a stance would entail. Because the available sample consists of three (successful) ECIs, it is acknowledged that only time will tell whether the Commission is indeed prepared (or not) to partially compromise, where appropriate, its monopoly to initiate legislation.

The author submits, therefore, that the Commission enjoys too broad a discretion at the final stage of the ECI. While this may be legally explainable, politically it cannot be easily justified. Further political or quasi-judicial scrutiny is necessary in order to ensure that the Commission indeed serves the EU interest. Alternatively, and perhaps preferably, pressure should be exercised upon the Commission in order for the latter to *de facto* accept to forward the proposal to the EU legislature or to undertake a commitment to do so if there is foreseeable support by the European Parliament and the Council. The optimist would believe the Commission when explaining that it has the best of intentions to strengthen the ECI as a tool of political participation and a means to fulfil the perennial promise of bringing citizens closer to the EU.¹⁶⁵ In order for the Commission to convince the cynic, however, it will need to engage in

¹⁶²European Parliament's Resolution, above, n. 7, point 13. In the same Resolution (point 14) the European Parliament 'call[ed] on the the Commission ... to consider Parliament also as a decision-maker, particularly because it is the only institution the members of which are directly elected by EU citizens'.

¹⁶³Bouza García, above, n. 95, at 274–275.

¹⁶⁴See above, n. 130.

¹⁶⁵See the Commission's three-year Report on the ECI, further to Article 22 of Regulation 211/2011; European Commission, 'Report on the Application of Regulation (EU) No. 211/2011 on the Citizens' Initiative' (2015) COM(2015) 145 final.

an open dialogue about the final stage of the ECI, which so far appears to be a very delicate issue. Regardless of how much credit the Commission should (indeed) take for helping organisers *until the follow-up stage* and within a complex legal framework under the ECI Regulation, what is *does next* with the proposal is simply too critical an issue to be left unaddressed.

8 | CONCLUDING REMARKS

This paper assessed the institutional position of the Commission in the ECI process from a legal perspective, but also from the perspective of the evolution of European integration. It found that the Court is more likely to be involved (and has indeed been involved) as a control mechanism at the registration stage, particularly with regard to respect of the Union's competences. By contrast, the EU judge may not be expected to thoroughly scrutinise the Commission's stance under Article 10 of the Regulation. Regarding the extra-judicial avenue, the Ombudsman could scrutinise the quality of the Commission's reasoning at the follow-up stage, also relying on the right to participate in the democratic life of the Union under Article 10(3) TEU. The difference with the method applied in infringement proceedings is that in the latter case the Commission's role clearly pertains to its *administrative* activities. Further, only indirectly can the European Parliament and the Council intervene and follow up an unsuccessful ECI, through their constitutional prerogatives under Articles 225 and 241 TFEU.¹⁶⁶ Otherwise, the European Parliament hosts and participates in the hearing of the ECI organisers but ultimately cannot limit the Commission's discretion within the ECI process.

This contribution also situated the provisions of the ECI in the context of the evolution of European integration and the Commission's role therein. Particular emphasis was placed on the persistent issue of the legitimacy of a non-representative, supranational institution, the developments in the area of initiation of legislation, the 'representation of Union interest' claim and the transformation of the Union into a particular constitutional project. Viewed from this perspective, the Commission's role at the admissibility stage is arguably compatible with the constitutionalisation of the Union. The same cannot be said, however, with regard to the Commission's leeway at the follow-up stage, which is open to criticism on a number of grounds (all going beyond the Treaty text and the case-law of the EU courts, which indeed preserve the Commission's discretion in initiating legislation). Pragmatically, the Commission is now infrequently the initiator of legislation;¹⁶⁷ and the latter cannot always be deemed to act on behalf of the Union interest.

Insofar as the Commission's right of initiative is concerned, the discrepancy between the text of the EU Treaties and the institutional reality should concern commentators, unless, of course, it is (perhaps lightheartedly) agreed that in the present challenging state of the Union when the legitimacy question is particularly pertinent, the ultimate priority should be to—always and at any cost—safeguard the Commission's prerogative. In fact, after the result of the UK referendum, and in light of the EU's need to re-think its focus and connect with citizens, some commentators have opined that the 'time has come to think seriously about passing the right of initiative from the Commission to the European Parliament and reinforcing the citizens' initiative'.¹⁶⁸ To return to the scope of the present contribution, as things stand the Commission controls both the admissibility and the final stage, has generally improved the quality of its reasoning at the follow-up stage and to its credit assists the organisers during the collection period by providing resources and expertise.¹⁶⁹ Nonetheless, after more than four years since the entry into force of Regulation 211/2011,¹⁷⁰ the first signs demonstrate that, in the near future, the scenario of an ECI being transferred as such to the

¹⁶⁶See, further, Dougan, above, n. 5, at 1843–1844.

¹⁶⁷For evidence on this compare, e.g., the empirical work of Ponzano et al., above, n. 37, at 13 *et seq.*

¹⁶⁸Anthony Arnall, 'Broken Bats' (2016) 41 *European Law Review*, 473, at 474.

¹⁶⁹As the Commission's three-year Report illustrates (above, n. 165), the Commission collaborates with Europe Direct to answer a plethora of queries throughout (or even before the commencement of) the ECI process. More recent developments include the possibility of the creation of a collaborative online platform, potentially to be run by both the Commission and NGOs, with a view to providing advice on the organisation of ECIs; see www.citizens-initiative.eu/survey-collaborative-platform-european-citizens-initiative.

¹⁷⁰The Regulation entered into force on 1 April 2012.

EU legislature is rather remote. To be fair to the Commission, a sample of three ECIs is not sufficient in itself to provide definitive conclusions on this point. Still, a situation whereby Article 11(4) TEU and the Regulation 211/2011 or its future revised version will essentially turn into dead letter has to be avoided.

The ongoing concern, if not widespread sense of disappointment, about the direction of the instrument within the advocates of the ECI and—more generally—proponents of participatory or even direct democracy in the EU can hardly remain unnoticed. Even if the *status quo* guarantees the Commission's constitutional prerogatives, one question that should be reflected upon is whether the consistent refusal to forward proposal(s) to the EU legislature further undermines the Commission's legitimacy—and the same applies, of course, to the legitimacy of the EU as a whole.¹⁷¹ Proposals inviting the Commission to *de facto* accept successful ECIs¹⁷² or base its action on the possible support of the co-legislators¹⁷³ (and undertake a general and explicit political commitment to doing so, this account adds) arguably reflect a plausible balance between, on the one hand, the available legal framework and, on the other, the existing institutional practice, as well as the need to render instruments of participatory democracy in the EU more salient.

If eventually the Commission proves unwilling to forward any ECIs to the EU legislature, can it really be excluded that a possible revision of Article 11(4) TEU¹⁷⁴ will one day be seriously considered?¹⁷⁵ Instead of thinking of treaty revision and its challenges, however (in the case of several further 'unsuccessful' ECIs), it is hoped that there is still time for the Commission to adopt a more accommodating approach to this matter, and take steps with a view to demonstrating that in practice it is prepared within the ECI process and *where appropriate* to 'sacrifice' its legislative prerogative.

How to cite this article: Vogiatzis N. Between discretion and control: Reflections on the institutional position of the Commission within the European citizens' initiative process. *Eur Law J.* 2017;23:250–271. <https://doi.org/10.1111/eulj.12229>

¹⁷¹In its critical Resolution on the Commission's follow-up to 'Right2Water', the European Parliament 'stress[ed] that if the Commission neglects successful and widely supported ECIs in the framework of the democratic mechanism established by the Lisbon Treaty, the EU as such will lose credibility in the eyes of citizens'. See European Parliament Resolution, above, n. 143, point 11.

¹⁷²See Bouza García, above, n. 95, at 274–275.

¹⁷³European Ombudsman Case OI/9/2013/TN, points 17–24.

¹⁷⁴In this regard, it should be remembered that the Commission's legislative prerogative is not drafted in absolute terms as Article 17(2) TEU contains the clause 'except where the Treaties provide otherwise'. The author refers to Article 11(4) TEU because it is unlikely that an amendment of current Article 10 of the ECI Regulation would suffice; see Auer, above, n. 146.

¹⁷⁵Past, well-known experience informs us, of course, that treaty revision is not a straightforward exercise. See, among others, a contribution focusing on the variable legitimacy of the EU's treaty revision practices in Thomas Risse and Mareike Kleine, 'Assessing the Legitimacy of the EU's Treaty Revision Methods' (2007) 45 *Journal of Common Market Studies*, 69.