

# **The European Citizens' Initiative and the EU institutional balance: On realism and the possibilities of affecting EU law-making**

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## ***Abstract***

*The European Citizens' Initiative (ECI) has been promoted as a way to strengthen citizens' participation in EU law-making. Taking stock of the ECI's first few years of operation, this article aims to identify the influence of the ECI on EU law-making and its position in the EU institutional triangle (Commission – European Parliament - Council). In particular, the article examines whether the ECI has shifted the EU institutional status quo vis-à-vis the Commission's power of legislative initiative. It focuses on the first few ECIs that have managed to collect the necessary signatures to be formally considered by the Commission, and evaluates the Commission's discretion to respond to these ECIs. It argues that there is currently a mismatch between, on the one hand, the expectations of EU citizens from the ECI and, on the other hand, the ECI's capacity to lead to legislative output. The article addresses the challenges that arise from this mismatch.*

## **1. Introduction**

The past year has seen a surge in the use of citizens' participatory mechanisms in EU Member States. For example, referendums took place in Greece, the Netherlands, the UK, and Hungary on significant EU-related matters (the Euro, association agreements between the EU and third countries, EU membership, and migrant quotas respectively), giving people an opportunity, additional to electoral voting, to participate in politics. An opportunity for citizens' participation in decision-making beyond voting also exists at the EU level, in the form of the European Citizens' Initiative (ECI). The ECI enables EU citizens, after collecting one million signatures, to request the European Commission to consider an idea as a possible basis for a legislative proposal. Even if ECI organisers manage to collect the necessary signatures of support, the Commission is not formally obliged to act on the submitted proposal. Yet as a mechanism that allows citizens to propose legislation to the Commission, the ECI is inextricably linked with the Commission's power of legislative initiative.

This article presents an account of the ECI's potential to affect EU legislation, along with a treatise of the Commission's approach to successful ECIs to date. It argues that, while the ECI has been considered as a new opportunity and force of legislative initiative, in reality its potential is weak as a means of influencing EU legislative output. The article addresses this challenge, explicating its background and advancing the debate on citizens' participation in EU law-making. To this effect, the analysis focuses on a specific aspect of the ECI's lifecycle, namely the 'follow-up' of an ECI, which is the stage that succeeds the 12-month signature collection phase and entails the decision by the Commission on how to react to the proposals of an ECI that managed to collect one million signatures from seven different Member States as stipulated in Regulation 211/2011 (ECI Regulation).<sup>1</sup>

Although issues concerning the ECI's burdensome legislative framework, its potential to foster an emerging European public sphere, and its relevance to the (missing) European demos, have attracted the interest of academic commentators, there has been less attention to the extent to which ECIs have

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<sup>1</sup> Regulation 211/2011 on the citizens' initiative O.J. 2011, L 65/1.

actually influenced the Commission's near-monopoly of legislative initiative.<sup>2</sup> Instead, commentators often see the non-binding nature of the ECI as the end of the story when it comes to the effect of this participatory mechanism on EU legislation.<sup>3</sup> This article contributes to the relevant literature by examining whether the ECI has proven to be a new opportunity and force of legislative initiative in the EU. In doing so, the ensuing analysis illustrates how the ECI has blended into the EU's institutional balance, and what this says about the way in which Article 11(4) TEU (citizens' participation via an ECI) currently complements Article 10(2) TEU (citizens' representation via the European Parliament and the Council) in practice as a source of legitimacy for the EU.<sup>4</sup>

The contribution begins by depicting the EU institutional framework in which the ECI was introduced, exploring the nature and theoretical potential of the ECI as a force of legislative initiative (section 2). It expounds the argument that, although the ECI does not have binding powers to oblige the Commission to act, there could be more to the concept of the ECI than meets the eye when it comes to its effect on EU law-making. On this premise, the article then turns to examine the manifestation of the ECI's follow-up stage in practice so far (section 3).

In order to gauge the Commission's discretion to respond to an ECI, the article subsequently addresses two questions: first, whether and how the EU co-legislators, namely the European Parliament and the Council, have affected the chances of successful ECIs to lead to a legislative proposal (section 3.1). Second, whether the Commission felt pressurised to act on the first wave of successfully submitted ECIs in order to maintain the credibility of the ECI mechanism (section 3.2). The analysis draws conclusions not only as to the effectiveness of the ECI in influencing EU law-making, but also regarding the institutional interactions that unfolded in the follow-up of the first few ECIs. These findings point to a mismatch between, on the one hand, ECI stakeholders' expectations from the ECI, and, on the other hand, the capacity of the ECI to produce legislative output (section 4). Based on these considerations, we conclude by arguing that increasing the transparency of the ECI's follow-up stage is key to alleviating citizens' frustration with the ECI mechanism in the future by highlighting the positive effects of an ECI whilst allowing the Commission to maintain its power of legislative initiative (section 5).

## 2. The ECI as a force of legislative initiative?

Pre-Lisbon, citizens' participation in EU agenda-setting was seen as taking place indirectly, through arrangements for citizens' representation by civil society associations and interest groups. These

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<sup>2</sup> Examples include: Dougan, "What are we to make of the Citizens' Initiative?", 48 CML Rev. (2011), 1807-1848; Ferro, "Popular Legislative Initiative in the EU: Alea Iacta Est", 26 YEL (2007), 354-385; Karatzia, "The European Citizens' Initiative in practice: Legal Admissibility Concerns", 40 EL Rev. (2015), 509-530; Bouza Garcia and Greenwood, "The European Citizens' Initiative: A New Sphere of EU Politics?", *Interest Groups and Advocacy* (2014), 246-267; Langer, "Die Europäische Bürgerinitiative: partizipativer Placebo oder direktdemokratischer Keimling?" in Kübler and Stojanovic (Eds), *Demokratie in der Europäischen Union* (Schulthess, 2014) 141-161.

<sup>3</sup> For the most recent contributions discussing the ECI from an empirical perspective see: Conrad, Knaut, Bottger (Eds), *Bridging the Gap? Opportunities and Constraints of the European Citizens' Initiative* (Nomos 2016), Marxen, "Participatory Democracy in Europe – Article 11 TEU and the Legitimacy of the European Union" in Fabbrini, Ballin, Somsen (Eds) *What Form of Government for the European Union and the Eurozone?* (Hart, 2015), 151-169; Bussaguet, "Participatory mechanisms as symbolic policy instruments?" 1 *Comparative European Politics* (2015) 1-18.

<sup>4</sup> For the argument that Articles 11(4) and 10(2) TEU are complementary see: Hrbek, "National and European Parties and the European Citizens' Initiative", 13 *Perspectives on European Politics and Society* (2012), 370-384, at 372; Szeligowska and Mincheva, "The European Citizens' Initiative- Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis" 13 *Perspectives on European Politics and Society* (2012), 270-284, at 271.

institutional practices have now largely been codified in Articles 11(1), (2), and (3) TEU. The establishment of the ECI by the Treaty of Lisbon illustrates that the ECI is not only a new opportunity for citizens' participation in EU law-making, but also a new element of the EU institutional and constitutional order. As such, the ECI should be assessed vis-à-vis the broader EU institutional framework. The starting point in this respect is that the ECI cannot generate legislation in its own accord. As confirmed recently by the Court of Justice, '(...) it is for the Commission alone to decide whether or not to submit a legislative proposal and, as the case may be, to determine its subject matter, objective and content.'<sup>5</sup>

In the context of both Article 11(4) TEU, and the ECI Regulation, the non-binding character of the ECI mechanism is in line with the Commission's prerogative of legislative initiative, and the fundamental principle that the Commission should not take instructions from other entities.<sup>6</sup> Conferring the ECI a binding power would mean that the legal importance of the ECI would have exceeded the parallel powers of the European Parliament and the Council to promote legislation.<sup>7</sup> Although the two co-legislators can request the Commission to submit a legislative proposal by virtue of Articles 225 TFEU and 241 TFEU respectively, these proposals do not create any binding obligations for the Commission.

Against this background, the introduction of the ECI in the EU institutional framework begs the question: what can an ECI actually achieve in terms of influencing legislation at the EU level? According to the former Commission vice-president, Maros Šefcovic, the ECI was supposed to be 'a powerful agenda-setting tool in the hands of citizens.'<sup>8</sup> In the same vein, the ECI has also been described as a mechanism that gives EU citizens the opportunity to affect the EU political agenda by introducing collective claims to the EU decision-making process.<sup>9</sup> The question of the ECI's potential to affect EU legislation becomes all the more pertinent considering two recent judgments of the General Court on the interpretation of the ECI Regulation. According to the General Court, citizens have a right to submit proposed ECIs, and the objective of the ECI mechanism is not to initiate 'a mere dialogue between the citizens and the institutions' but 'to request the Commission, within the framework of its powers, to submit a proposal for an act.'<sup>10</sup>

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<sup>5</sup> Case C-409/13, *Council v. Commission (MFA)*, EU:C:2014:2470, para. 74; Article 17(2) TEU; The Commission's right of initiative is, generally speaking, undivided, with the main exception being the area of Justice and Home Affairs, where the Commission shares the right to propose new legislative acts with a quarter of the Member States (Article 76 TFEU). For other examples showing that the Commission's right of initiative is not entirely exclusive, see Article 7 TEU and Article 129 TFEU, and Opinion of A.G. Jääskinen in Case C-409/13, *MFA*, para 43; For a commentary on the *MFA* case see Ritleng, "Does the European Court of Justice take democracy seriously?" 53 CML Rev. (2016), 11-23.

<sup>6</sup> Article 17(3) TEU; Dougan, op. cit. *supra* note 2 at 1842.

<sup>7</sup> Ponzano, "A million citizens can request European Legislation: a *suis generis* right of initiative", <<https://blogs.eui.eu/eudo-cafe/2011/04/13/a-million-citizens-can-request-european-legislation-a-sui-generis-right-of-initiative/>> (last visited 15 June 2016); Dougan, op. cit. *supra* note 2 at 1842. Other academic commentators advocated a legal obligation for the Commission to submit legislative proposals on the basis of an ECI, see for instance: Epiney, "Europäische Verfassung und Legitimation durch die Unionsbürger" in Kadelbach (Ed.), *Europäische Verfassung und direkte Demokratie* (Nomos 2006), at 49.

<sup>8</sup> Commission Press Release, 'Commission fires starting gun on European Citizens' Initiative' IP/12/336.

<sup>9</sup> Warleigh-Lack, "On the path to legitimacy? A critical deliberativist perspective on the right to the citizens' initiative" in Ruzza and Della Salla (Eds.), *Governance and civil society in the European Union: Normative perspectives* (Manchester University Press, 2007), at 64.

<sup>10</sup> Case T-44/14, *Costantini and Others v. Commission*, EU:T:2016:223, para 3; Case T-450/12, *Anagnostakis v. Commission*, EU:T:2015:739, para 26; On a different take of what is a successful ECI, exploring the multiple usages of the ECI beyond its agenda-setting potential, see Bouza Garcia and Greenwood, "What is a successful ECI?" in Conrad, Knaut, Bottger (Eds.), *Bridging the Gap? Opportunities and Constraints of the European Citizens' Initiative* (Nomos, 2016), 149-165.

In examining the ECI's potential as a force of legislative initiative, the formally non-binding nature of the mechanism is only one factor. Another factor concerns the EU institutional reality in which the ECI is being developed in practice. This institutional reality, to which we will now turn, should serve as the basis to analyse the ECI's capacity to influence EU legislation in practice. As will be subsequently discussed, an anchoring point in such analysis is that the Commission's near-monopoly over legislative initiative is not one-dimensional.<sup>11</sup>

## **2.1 The ECI and the multi-dimensional nature of the Commission's power of legislative initiative**

Indeed, the choice of proposing legislation, as well as the manner in which it does so, belongs solely to the Commission. In the process of exercising its right of legislative initiative, however, the Commission takes into account the positions, views, and opinions of a multiplicity of actors such as interest groups, representatives of governments and industry, experts and trade unions.<sup>12</sup>

The participation of interest groups in consultation procedures and other lobbying activities ensures that an array of viewpoints and positions are brought before the Commission. Consultation procedures are in fact promoted by the Commission precisely because they bring to its attention the positions of relevant stakeholders on a particular policy or legislation.<sup>13</sup> Furthermore, lobbying - broadly defined here as the attempts of various interest groups to promote public and private interests before EU Institutions and influence EU policy - takes place at various stages of the EU law-making and policy process, including policy formation and ratification of legislative acts.<sup>14</sup>

It is eminent that there is a long history of cooperation between the Commission and interest groups.<sup>15</sup> According to the Commission, NGOs represent the views of specific groups of citizens to the EU institutions.<sup>16</sup> This state of affairs between the Commission and interest groups can be perceived as an exchange: the Commission obtains technical information, expertise, and an insight into citizens' views in exchange for giving lobbyists access to the EU decision-making process.<sup>17</sup> For the Commission, the value of NGOs' contribution to policy-shaping is mostly seen in the stage of

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<sup>11</sup> Princen, "Agenda-setting in the European Union: a theoretical exploration and agenda for research" 14 JEPP (2007), 21-38, pp. 21, 23, 29; Nugent and Rhinard, "Is the European Commission Really in Decline?" 54 JCMS (2016), 1-17, pp. 6-8.

<sup>12</sup> Peeters, Costa et al, "The revision of the 2014 European tobacco products directive: an analysis of the tobacco industry's attempts to "break the health silo"" Tob Control (2015), at 6; Vogiatzis, "Is the European Citizens' Initiative a serious threat for the Community method?", 6 EJLS (2013), 91-107; A detailed discussion of the role of interest groups in EU decision-making falls outside the scope of this paper. The terms 'interest groups', 'organised civil society' and 'lobbyists' will be used here interchangeably to connote groups promoting both economic and general interests, as well as public interest groups such as NGOs. Saurugger, "Interest Groups and Democracy in the European Union", 31 WEurPol (2008), 1274-1291, at 1287; Lenaerts, "Institutional Balance in the EU" in Joerges and Dehousse (Eds.), *Good Governance in Europe's Integrated Market*, (OUP, 2002), at 70.

<sup>13</sup> House of Lords, EU Committee, *Initiation of EU Legislation* (HL 2007-2008, 150-I) para 102; See also Kohler-Koch and Quittkat, *De-Mystification of Participatory Democracy*, (OUP, 2013).

<sup>14</sup> Hauser explains that '[i]n the EU, businesses demand access to the Commission, the Parliament and the Council with the ultimate objective of securing favourable legislation and blocking adversative regulations. Citizens' organisations, on the other hand, demand access with ultimate collective goals such as the protection of public health and the environment.' Hauser, "European Union Lobbying Post-Lisbon: An Economic Analysis" 29 Berkeley J Int'l Law (2011), 680-709, pp. 684, 692.

<sup>15</sup> Chalmers, "Direct Democracy for the EU: A place for interest groups in the European Citizens' Initiative" SWP Working Paper (2011).

<sup>16</sup> Commission Discussion Paper 'The Commission and Non-governmental organisations: Building a Stronger Partnership' COM(2000)11 final.

<sup>17</sup> Klüver, "Lobbying as a collective enterprise: winners and losers of policy formulation in the European Union", 20 JEPP (2013), 59-76, at 62; Hauser, op. cit. *supra* note 27 at 692.

initiating legislation; consulting with these stakeholders before proposing legislation is said to improve policy design.<sup>18</sup>

From an institutional point of view, the European Council is also a key source of influence upon the exercise of the Commission's legislative initiative, by setting out the EU's priorities and general political direction. Commission legislative proposals often originate from Member States' preferences expressed collectively in the European Council, and it is common for the European Council to issue directions to the Commission on submitting such proposals.<sup>19</sup> In the context of the Eurozone crisis specifically, the European Council was even criticised for assuming the role of legislative initiator by establishing detailed proposals masked as generic guidelines, and monitoring their implementation.<sup>20</sup>

In light of this background, it can be seen that agenda-setting in most EU policy areas involves the input of several actors with potentially contesting interests.<sup>21</sup> Hence, although the ECI could not have been given any binding powers to oblige the Commission to act, the potential of this participatory mechanism to influence EU law-making could be greater than is first apparent. This argument is reinforced by two observations concerning the rights of the European Parliament and the Council to propose legislation to the Commission (Articles 225 and 241 TFEU respectively). Firstly, the two EU Institutions may seek to impact the Commission's decisions on the follow-up of the ECI either by way of their Treaty rights or less formal mechanisms.<sup>22</sup> For instance, the day-to-day informal interaction between EU Institutions and Members of the European Parliament (MEPs) is a common way to inform the Commission of any requests for legislation.<sup>23</sup> The Directives on the ban on tobacco advertising and on trans-frontier television broadcasts are examples of legislation that originated from calls of action by the European Parliament.<sup>24</sup>

The influence of the two EU Institutions, the argument goes, directly affects the potential of the ECI to turn citizens' proposal into legislation. Particularly at the beginning of the ECI's operation, an expectation was expressed in the literature that, if the European Parliament and the Council support a successfully submitted ECI, the proposal put forward could have more chances of being followed-up by the Commission as a legislative proposal.<sup>25</sup> On this view, the two co-legislators could promote an ECI by putting pressure on the Commission to respond positively to the Initiative's proposals. This would be all the more likely considering that, at the end of a successful campaign, ECI organisers are

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<sup>18</sup> Saurugger, *op. cit. supra* note 12 at 1281; See Commission White Paper on Governance, COM(2001)428 final, at 14 where it was stated that '[NGOs] play an important role at global level in development policy [and they] often act as an early warning system for the direction of political debate'.

<sup>19</sup> Nugent and Rhinard, "In the European Commission Really in Decline?" 54 *JCMS* (2016), 1-17, pp. 5,8,10.

<sup>20</sup> Dawson and De Witte, "Constitutional Balance in the EU after the Euro-Crisis", (2013) *MLR*, 817-844 at 830; For a different view on the actual effect of the European Council on the Commission's right of initiative see Nugent and Rhinard *op.cit supra* note 19.

<sup>21</sup> Bouza Garcia and Greenwood, *op.cit. supra* note 10 at 155.

<sup>22</sup> Written evidence by Richard Corbett for the House of Lords EU Committee, *Initiation of EU Legislation* (HL 2007-2008, 150-I).

<sup>23</sup> House of Lords EU Committee, *Initiation of EU Legislation* (HL 2007-2008, 150-I) para 84.

<sup>24</sup> See respectively: Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products O.J. 1998, L 213; Directive 97/36/EC amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. 1997, L 202/60; Richard Corbett in House of Lords Report *op. cit. supra* note 22.

<sup>25</sup> Smith, "The European Citizens' Initiative: A New Institution for Empowering Europe's Citizens?" in Dougan, Nic Shuibhne, Spaventa (Eds.), *Empowerment and Disempowerment of the European Citizen* (Hart, 2012), 277-290, at 285; Maiani, "Citizen Participation and the Lisbon Treaty: A legal perspective" 484 *SPP* (2011) at 118; Dougan, *op.cit. supra* note 2, pp. 1843-1844.

invited to a public hearing with attendants from the EU Institutions (Article 11 of the ECI Regulation).

Secondly, the indirect legislative proposals of the European Parliament and the Council are increasingly being followed-up by the Commission.<sup>26</sup> The Recital to the ECI Regulation confirms that the indirect right of legislative initiative of one million people has a similar status to the right held by the European Parliament and the Council. An outright rejection of an ECI by the EU Institutions (particularly the Commission) would not only have negative effects on the ECI's credibility as an agenda-setting mechanism.<sup>27</sup> It would also be significant with regard to the future use of the ECI, since 'participation without power can lead to more disaffection, as citizens go through the exercise of engaging only to have decisions taken elsewhere and for reasons unrelated to citizen input'.<sup>28</sup> It has therefore been suggested that, in the same way that the Commission is hesitant to ignore the non-binding proposals of the co-legislators, it would be hesitant to turn down a successfully submitted ECI which expresses the views of a representative part of the EU citizenry.<sup>29</sup>

All things considered, the Commission's responsiveness to guidelines of the European Council, and proposals from the European Parliament and Council, as well as its exchanges with multiple actors, indicate that the non-binding nature of the ECI should not necessarily conclude that successfully submitted ECIs would not have any influence on the Commission's monopoly of initiative. Four years after the registration of the first ECI, and considering that three Initiatives have managed to collect a million signatures and proceed to the follow-up stage, the time is ripe to assess the potential of citizens to influence EU legislation by organising an ECI.

### 3. The ECI on the ground

Inevitably, the exploration of the ECI's actual potential to affect EU law-making will revolve around the Commission's discretion to act on a successfully submitted ECI. This section engages with this task by focusing on the stage that comes after the 12-month deadline for the collection of signatures, namely the 'follow-up' or 'examination' stage for successfully submitted ECIs. This stage includes a public hearing at the European Parliament and an official response from the Commission to the ECI's organisers.

The legal framework in place does not allow ECI organisers to do much to influence the Commission's discretion concerning the final outcome of their Initiative. After the validation of signatures is completed, the organisers can submit their ECI to the Commission (Article 9). If they have managed to collect the necessary signatures, they proceed to the public hearing procedure. The ECI Regulation requires that a public hearing must be organised for the ECI organisers at the premises of the European Parliament and should be attended by representatives of the Commission (Article 11). Between the submission of an ECI and the date of the public hearing, Commission representatives must meet with the ECI organisers to listen to the details of their proposed initiatives (Article 10(1)(b)). After the public hearing, the Commission has three months to publish a

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<sup>26</sup> Ponzano, Hermanin, and Corona, "The power of initiative of the European Commission: A progressive erosion?" 89 *Notre Europe Study and Research* (2012), pp. 39,40.

<sup>27</sup> Vogiatzis, *op. cit. supra* note 12 at 107.

<sup>28</sup> Warren, "Citizen Participation and Democratic Deficits: Considerations from the Perspective of Democratic Theory" in De Bardeleben and Pammett, (Eds.), *Activating the Citizen* (Palgrave MacMillan, 2009) at 29; Dougan, *op. cit. supra* note 2 at 1844; Bouza Garcia, "How could the new Article 11 TEU contribute to reduce the EU's democratic malaise?" in Dougan, Shuibhne, Spaventa (Eds.), *Empowerment and Disempowerment of the European Citizen* (Hart, 2012) 273, at 273.

<sup>29</sup> Ponzano, *op. cit. supra* note 7; Bouza Garcia, *Participatory Democracy and Civil Society in the EU*, (Palgrave Macmillan, 2015) 137.

Communication with its legal and political conclusions on the ECI, ‘the action it intends to take, *if any*, and its reasons for taking or not taking that action’ (Article 10(1)(c)).

In the first four years of the ECI’s operation, three of the 34 registered ECIs managed to collect the minimum number of signatures required: ‘One of Us’ collected 1,897,588 signatures, ‘Right to Water’ 1,844,790, and ‘Stop Vivisection’ 1,326,807 signatures. Of the remaining ECIs that reported the number of signatures that they collected, none was even close to the one million threshold.<sup>30</sup>

The three ECIs with the most signatures presented their initiatives to Commission representatives and MEPs at public hearings in the European Parliament. Members of different Commission Directorate Generals (DGs) attended the public hearings, depending on the topic of each ECI. Subsequently, the Commission responded to the ECI organisers with Communications. In each of the three Communications, the Commission set out its conclusions as to any follow-up actions that it would take based on the ECI; notably, it did not commit to any binding legislative acts based on the submitted proposals.

There is a noticeable contrast between the three Communications of the Commission to the successful ECIs. While the Commission proposed some follow-up actions for the ‘Right to Water’ and the ‘Stop Vivisection’ ECIs, it rejected all of the proposals of ‘One of Us’ without even suggesting any alternatives or compromises. To an extent, the differences in the Commission’s responses can be attributed to the substantial divergence in the subject matters of these ECIs, and to the antithesis of their overall objectives. The ECIs related to issues of water privatisation, animal experimentation, and abortion (phrased in the ECI proposal as ‘destruction of human embryos’) respectively, and while ‘Right to Water’ mainly asked the Commission to take further action in areas that the EU was already acting, ‘One of Us’ and ‘Stop Vivisection’ asked the Commission to make radical policy changes. Out of the three, the ‘Right to Water’ ECI, which was the first to be submitted and the least controversial, received the most affirmative response from the Commission.

Against this background, we will now consider the Commission’s discretion to act on a successfully submitted ECI by addressing two questions formulated in light of the argument that the ECI could have more influence on the Commission’s power of initiative than its legal framework reveals. The first question asks whether and how the two EU co-legislators have affected the chances of successful ECIs to lead to a Commission’s proposal. The second question asks whether the Commission was under pressure to act on the first wave of successfully submitted ECIs in order to maintain the credibility of the mechanism.

### **3.1. Did the European Parliament and the Council affect the chances of ECIs to lead to legislation?**

Out of the three ECIs, the outcome of the ‘Right to Water’, which was the first ECI that managed to collect the necessary signatures, was the most positive. Having reached the signature thresholds in 15 Member States, the ECI was submitted to the Commission on 20 December 2013. Its public hearing was organised by the European Parliament Committee on the Environment, Public Health and Food Safety (ENVI Committee), and was attended by MEPs, the ECI’s citizens’ committee, and a large number of activists and members of the public.

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<sup>30</sup> The reader can refer to the ECI website for information and data regarding the ECIs mentioned throughout this contribution: <<http://ec.europa.eu/citizens-initiative/public/welcome>> (last visited 10 June 2016). The Commission’s 3-year Report on the ECI provides further information: Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 211/2011 on the citizens’ initiative COM(2015)145 final (hereinafter ‘Commission 3-year Report on the ECI’).

Briefly put, the submitted ECI proposal comprised three requests. It primarily asked for the adoption of EU legislation that recognises water and sanitation as a human right in line with international law under the 2010 United Nations Resolution 64/292.<sup>31</sup> It also suggested that the provision of water and sanitation should be acknowledged as a public service for all EU citizens under Article 14 TFEU and thus that the Commission should abstain from proposing legislative initiatives for the liberalisation of water and sanitation services. Finally, the ECI urged the Commission to increase its efforts to achieve universal access to water and sanitation as part of the EU's development policy (Articles 209 and 210 TFEU). The bottom line is that the ECI aimed to prevent the privatisation of water services in the EU. The common rationale behind the three requests was that making the provision of water services a public good is the only way to establish the human right to water, and since the privatisation of water supply would conflict with this right, such privatisation should be prohibited.<sup>32</sup>

The Commission released its official response to the 'Right to Water' on 19 March 2014, in a Communication accompanied by a Press Release with an eye-catching title ('Commission says yes to first successful European Citizens' Initiative'),<sup>33</sup> implying that the Commission decided to act on the ECI's proposals. Ensuring that the EU remains neutral regarding national decisions for water undertakings and prioritising attempts for universal access to water and sanitation in the context of the EU's development policy, were identified as some of the areas in which the Commission was prepared to act. With respect to these areas, the Communication outlined a series of follow-up actions in response to 'Right to Water'.

Although the Press Release stated that 'the Commission today decided to react positively to the first ever successful ECI', it is more accurate to say that the Commission met the requests of the organisers somewhat halfway. For instance, even though the Commission acknowledged the human rights dimension of access to safe drinking water and sanitation, it did not suggest relevant legislation to make this a part of EU law under Article 14 TFEU as the ECI organisers had suggested. Furthermore, most of the actions proposed by the Commission built upon already existing EU efforts, thus making it unclear whether they were indeed measures tailored to the ECI or merely a continuation of the Commission's current practice.<sup>34</sup> As for the central objective of the ECI - to prevent the privatisation of water services - the Commission only mentioned the exclusion of water from the Concessions Directive and from legislation on public procurement where local authorities decide to provide the water services themselves.<sup>35</sup>

Despite the lack of a proposal for a legally binding instrument, the Commission has pursued some of its proposed follow-up actions since its reply to the 'Right to Water' organisers.<sup>36</sup> For example, it invited the ECI organisers to participate in a stakeholder meeting on the benchmarking of water

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<sup>31</sup> UN Resolution 64/292 adopted by the General Assembly on 28 July 2010, A/RES/64/292.

<sup>32</sup> Schiffler, *Water, Politics and Money: A Reality Check on Privatization* (Springer, 2015) at 116.

<sup>33</sup> Commission Communication on the European Citizens Initiative 'Water and sanitation are a human right! Water is a public good, not a commodity!' COM(2014)177 final, Brussels, 19 March 2014 (Hereinafter Communication on 'Right to Water'); Commission Press Release, "Commission says yes to first successful European Citizens' Initiative" IP/14/277.

<sup>34</sup> For example, the Commission stated that it would build on the commitments presented in the 7<sup>th</sup> Environmental Action programme in order to reinforce implementation of water quality legislation. Communication on 'Right to Water' at 13.

<sup>35</sup> Art. 12 of Directive 2014/23/EU on the award of concession contracts O.J. 2014, L 94/1.

<sup>36</sup> A summary of the actions is available at: <[http://ec.europa.eu/dgs/secretariat\\_general/followup\\_actions/citizens\\_initiative\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/followup_actions/citizens_initiative_en.htm)> (last visited 10 June 2016).



quality. Most notably, the Commission has committed to revise the Drinking Water Directive.<sup>37</sup> In this respect, the Commission's Work Programme 2017 refers explicitly to the 'Right to Water' ECI as one of the driving forces behind the revision, the other being the recent evaluation of the Directive as part of the Commission's 'Regulatory Fitness and Performance Programme' (REFIT).<sup>38</sup>

Not only was some action taken by the Commission as a response, but formal support was also received from the European Parliament. Specifically, an own-initiative resolution on the follow-up to the 'Right to Water' was prepared by the ENVI Committee, with Opinions from the Petitions Committee (PETI) and the Committee on Development (DEVE),<sup>39</sup> and adopted by the European Parliament Plenary on 8 September 2015 (hereinafter European Parliament Resolution).<sup>40</sup>

The starting point of the European Parliament Resolution was that the Commission's reply to the 'Right to Water' was unsatisfactory because it did not introduce all the measures that were necessary to achieve the objectives of the ECI. On this premise, and motivated by two considerations, the European Parliament requested that the Commission takes further actions. The first consideration behind the Resolution relates to the topic of the particular ECI. The European Parliament shares the view and aspirations of the ECI organisers that water should be recognised as a human right at the EU level. To this end, the Resolution asked the Commission to submit legislative proposals and consider revising the Water Framework Directive.<sup>41</sup> The second motivation underlying the Resolution is more broadly linked to the functioning of the ECI as a mechanism for participatory democracy. In this regard, the European Parliament maintains the view that the credibility of the ECI is at risk unless the Commission comes up with relevant legislative proposals.

At first sight, the position of the European Parliament on the follow-up of 'Right to Water' seems to support the argument that an ECI that has not been acted upon by the Commission could still have a chance of resulting in legislation if it is supported by the European Parliament or the Council.<sup>42</sup> The adoption of the European Parliament Resolution in plenary confirms that EU Institutions could promote an ECI by putting pressure on the Commission to respond positively to the proposals of the organisers.

The argument, however, becomes more nuanced when one looks at the Commission's response to the European Parliament's Resolution.<sup>43</sup> The response emphasised that 'under the existing requirements the Commission is not obliged to follow all the specific requests contained in a successful ECI' and that 'when the Commission does not respond positively to each element of a successful ECI, this cannot be considered to be neglecting the initiative.' Having said that, it noted that the Commission 'will consider all of Parliament's calls related to water and environmental policies and take them into account in its future work.'

Admittedly, it is still uncertain whether the European Parliament Resolution will have any tangible effect on the Commission's future follow-up actions to the 'Right to Water'. Advocates of

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<sup>37</sup> Directive 98/83/EC on the quality of water intended for human consumption O.J. 1998, L 330.

<sup>38</sup> European Commission Work Programme 2017 COM(2016) 710 final <[http://ec.europa.eu/atwork/pdf/cwp\\_2017\\_en.pdf](http://ec.europa.eu/atwork/pdf/cwp_2017_en.pdf)> at 5.

<sup>39</sup> European Parliament Report on the follow-up to the European Citizens' Initiative Right 2 Water (2014/2239(INI)) A8-0228/2015, (17 July 2015) (hereinafter EP Report on 'Right to Water').

<sup>40</sup> European Parliament resolution of 8 September 2015 on the follow-up to the European Citizens' Initiative Right2Water (2014/2239(INI)) P8\_TA-PROV(2015) (hereinafter EP Resolution on 'Right to Water').

<sup>41</sup> EP Resolution on 'Right to Water' para. 10.

<sup>42</sup> See *supra* section 2.1.

<sup>43</sup> Follow up to the European Parliament resolution on the follow up to the ECI Right2Water, adopted by the Commission on 9 December 2015.

representative democracy are likely to criticise the Commission for not following the European Parliament's suggestions more closely. Almost irrespective of its actual influence, however, the European Parliament's involvement in the continuation of the ECI in question sheds light on the interaction between participatory (Article 11(4) TEU) and representative (Article 10(2) TEU) avenues of citizens' engagement in EU politics. In particular, the political influence of the European Parliament (representative avenue) in promoting an ECI (participatory avenue) has a dual benefit.

Firstly, the said ECI could still potentially benefit from an increased chance to result in tangible actions from the Commission. Moreover, if the organisers decide to continue campaigning after the end of the ECI's lifecycle, their campaign will benefit from the European Parliament's support irrespective of whether or not the Commission acts upon the initiative. The 'Right to Water' organisers, for instance, are now able to claim not only that they have a mandate from their 1.9 million signatories to continue pushing for their objectives, but also that their attempts are reinforced by the only directly elected democratic institution of the EU. The European Parliament's support to the ECI's cause can only help with the visibility of the campaign.

Secondly, by promoting a successfully submitted ECI such as the 'Right to Water' for inclusion in the Commission's legislative agenda, the European Parliament enhances its own image as a representative of EU citizens. By supporting the successful ECI, the European Parliament promotes an image of itself as the defender of successfully submitted ECIs and as an institution that is ready to step up in support of EU citizens' attempts to voice their collective aspirations.<sup>44</sup> In addition, the European Parliament's Resolution has provided another layer of accountability from the Commission, by forcing the latter to publish a reply to the Resolution further explaining the reasons behind its response to the said ECI.

Whatever the outcome of the institutional crossing between the European Parliament and the Commission, the case of 'Right to Water' illustrates the synergy between citizens' representative avenues and citizens' participatory avenues in the context of the EU institutional order with respect to the ECI.<sup>45</sup> This synergy demonstrates that the ECI is not detached from the rest of the EU's legal and institutional fabric and should be seen as an opportunity for citizens' participation that exists parallel to the functioning of the European Parliament as the main representative body for EU citizens. It can thus be argued that Article 10(2) TEU and Article 11(4) TEU reinforce each other both in theory and in practice, as opportunities for EU citizens to become involved in the EU decision-making process.

By way of contrast with the European Parliament's vocal presence in the follow-up to the 'Right to Water', the Council has been absent from the ECI's examination stage. No Council representatives attended the three ECIs' public hearings, and no official position on any of the ECIs has been published by the Institution. At the start of the ECI, academic commentators argued that the Council could filter an ECI as part of the ordinary legislative process thus affecting the ECI's final outcome.<sup>46</sup>

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<sup>44</sup> This is not the first time that the EP explicitly asserts such a role. Its willingness to make use of its powers and political influence for the purposes of protecting citizens' interests was also evidenced in its rejection of the Anti-Counterfeiting Trade Agreement (ACTA). As a formal agreement with a third country, ACTA needed the consent of the EP (Article 218 TFEU) in order to be concluded. In July 2012, ACTA was rejected by 478 to 39 votes due to concerns about the inadequate protection of citizens' intellectual rights and data privacy.

<sup>45</sup> At the early stages of the ECI's operation, Michael Dougan wrote in this journal about the possibility of the EP and the Council to call upon the Commission to act 'thus combining the pressure of participatory with that of representative democracy upon the exercise of the Commission's prerogative of legislative initiative', see Dougan, *op. cit. supra* note 2 at 1844.

<sup>46</sup> Lopez, "A Preliminary approach to the Regulation on European Citizens' Initiative from Comparative Constitutional Law" Bruges Political Research Papers 24/2012 (2012) at 256.

As will be subsequently shown, the response of the Commission to ‘One of Us’ further suggests that the positions, priorities, and activities both of the Council and the European Parliament also have an indirect impact on the Commission’s reaction to successfully submitted ECIs.

After collecting the largest number of validated signatures collected by an ECI to date (1,897,588), ‘One of Us’ was presented to the European Parliament at a public hearing on 10 April 2014. ‘One of Us’ asked for an EU-wide ban and termination of ‘the financing of activities which presuppose the destruction of human embryos’, such as EU funds for research and foreign aid programmes linked in some way to human embryos and especially abortion. The ECI’s proposals consisted of three legislative amendments to existing EU secondary legislation. According to the proposals: the Financial Regulation<sup>47</sup> should stop any budget allocation for the funding of activities that require the destruction of human embryos; these activities should be excluded from the scope of financing of research projects under Horizon 2020;<sup>48</sup> and, the EU Development Cooperation policy<sup>49</sup> should be modified to prohibit the allocation of EU funds to organisations that directly or indirectly promote abortion in third countries.

During the public hearing of the ECI, which was organised jointly by the Committee on Development, the Committee on Legal Affairs, the Committee on Industry, Research and Energy, and the PETI Committee, an intense debate took place between MEPs and the ECI organisers. The ECI organisers blamed the EU for financing abortion through development aid, even in countries where abortion is illegal, and asked for transparency in the Commission’s funding practices. Although some MEPs supported the ECI, others criticised it on the basis that it would prohibit the EU from meeting its international commitments on development aid, family planning, and sexual and reproductive health.<sup>50</sup> These concerns were later reflected in the Commission’s Communication, which was published on 28 May 2014.<sup>51</sup>

Every single proposal of the ECI was rejected by the Commission in its Communication. The main reason put forward by the Commission for refusing to act in response to ‘One of Us’ was that the two EU co-legislators had only recently voted for the current legislation. This justification strongly suggests that the views of the EU co-legislators are vital in the Commission’s decision to go through with the drafting of legislation and, by extension, with accepting or rejecting an ECI.<sup>52</sup> After all, the process of determining the issues to be included in the EU agenda is equally political in nature as the

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<sup>47</sup> Regulation No 966/2012 on the financial rules applicable to the general budget of the Union, O.J. 2012, L 298/1; Commission Delegated Regulation No 1268/2012 on the rules of application of Regulation No 966/2012 on the financial rules applicable to the general budget of the Union, O.J. 2012, L 362/1.

<sup>48</sup> This exclusion would primarily affect research activities that require the collection or use of human embryonic stem cells. Regulation No 1291/2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC, O.J. 2013, L 347/104.

<sup>49</sup> Regulation No 233/2014 establishing a financing instrument for development cooperation for the period 2014-2020, O.J. 2014, L 77/44.

<sup>50</sup> Author’s observations from the public hearing. For two very different descriptions of the hearing see: International Planned Parenthood Federation (IPPF) “European Citizens’ Initiative “One Of Us” discussed in European Parliament” <[www.ippfen.org/news/](http://www.ippfen.org/news/)> and European Dignity Watch, ‘Historic Hearing at European <<http://europeandignitywatch.org/pl/codzienny/detail/article/historic-hearing-at-european-parliament.html>> (both visited 8 June 2016).

<sup>51</sup> Communication from the Commission on the European Citizens’ Initiative “One of Us” of 28 May 2014, COM(2014) 355 final (hereinafter Commission Communication on ‘One of Us’).

<sup>52</sup> See Vogiatzis op. cit. *supra* note 12 for a similar argument made at the initial stages of the ECI; See generally on the Commission’s legislative initiative: Rasmussen, “Challenging the Commission’s right of initiative? Conditions for institutional change and stability” 30 WEP (2007), 248-249; Nugent and Rhinard, op.cit. *supra* note 11.

process of deciding on those issues once they are on the agenda.<sup>53</sup> It is not uncommon for the Commission to abstain from submitting proposals that are likely to be rejected by the two Institutions. Take here as an example the Commission's 2015 Programme, which worked on the basis of 'political discontinuity', according to which a newly-structured Commission can review all the existing legislative proposals at the beginning of its term and decide which of those proposals to pursue and which to withdraw.<sup>54</sup> After what the Commission describes as 'constructive discussions with the other institutions', only legislative proposals with good chances of being adopted remained on the table.<sup>55</sup>

The description of the European Parliament's and the Council's indirect influence over the Commission's prerogative of legislative initiative tallies well with the Commission's reply to 'One of Us'. It appears from the Commission's Communication that, knowing that the European Parliament and the Council would not have voted for a proposal to modify the heavily-debated regulatory framework that they had adopted only a few months ago, the Commission chose not to proceed with undertaking any legislative or other commitments based on the proposals of 'One of Us'.<sup>56</sup> This is not to say that the Commission's decision was or will always be directed by the two Institutions; the Commission has its own agenda as well, which does not always follow the agendas of the European Parliament or the Council.<sup>57</sup> It is rather to suggest that, based on the currently available evidence, an ECI has slim chances of resulting in a legislative proposal if its aims and objectives sharply contrast with the priorities and existing agenda of the Commission or the two co-legislators.<sup>58</sup>

Although the ECI was launched and promoted as an indirect way to propose legislation analogous to the rights of the European Parliament (Article 225 TFEU) and the Council (Article 241 TFEU), the difference is apparent. Essentially, the comparison is between the weight of the influence exerted on the agenda by the two EU co-legislators and the influence of a group of less than 2 million citizens. Even though the required one million signatories of a successful ECI are supposed to represent the EU as a whole, they amount to little more than 0.2% of the entire EU citizenry, and the proposals are not the subject of any popular voting.<sup>59</sup> The Commission's response to 'One of Us' strongly indicates that, so far, between the preferences of the Commission, European Parliament and Council, and those of one million ECI signatories, the former prevail in the Commission's considerations about its reply to a successfully submitted ECI.

The follow-up of 'One of Us' therefore reveals a different picture than that of 'Right to Water' regarding the interplay of citizens' representation and citizens' participation in the EU. In the context of the second successfully submitted ECI, the two forms of citizens' civic engagement do not co-exist in synergy, but are rather juxtaposed in the EU decision-making apparatus. So far, the inter-institutional dynamics appear to favour the position of the two co-legislators where these are opposed

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<sup>53</sup> Princen op. cit. *supra* note 11 at 22.

<sup>54</sup> Framework Agreement on relations between the European Parliament and the European Commission, O.J. 2010, L 304/47, point 39(2); Commission Communication, "Commission Work Programme 2015: A New Start" COM(2014)910 final.

<sup>55</sup> Over the past five years on average 30 proposals were withdrawn annually. European Commission Press Release IP/15/4567; European Commission, "Questions and Answers: the 2015 Work Programme" MEMO/14/2704 (14 December 2014).

<sup>56</sup> Smismans, "Democratic participation and the search for an institutional architecture that accommodates interests and expertise" in Piattoni (Ed), *The European Union: Institutional Architectures and Democratic Principles in Times of Crisis*. (OUP 2015), 88-111, at 92.

<sup>57</sup> Princen, op. cit. *supra* note 11 at 28; An example is the recent inter-institutional dispute on the Commission's power to withdraw a legislative proposal, see Case C-409/13, *MFA*.

<sup>58</sup> Bouza Garcia and Greenwood explain that 'interest groups are more effective when advocating agendas that go in the direction of a change that is desirable to one of the institutions', see op. cit. *supra* note 10 at 155.

<sup>59</sup> Smismans op. cit. *supra* note 56 at 92.

to the objectives of a successfully submitted ECI. This observation could even indicate that the more elaborate the legislation in a specific field (for instance in areas that are heavily regulated such as research funding and development aid), the more difficult it would be for an ECI to trigger a legislative change in that area.<sup>60</sup>

### 3.2. Was the Commission under pressure to act on the first wave of ECIs?

The Commission's willingness to act on the 'Right to Water' close to the end of the signature collection stage with regard to the Concessions Directive supports the argument that the Commission would be hesitant to disregard a successful ECI's proposals. The organisers of 'Right to Water' were explicitly against the adoption of the Directive, which they perceived at the time as the latest indirect attempt of the EU to privatise water services.<sup>61</sup> In June 2013, the then Commissioner for Internal Market and Services, Michael Barnier, announced that water was removed from the scope of the Concessions Directive. Barnier explicitly referred to the 'Right to Water' ECI in his statement, commenting that it is the Commission's duty 'to take into account the concerns expressed by so many citizens'.<sup>62</sup> Nonetheless, the pressure from such concerned voices worked to the benefit of the ECI organisers only to a certain extent. While the organisers welcomed the exclusion of water from the Directive and from public procurement legislation, they criticised the Commission for not also excluding water services from international negotiations, such as the negotiations over the Transatlantic Trade and Investment Partnership (TTIP).<sup>63</sup>

In addition, the response to the 'One of Us' proposals refutes any strong expectations that the Commission would feel pressurised to act upon a successfully submitted ECI as an attempt to safeguard the popularity and credibility of this novel mechanism. The Press Officer of 'One of Us' had expressed the view that it was unlikely that the Commission would ignore the nearly two million signatures collected by the campaign.<sup>64</sup> Despite the expectations of the organisers, the Commission has made full use of its discretion to decide on the future of the ECI based on political considerations.

The outcome of 'One of Us' throws into sharp relief the inability of the ECI to exert strong pressure on the Commission in order to compel it to take action. In this respect, it is also relevant that the responsibility to respond to an ECI belongs to the Commission rather than an elected, representative institution. Research about national experiences of citizens' initiatives indicates that the attitude of representative bodies to successful citizens' initiatives can have direct impact on the chance of re-election of national parties.<sup>65</sup> As the Commission is not elected by voters, it does not risk losing

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<sup>60</sup> *ibid*

<sup>61</sup> "How the concessions directive is a new piece in a longer struggle to privatise water and make money out of water-services" (20 February 2013) < [www.right2water.eu/news/how-concessions-directive-new-piece-longer-struggle-privatise-water-and-make-money-out-water](http://www.right2water.eu/news/how-concessions-directive-new-piece-longer-struggle-privatise-water-and-make-money-out-water) > (visited 10 June 2016).

<sup>62</sup> Statement by Commissioner Michel Barnier, 21 June 2013, <[http://ec.europa.eu/archives/commission\\_2010-2014/barnier/headlines/speeches/2013/06/20130621\\_en.html](http://ec.europa.eu/archives/commission_2010-2014/barnier/headlines/speeches/2013/06/20130621_en.html)> (last visited 9 June 2016).

<sup>63</sup> Press Release from the 'Right 2 Water' Citizens' Committee, "Commission lacks ambition in replying to first European Citizens' Initiative" <[www.right2water.eu/news/press-release-commission-lacks-ambition-replying-first-european-citizens%E2%80%99-initiative](http://www.right2water.eu/news/press-release-commission-lacks-ambition-replying-first-european-citizens%E2%80%99-initiative)> (last visited 2 June 2016).

<sup>64</sup> Ana Del Pino, Interview in Berg and Thomson (Eds.), *An ECI That Works!* (The ECI Campaign, 2014).

<sup>65</sup> Qvortrup, "The Legislative Initiative: A Comparative analysis of the domestic experiences in EU countries" in Dougan, Nic Shuibhne, Spaventa (Eds.), *Empowerment and Disempowerment of the European Citizen* (Hart, 2012) at 298; Muller, "Party Competition and Plebiscitary Politics in Austria" 17 *Electoral Studies* (1998), 21-43, pp. 21, 26, 31.

voters' support as a result of its decisions, and thus has a weaker incentive to act on an ECI's proposals.<sup>66</sup>

The follow-up of 'One of Us' is a telling example not only of the interinstitutional dynamics that surround the operation of the ECI, but also of the array of factors to be taken into account when deciding on the proposals of an ECI. Apart from the abovementioned democratic considerations seemingly taken into account by the Commission, the Communication also explained that the current state of play in the EU with regard to the policy areas in question was satisfactory. The strict monitoring, evaluation, and financial audits which takes place to ensure the quality of these financing programmes was emphasised throughout the Communication. According to the Commission, there is no need to propose changes to the current legislation.<sup>67</sup>

A similar focus on the current legislative efficiency is observed with respect to the Commission's follow-up to 'Stop Vivisection'. The ECI proposed the repeal of Directive 2001/63/EU<sup>68</sup> in order to phase out the practice of animal experimentation. The third successfully submitted ECI serves as an example of additional considerations that limit the potential of an ECI to impact the Commission's power of legislative initiative. In its Communication, the Commission highlighted the twofold effectiveness of the Directive in allowing the use of animal models to test medicines that could be too dangerous for human trials and in ensuring the protection of such animals.<sup>69</sup> The main message of the Communication was that, although the Commission shared the position of the ECI organisers on abolishing animal experimentation in the future, the Directive is currently 'an indispensable tool at the EU level'.

Contrary to the categorical rejection of 'One of Us', some follow-up actions were proposed by the Commission in response to 'Stop Vivisection', including actions to accelerate the phasing out of animal-based research, and organising a debate between the scientific community and relevant stakeholders, including the ECI organisers, on developing alternative methods of experimentation. Most of these actions, however, were either based on existing activities of the Commission or would have taken place anyway in the context of Directive 2010/63/EC.<sup>70</sup> Moreover, according to the Commission the Directive is currently the most efficient way to ensure the welfare of animals used in experiments. Animal experimentation has led to numerous advancements in medicine and rejecting it altogether was a premature objective that would only result in the deregulation of animal practices and thus in an inadequate standard of animal protection. The efficiency of the current legislative framework in the protection of those animals meant that the objectives of the ECI could not be met at this point in time.

To summarise, it would appear that the effectiveness and efficiency of current legislation are primary considerations for the Commission when deciding on how to reply to an ECI. In this respect, the outcome of 'Stop Vivisection' can also be linked with the so-called trade-off between input and output legitimacy, whereby 'good output policies are seen to make up for a lack of participatory input'.<sup>71</sup> In a similar vein, it can be argued that the importance placed on the efficiency of current

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<sup>66</sup> Smith, *op. cit. supra* note 25 at 285.

<sup>67</sup> Communication on 'One of Us' at 16.

<sup>68</sup> Directive 2010/63/EU on the protection of animals used for scientific purposes, O.J. 2010, L 276/33.

<sup>69</sup> Communication from the Commission on the European Citizens' Initiative "Stop Vivisection" of 3 June 2015, COM(2015)3773 final, at 10 (hereinafter Communication on 'Stop Vivisection').

<sup>70</sup> Communication on 'Stop Vivisection' pp.8-9, Actions 1,2,3.

<sup>71</sup> Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'" 61 *Political Studies* (2013), pp. 2, 8.

legislation (output legitimacy) is aimed at compensating organisers for the partial disregard of the concrete proposals of ‘Stop Vivisection’ (input legitimacy).

Unless one subscribes to the argument that the Commission should be obliged to initiate the legislative process for each successfully submitted ECI, it should be accepted that the Commission’s role is to assess each successful ECI by considering several factors, such as the effectiveness of the general legal framework, the view and agendas of the EU co-legislators, and the legislative and political priorities of the EU. This approach can be discerned in the responses to the first three successfully submitted ECIs. Our analysis has demonstrated that, so far, the ECI has been an instrument with weak potential to affect the near-monopoly of the Commission to initiate legislation to any substantial degree. This conclusion necessitates an inquiry into the effect of the outcome of the three Initiatives on the credibility of the ECI as a citizens’ participatory mechanism, an issue that will be considered in turn.

#### **4. Mapping expectations and outcomes regarding the ECI’s follow-up stage**

The preceding discussion illustrated the manifestation of the Commission’s discretion to act on successfully submitted ECIs. This discretion has so far had rather negative consequences for the credibility and future development of the ECI. For instance, the organisers of ‘One of Us’ stated that the Commission’s reply was ‘hypocritical and disdainful as the Commission pretends to not understand the purpose of the [ECI’s] demand and comprises of thirty pages of self-satisfaction of its own policy.’<sup>72</sup> In a similar manner, the organisers of ‘Stop Vivisection’ commented: ‘we feel that 1.2 million citizens and three years of intense campaigning deserve something better than a very superficial, generic reply’.<sup>73</sup> Even the ‘Right to Water’ organisers, who received a relatively better response, stated with regard to the absence of a commitment to a legislative proposal that ‘the reaction of the European Commission lacks any real ambition to respond appropriately to the expectations of 1.9 million people’.<sup>74</sup> The organisers also commented: ‘If the European Commission doesn’t want to satisfy our demands, it should just say it and provide reasons instead of pretending to do one thing and do the opposite’.<sup>75</sup>

The statements by the organisers indicate dissatisfaction not only with the outcome of their ECIs, but also with the process by which the Commission reached and communicated its replies. The organisers’ reactions were neither unforeseen nor surprising. In the context of participatory mechanisms which grant the final say to representative institutions rather than citizens, actors who use these mechanisms may be left disappointed with the outcome if they perceive that their attempts were not at all influential.<sup>76</sup> It also appears from the ECI organisers’ comments that they had certain expectations from the EU Institutions, which were left unfulfilled. Although the Commission clarified from the beginning that the ECI is not a legally binding mechanism, the demanding nature of the ECI

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<sup>72</sup> “The Commission Vetoes the Citizens’ Initiative ‘One of Us’” (28 May 2014) <[www.oneofus.eu/the-commission-vetos-the-citizens-initiative-one-of-us/](http://www.oneofus.eu/the-commission-vetos-the-citizens-initiative-one-of-us/)> (last visited 2 June 2016).

<sup>73</sup> Stop Vivisection Press Release “A disappointing response” (5 June 2015) <<http://stopvivisection.eu/en/content/press-releases>> (last visited 2 June 2016).

<sup>74</sup> Press Release from the “Right 2 Water” Citizens’ Committee <[www.right2water.eu/news/press-release-commission-lacks-ambition-replying-first-european-citizens%E2%80%99-initiative](http://www.right2water.eu/news/press-release-commission-lacks-ambition-replying-first-european-citizens%E2%80%99-initiative)> (last visited 2 June 2016).

<sup>75</sup> Feedback from “Corporate Europe Observatory” to Ombudsman’s own-initiative inquiry OI/9/2013/TN into the functioning of the ECI procedure, available at: <[www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54510/html](http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54510/html)> (last visited 2 June 2016).

<sup>76</sup> Carman, “The Process is the Reality: Perceptions of Procedural Fairness and Participatory Democracy” 58 *Political Studies* (2010), 731-751, pp. 731, 736; Marriott, “A “meaningless charade”? Public petitioning and the indelible marks of history” *PL* (2013), 755-778, pp.755, 767.

- with the detailed legal framework and all the procedural hurdles of the signature collection process<sup>77</sup>  
- seems to have triggered expectations among the organisers that they would receive something different than a mere Communication from the Commission at the end of their campaign. This sentiment is encapsulated in the currently pending case of *One of Us v. Commission*<sup>78</sup>, where the organisers of ‘One of Us’ are challenging the Commission’s refusal to act on their ECI’s proposals, requesting the annulment of the relevant Commission’s Communication.

The bone of contention in the case brought by the ‘One of Us’ organisers against the Commission, the European Parliament, and the Council, is the interpretation of Article 10 of the ECI Regulation, which sets out the details of the ECI’s examination stage, vis-à-vis Article 11(4) TEU. The core of the applicants’ arguments concerns the discretion of the Commission to decide the follow-up to an ECI. According to the applicants, the Commission infringed both Article 10(1)(c) of the ECI Regulation and Article 11(4) TEU by failing to submit a proposal for a legal act. It is also submitted in the case that, if Article 10(1)(c) is found not to oblige the Commission to submit a legislative proposal based on a successful ECI, then the ECI Regulation is incompatible with the Treaties, and should be annulled. The Commission’s Communication is also being challenged on a procedural ground: the organisers submit that the Commission did not adequately substantiate the reasons behind its final decision.

In essence, the applicants contend that the only way to ensure that the ECI is a meaningful instrument of citizens’ participation is to interpret the ECI Regulation as obliging the Commission to transmit a successfully submitted ECI to the European Parliament and the Council by default. The applicants claim that allowing the Commission absolute leeway for the purposes of an ECI’s follow-up is out of proportion with the effort, time, and money spent by organisers collecting one million signatures.<sup>79</sup> The applicants further submit that ‘it is unthinkable that an administrative body like the Commission would have the right to adopt a decision that, based on that body’s institutional self-interest rather than on sound legal reasons, supersedes a legislative proposal directly and explicitly endorsed by more than one million citizens’.<sup>80</sup>

The ‘One of Us’ organisers’ statement appears to undermine the role of the Commission to that of a mere administrator of successful ECIs. An alternative view would point out the Commission’s power of legislative monopoly under Article 17 TEU. Even when the European Parliament or the Council suggest legislative proposals, it is the Commission that takes the final decision as to whether to proceed with these suggestions. Since the Commission is not merely an administrator of the proposals of the European Parliament and the Council, why should it be perceived as such in relation to a successful ECI?

The case illustrates several matters of controversy concerning the examination of successfully submitted ECIs, including the factors to be considered by the Commission in its final decision; the purpose of the ECI mechanism; and, the quality of reasons given by the Commission. Regardless of

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<sup>77</sup> The demanding legal framework of the ECI has been facing criticism since the drafting of the ECI Regulation.

<sup>78</sup> Case T-561/14, *One of Us*; The organisers’ arguments, which are discussed in this section, can be found at: European Centre for Law and Justice “Application to the General Court of the European Union in the case of European Citizens’ Initiative ONE OF US and others versus the European Commission, the Council of the EU and the European Parliament” <<http://eclj.org/>> (last visited 2 June 2016) (hereinafter ‘One of Us’ application to the General Court).

<sup>79</sup> ‘One of Us’ Reply to the Commission’s Defence in Case T-561/14 (Luxembourg, 14 April 2015) paras 3, 4, Document with the author.

<sup>80</sup> ‘One of Us’ Application to the General Court para. 177



its future outcome,<sup>81</sup> the case is a prime example of the mismatch between the expectations of ECI organisers and the way in which the ECI has manifested in practice as a mechanism to influence EU law-making.<sup>82</sup> In contrast to the expectations of organisers, the analysis of the three successfully submitted ECIs has illustrated that an ECI, which has the support of a minority of EU citizens, cannot automatically surpass the multiple considerations to be taken into account by the Commission in proposing and drafting legislation.

In what can be perceived as an attempt to address this mismatch, the Ombudsman and the Commission have recently sought to highlight the political aspect of the ECI vis-à-vis its actual legislative impact. The Ombudsman has suggested that the Commission ‘articulates more clearly for citizens its understanding of the value of the public debate generated through the ECI procedure and of how this debate and irrespective of the individual outcome, gives the ECI process value and legitimacy’.<sup>83</sup> The Commission Vice-President Frans Timmermans recently committed to increasing the capacity of the ECI to foster public debate.<sup>84</sup> Yet, despite Mr. Timmermans’ pledge, neither he, nor the Commission’s 3-year Report on the ECI specified how this can be done. In fact, in the discourse of the EU Institutions on the ECI, the aspiration to ‘enhance public debate’ seems unsupported by any suggestions for procedural changes and thus comes across as a vague notion.<sup>85</sup>

Indeed practice so far indicates that not all ECIs started with the aim of reaching one million signatures; some were used to get media publicity.<sup>86</sup> Others were more focused on creating networks and fostering public relations.<sup>87</sup> For instance, for the organisers of the ‘High Quality Education for All’ ECI, the primary goal was to raise awareness of their objectives.<sup>88</sup>

In spite of the political rhetoric, the Commission, European Parliament, and Council have not (yet) explained how such public debate can be further promoted or supported in relation to an ECI. There have also been suggestions to improve the communication channels between the Commission and ECI organisers, to which the Commission replied that it currently has ‘no plans for a new, formal and systematic form of dialogue with ECI organisers.’<sup>89</sup> It is subsequently argued that procedural improvements in the ECI’s follow-up stage could address organisers’ current feelings of alienation; would demonstrate to citizens the multiple considerations that should be taken into account by the Commission in proposing legislation; and, would show that there are benefits to campaigning other

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<sup>81</sup> We should note here that the admissibility of the ‘One of Us’ before the Court is doubtful, especially when one considers recent judgments concerning petitions to the EP. In the cases of *Schönberger* and *Tegebauer*, the CJEU confirmed that, since the EP Petitions Committee retains full political discretion in its examination of a petition, its final conclusions are not reviewable. See Case C-261/12 P, *Schönberger v. European Parliament*, EU:C:2014:2423; Case T-308/07, *Tegebauer v. European Parliament*, EU:T:2011:466.

<sup>82</sup> For a similar reference to a mismatch between what the ECI is and what citizens, media, and stakeholders, think it is, see Berg and Glogowski, “Heavy Stones in the Road: The ECI in Practice” in Conrad, Knaut, Bottger (eds), *Bridging the Gap? Opportunities and Constraints of the European Citizens’ Initiative* (Nomos 2016) 199-219.

<sup>83</sup> Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2013/TN concerning the European Commission, 4 March 2015, para 21 (hereinafter ‘Ombudsman decision on the ECI’).

<sup>84</sup> Council, ITEM NOTE 9832/15, INST 200, (11 June 2015) at 15.

<sup>85</sup> See, for instance, Draft Opinion of the Committee on Petitions for the Committee on Constitutional Affairs on the European Citizens’ Initiative (2014/2257(INI)): ‘(...) believes that the instrument still has the potential to engage the public and to promote dialogue among citizens’.

<sup>86</sup> Bouza Garcia and Greenwood, op. cit. *supra* note 2 at 15.

<sup>87</sup> *ibid*

<sup>88</sup> “Feedbacks from “MEET ECI” to own-initiative inquiry OI/9/2013/TN into the functioning of the ECI procedure” <[www.ombudsman.europa.eu/en/press/release.faces/en/53306/html.bookmark](http://www.ombudsman.europa.eu/en/press/release.faces/en/53306/html.bookmark)> (last visited 10 June 2016).

<sup>89</sup> Council, ITEM NOTE 9832/15, INST 200, 11 June 2015, at 7.

than legislative output (e.g. creating a network or promoting ideas to the public). With this in mind, and in light of the ECI's current position in the EU institutional structure, it is worth contemplating some suggestions for revisiting the ECI's follow-up stage.

### **5. Revisiting the ECI's follow-up stage: Some procedural suggestions**

The process by which the citizens' participatory attempts are being evaluated is crucial as to whether the outcome of the evaluation will be perceived as satisfactory by the affected citizens. 'Individuals are often willing to accept outcomes they do not prefer if they believe the outcomes were derived through a fair process.'<sup>90</sup> Hence, even though anything shy of a legislative proposal would probably be unsatisfactory for the organisers of successful ECIs, procedural improvements to the follow-up of an ECI could mitigate citizens' frustration with the end result. Most importantly, such improvements could allow EU citizens to assess in a well-informed manner the evaluation of ECIs undertaken by the Commission.

Against this background, the ECI's follow-up process should become more transparent and more open to a plurality of actors, interests, and views. Increasing the transparency of the process would not only emphasise the deliberative characteristics of the entire process. It would also demonstrate the receptiveness of the EU Institutions to a range of interests during the legislative procedure and hence when examining an ECI. Simultaneously, it would oblige the Commission to clarify the source of interests that are contrary to the interests promoted by an ECI, not only at the final stage of issuing its Communication, but also earlier in the ECI process. Opening up the ECI's follow-up stage to further transparency would expose EU citizens to both sides of the debate on the subject matter of an ECI.

Modifying the ECI's follow-up stage could entail an increased involvement of the European Parliament and the Council in the decision of whether to proceed on an Initiative's proposals. It has been argued, for instance, that a successfully submitted ECI should automatically lead to a legislative proposal by the Commission, which would be immediately transmitted to the European Parliament and the Council for voting. A vote by the European Parliament and the Council in favour of the ECI would then oblige the Commission to submit a formal proposal for a legal act. According to this position, adjusting the Commission's obligations with encompassing the drafting of a legislative proposal would tally with the Commission's increased exposure to citizens' participation and would ensure that the ECI is a meaningful and rewarding participatory mechanism.<sup>91</sup>

Nevertheless, a formal and binding obligation on the Commission to submit a legislative initiative based on an ECI would be incompatible with the express wording of the Treaties, the ECI Regulation, and the existing institutional balance. Moreover, there has been no indication by the Commission of any formal or informal move towards a more binding character for the ECI. In its 3-year Report on the ECI, the Commission merely referred to the need for a more structured examination of a successfully submitted ECI and more extensive involvement of the ECI organisers in the follow-up of their initiative.<sup>92</sup> In its recent response to the European Parliament's Resolution on the ECI, the Commission explicitly refuted any possibility for such major restructuring of the ECI follow-up stage.<sup>93</sup>

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<sup>90</sup> Carman, *op. cit. supra* note 76 at 736; See also Marxen, *op.cit. supra* note 3.

<sup>91</sup> See Bouza Garcia, *op. cit. supra* note 28.

<sup>92</sup> Commission 3-year Report on the ECI at 15.

<sup>93</sup> Follow up to the European Parliament resolution on the European Citizens' Initiative 2014/2239(INI), adopted by the Commission on 2 February 2016.

In the Resolution, the European Parliament seemed eager to revisit the follow-up stage. It urged the Commission to revise the wording of Article 10(1)(c) of the ECI Regulation to allow for ‘proper follow-up’ to a successful ECI, and urged it ‘to start preparing a legal act on successful ECIs within 12 months after issuing a positive opinion.’<sup>94</sup> During the drafting of the Resolution, György Schöpflin, the AFCO Rapporteur for the ECI, even commented that ‘[t]he object of the [ECI] exercise is to change EU law, because that was the radical, original dimension that the ECI was supposed to bring about. That there is to be another body - citizens - that can initiate legislation in the EU’.<sup>95</sup>

In the view of the Commission, however, ‘the current rules already ensure an efficient and proportionate mechanism that fully reflects and respects the Commission’s right of initiative.’<sup>96</sup> We have seen that the rules allow for utmost discretion to the Commission regarding its final decisions. The Commission’s statement, however, seems to overlook the other, main players, in the follow-up of an ECI: citizens, and their perception of the Commission’s decisions. Having secured its prerogative of legislative initiative, the Commission should now be turning its attention to ensuring that the justifications of its follow-up decisions are not seen as arbitrary and capricious Commission decisions that undermine the ECI. Extending the examination stage to include the formal input of the European Parliament – the only directly elected EU Institution – would have been a good way to increase the credibility of the ECI.

Given that the option of a parliamentary vote is not on the table, an alternative suggestion would be to open up the examination stage of the ECI to input from the European Parliament in a less formalistic way. In line with the Ombudsman’s suggestion, the European Parliament – and potentially the Council – could provide their opinions on the existence of political support for an ECI before the Commission drafts its final Communication.<sup>97</sup> Taking the Ombudsman’s suggestion one step further, it is equally important that consultations with the two co-legislators are published. This practice would mean more transparency for the benefit of ECI organisers, signatories, and citizens alike. It would thus bring the EU decision-making process closer to the public, as it would expose citizens to the fact that the Commission often does not decide matters in isolation but that its decisions respect (or, at least, should respect) the views of the citizens’ democratically elected representatives.

The above modifications to the ECI process would also be an additional incentive for the Commission to take into account the views of the co-legislators or to explain in more detail the reasons why it may choose to deviate from them. Having said that, it is doubtful whether the Commission is ready to take a step in the direction of re-allocating powers regarding the ECI. In its reply to the calls of the European Parliament to consider the Parliament also as a decision-maker for ECIs, the Commission argued that such an expansion is not envisaged in the ECI Regulation.

By way of contrast, the Commission seemed more open to exposing the ECI’s follow-up stage to a plurality of interests and views. It is relevant here that, in the follow-up to successful ECIs, a number of groups condemned the proposals of the ‘One of Us’ and ‘Stop Vivisection.’ These groups included organisations that receive funding for stem cell research under Horizon 2020, and groups of scientists

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<sup>94</sup> EP Resolution of 28 October 2015 on the ECI 2014/2257(INI) P8\_TA(2015)0382, para. 30.

<sup>95</sup> The ECI Campaign, “The European Citizens’ Initiative and the Promise of Participatory Democracy: Report of 16 June 2015 Conference” <[www.citizens-initiative.eu/eci-conference-full-report/](http://www.citizens-initiative.eu/eci-conference-full-report/)> (last visited 10 June 2016).

<sup>96</sup> Follow up to the European Parliament resolution on the European Citizens' Initiative 2014/2239(INI), adopted by the Commission on 2 February 2016 at 9.

<sup>97</sup> Ombudsman decision on the ECI, para 17.

that support the utility of animal experimentation.<sup>98</sup> At present, such actors that oppose an ECI are not given an official platform to make their views known to the public. Changing the ECI process to allow for more actors to vocalise their viewpoints on successfully submitted ECIs is in consonance with the aspiration of the Commission and the Ombudsman that the ECI should be an instrument for fostering public debate in addition to being an agenda-setting tool.<sup>99</sup> Both the Commission and the European Parliament support the view that stakeholders with different views and perspectives on the topic of each ECI should be heard during the public hearings.<sup>100</sup> Despite the merits of these recommendations for encouraging public debate, the EU Institutions should also be attentive to the unwillingness of the ECI organisers to give their ‘moment of glory’ (the public hearing) to those who challenge their proposals.

With this sentiment in mind, public consultations on a successfully submitted ECI could be an alternative option. Such consultations would also chime with the provisions of the Inter-institutional Agreement on better law-making, according to which the Commission should conduct wide consultations during the period preceding the submission of legislative proposals.<sup>101</sup> This option, however, would require a review of the ECI Regulation, something that the Commission has excluded for now but should be kept in mind for the future.

Finally, another, more creative suggestion, which would not necessarily require a revision of the ECI Regulation, involves the creation of a centralised website or an electronic platform. The platform would publish letters received by the EU Institutions from organisations or groups of citizens who either support or contest the objectives of an ECI. It could also be expanded to include a deliberative platform for all ECIs, in order to allow website visitors to comment on ECI proposals, thus enhancing the ECI’s presence on social media. In this sense, such an electronic platform would go beyond the remit of the current official ECI website that only presents information for each ECI but does not provide any way for users to engage in a discussion.

In addition to supporting public debate, increased transparency of the ECI follow-up stage would make EU citizens aware of the multiplicity of actors and interests that should be weighed up by the Commission when deciding on the follow-up actions to an ECI. The underlying argument here is that, ‘to evaluate decision makers’ performance, citizens need to know the working properties of alternative rules’.<sup>102</sup> A more open follow-up stage would also partly compensate for the lack of any voting procedure at the end of an ECI. Since there is no way for the EU citizenry to vote for or against an ECI, there should be a chance for supporters of both sides of the debate to be heard. Stakeholders would thus become better able to evaluate the follow-up to an ECI by understanding the complexity of the EU institutional structure and the diversity of factors that should be taken into account when the Commission and the two co-legislators decide on whether to proceed with a legislative proposal on a

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<sup>98</sup> In an attempt to affect the outcome of the ECIs, these actors published their views online and communicated them to the Commission and the EP. See, for instance: Wellcome Trust, ‘Statement supporting funding for stem cell and reproductive health research in Europe 2014’ <[www.wellcome.ac.uk/About-us/Policy/Spotlight-issues/EU-affairs/Stem-cell/index.htm](http://www.wellcome.ac.uk/About-us/Policy/Spotlight-issues/EU-affairs/Stem-cell/index.htm)>; European Animal Research Association, ‘More than 120 organisations oppose “Stop Vivisection” initiative’ <<http://eara.eu/more-than-120-organisations-oppose-stop-vivisection-initiative/>> (last visited 9 June 2016).

<sup>99</sup> The ECI Campaign, ‘Timmermans Personally Commits to the ECI’s Continuation’ <[www.citizens-initiative.eu/timmermans-personally-commits-to-the-eci-contitunation/](http://www.citizens-initiative.eu/timmermans-personally-commits-to-the-eci-contitunation/)> (last visited 8 June 2016); Ombudsman Decision on the ECI, paras 17-24.

<sup>100</sup> See EP Report on the ECI, para 31; Follow up to the European Parliament resolution on the European Citizens' Initiative 2014/2239(INI), adopted by the Commission on 2 February 2016, at 10.

<sup>101</sup> Ombudsman Decision on the ECI; Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (13 Apr. 2016) para. 19.

<sup>102</sup> Bohnet and Frey, “Direct-Democratic Rules: The Role of Discussion” 47 KYKLOS (1994) at 345.

particular policy area. Whether the Commission is ready for such an increased level of exposure to the public is a different question.

## Conclusion

This article has considered the development of the ECI against the EU institutional framework and examined whether the ECI is a force of legislative initiative capable of shifting the EU institutional status quo by affecting the powers of the Commission to initiate legislation. Looking at the follow-up to the three successfully submitted ECIs, it was demonstrated that the ECIs have not led to legislation either because the Commission considered that there was no need to propose legislative acts ('Right 2 Water', 'Stop Vivisection') or because the ECI's proposals contradicted the objectives and purpose of legislation that was recently adopted by the European Parliament and the Council ('One of Us'.) An ECI can pressurise the Commission to act only up to a certain extent, whilst an ECI with objectives that are directly opposed to the agenda of the European Parliament and the Council has fewer chances of resulting to legislation.

These conclusions are not categorical for future ECIs. They are, however, telling conclusions not only about the ECI itself, but also about the ECI's position within the EU institutional triangle (Commission - European Parliament - Council). The discussion has shed some light on the relationship between the notions of citizens' representation and citizens' participation in the EU or, put differently, the connection between Article 10(2) TEU and Article 11(4) TEU. It was argued that the link between the two EU democratic notions has manifested itself in two different ways. On the one hand, the follow-up to the 'One of Us' has demonstrated the priority of the EU co-legislators' wishes over a proposal submitted by a successful ECI. On the other hand, the European Parliament has also acted as an ally to some ECI organisers, as seen in the follow-up to the 'Right to Water'.

Indeed, the European Parliament has been playing the role of facilitator in the overall ECI process since the adoption of this new participatory mechanism. From MEPs attending the three ECI public hearings to advocating changes to the ECI Regulation, the European Parliament has attempted to present itself as a defender of EU citizens' direct input in the EU decision-making process. An additional example of this approach is the European Parliament's role in the continuation of ECI campaigns that did not manage to collect the necessary signatures. One of these ECIs, namely 'End Ecocide' was presented to the PETI Committee as a petition in February 2015, an outcome that was received positively by the ECI organisers. The 'End Ecocide' representative stated: 'For us, it was important to be able to say to our signatories that their efforts were not wasted, that at least our issue is being discussed at the European Parliament.'<sup>103</sup>

By exposing the close link that is being developed between the European Parliament and ECI organisers, but also the result of clashes between ECI proposals and the position of the European Parliament on a given subject, this article illustrated the way in which citizens' participation via the ECI complements representative democracy as a source of citizens' input in the decision-making system of the EU.

Finally, the contribution has identified a mismatch between the expectations of citizens from the ECI and the ECI's capacity to lead to legislative output. In order to mitigate the risks to the credibility of the ECI that arise from this mismatch, some suggestions were made for procedural changes that

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<sup>103</sup> "Hearing of the ECI End Ecocide in Europe supported by over 182,000 citizens as petition in the European Parliament" <[www.europarl.europa.eu/meetdocs/2014\\_2019/documents/peti/dv/endecocidpetitionforconsiderationbyep\\_/endecocidpetitionforconsiderationbyep\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/peti/dv/endecocidpetitionforconsiderationbyep_/endecocidpetitionforconsiderationbyep_en.pdf)> (last visited 10 June 2016).

would increase the transparency of the ECI's follow-up stage and enhance the deliberative character of the ECI. It was argued that taking such steps would both facilitate public debate and communicate to EU citizens the different interests that come into play when deciding on the follow-up of an ECI. In this way, citizens would be given a more accurate picture of what should be expected from launching an ECI.

The Chairwoman of the European Parliament Constitutional Affairs Committee recently commented that 'we have not yet quite absorbed this new reality in which citizens are co-equal to the European Parliament and the Council with respect to asking the European Commission to initiate a legislative proposal which is, in fact, a Copernican Revolution in the European institutional landscape.'<sup>104</sup> Our present analysis has demonstrated that, if the ECI was ever intended to be a Copernican revolution in the EU institutional landscape, it has not yet shown its teeth. Currently, the ECI has not shifted the EU's institutional dynamics towards an enhanced position in EU agenda-setting for the organisers and supporters of an ECI. The frustration and disaffection of citizens with the EU Institutions – and particularly with the Commission – have been some of the side-effects of the ECI as a participatory experiment.

Despite the conclusions regarding the ECI's potential to affect legislative output, the Commission's statement that 'it is still too early to assess the long-term impacts of the ECI on the EU institutional and legislative process'<sup>105</sup> retains some traction. This is especially the case given that there are on-going actions by the Commission with regard to 'Right to Water' and 'Stop Vivisection', and the case brought by the organisers of 'One of Us' is still pending before the General Court. New ECIs have been registered in the past year, whilst some of the unsuccessful ECIs, such as 'End Ecocide' and 'Unconditional Basic Income', are continuing their campaigns by becoming federations, NGOs, or other forms of organised entities which could eventually have an indirect impact on EU policy. Future research should be able to identify the lasting effect of these first few ECIs on the EU's legislative and institutional landscape.

To conclude, expectations surrounding the ECI should be realistic. The ECI is certainly not adequate on its own to address the feelings of alienation and euroscepticism that have been fostered among EU citizens in the aftermath of the latest political challenges facing the EU, the most recent being the outcome of the 'Brexit' referendum. Whether the recent vote of the UK to leave the EU will lead to reform or institutional changes at the EU level remains to be seen. For now it can be concluded that, if the aim is to avoid letting the ECI turn into an unused instrument, and helping it develop as a mechanism that channels the voices of EU citizens, ultimately the Commission will have to find a balance between keeping intact its monopoly of legislative initiative, and communicating the message to EU citizens that their ECIs have had some impact at the EU level, or at least that their objectives have been carefully considered under transparent procedures.

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<sup>104</sup> "Parliament gearing up for European Citizens' Initiative review" <[www.euractiv.com/section/public-affairs/news/parliament-gearing-up-for-european-citizens-initiative-review/](http://www.euractiv.com/section/public-affairs/news/parliament-gearing-up-for-european-citizens-initiative-review/)> (last visited 8 June 2016)

<sup>105</sup> Commission 3-year Report on the ECI at 16.