

The European Citizens' Initiative: an effective tool to boost democratic participation in the EU?

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Good afternoon. First of all, I would like to thank the organisers of this event and to extend my gratitude to my colleague and friend Dr. Marko Milenković. In my speech I will tackle the current developments of the European Citizens' Initiative in these times of Brexit.

Tabled for the first time in the then failed EU Constitutional Treaty, a European Citizens' Initiative (ECI) has been introduced in the European Union (EU) legal order by the Treaty of Lisbon in order to ameliorate the democratic participation of citizens to the EU political – or, allow me to say – daily life. However, whereas ECIs are a novelty in the EU, they are not uncommon in national experiences – as it has been already highlighted by Mr. Fassina during the morning session - : what changes is the scope – or, the breadth – that an ECI can achieve.

Against this background, my speech will be structured as follows. First, I will offer a brief overview of ECIs procedures in order to assess whether they are suitable to reach their declared objective, that is, increasing the democratic participation of EU citizens to the EU daily life. In order to do so, I will hence differentiate between the three constitutive phases of an ECI: i) registration (phase 1); ii) gathering of statements of support (phase 2); iii) follow-up (phase 3). Second, I will depict the content and the impact over Brexit of three recent ECIs, currently in phase 2: a) Retaining European Citizenship (REC);¹ b) EU Citizenship for Europeans: United in Diversity in spite of Jus Soli and Jus Sanguinis (ECE);² c) European Free Movement Instrument (EFMI).³ In conclusion, third, I will argue that despite an ECI is, in principle, a good instrument to allow people to have their say and to boost democratic participation, its practical application– due to its essential Commission-centric character - is frustrating that legitimate expectation. Exactly for this reason, the Commission is proposing to amend Regulation 2011/211 (ECI Regulation). These aspects could also be linked to what has been argued by Mrs Lynch during the morning session, i.e. the Commission enjoys too much discretion in certain domains.

As anticipated, ECIs have three different and consequential phases. First, an ECI has to be registered by the Commission. Second, after the registration, an organising committee has 12 months to gather one million statements of support. Third, upon successful collection, the Commission has the duty to express its legal and political conclusions - (and I stress it again: legal and political) -, specifying whether it intends – or not – take an action. This, roughly speaking, constitutes the lifecycle of an ECI. It is important to underline at this stage that, to date, solely 4 ECIs (in the last 7 years) completed a whole lifecycle but the Commission's follow up has not regrettably been relevant. I will then come back to the nature of the Commission's actions in my concluding remarks.

The current Commission's practice coupled with an increasing stream of judgments delivered by the Court of Justice of the European Union (CJEU) show that the main administrative hurdles to be overcome are

¹ Retaining European Citizenship, Commission registration number: ECI(2017)000005 of 2 May 2017, deadline: 2 May 2018.

² EU Citizenship for Europeans: Unit-ed in Diversity in Spite of jus soli and jus sanguinis, Commission registration number: ECI(2017)000003 of 27 May 2017, deadline: 27 May 2018.

³ European Free Movement Instrument, Commission registration number: ECI(2017)000001 of 11 January 2017, deadline: 11 January 2018.

located in the registration phase. Indeed, according to the ECI Regulation, the Commission can register an ECI if, and only if, its subject matter falls within the framework of its powers. It is then intuitive that that aspect represents the bulk of disputes decided and pending before the CJEU. A good example is the *Anagnostakis* (⁴ and ⁵) case where the Commission refused to register an ECI aimed at introducing a mechanism aimed at not to repay the Greek public debt.

After this general introduction, I will now turn to the 3 ECIs launched to counterbalance the Brexit's effects.

REC wishes to invite the Commission to submit a proposal for a legal act aimed at '[...] retain[ing] citizenship for all those who have already exercised their freedom of movement prior to the departure of a Member State leaving the Union, and for those nationals of a departing State who wish to retain their status as citizens of the Union'. In other words, the organising committee is seeking to persuade the Commission to adopt a legal act aimed at preserving the EU citizenship of those individuals whose state is withdrawing the EU. The Commission's decision to register REC highlights that a legal act of the EU can very well regulate the situation of third country nationals, as citizens of a State willing to withdraw the EU will soon become.

ECE wishes to invite the Commission to submit a proposal for a legal act aimed at separating 'citizenship and nationality'. In its decision the Commission stipulates that despite there are no suitable legal basis in the Treaty to adopt such a legal act, it would nonetheless be linked to the conditions of third country nationals. Therefore, alike REC, ECE has been registered.

EFMI wishes to invite the Commission to submit a proposal for a legal act aimed at introducing a European laissez-passer document in order to allow citizens of 'good standing' to exercise their right to free movement. Although the Commission registered EFMI, the decision has not been published. Thanks to the kind and prompt reaction of the organising committee, I had the chance to read it. In its decision, the Commission solely affirms that the proposed subject matters falls within the framework of its powers; no further details are spelled out.

Coming the end of my speech, an ECI's overall evaluation – linked to citizens' democratic participation in the EU - is needed in order to understand whether it achieved its goal, that is, increasing the level of democratic participation in the EU and influencing the EU institutions' agenda setting on some specific – and somewhat neglected topics – (e.g. 'successful' ECIs on embryos, glyphosate, right to water and vivisection).

First, there is a common consensus on the fact that ECIs, as such, have largely failed to achieve their objectives. It is even more strikingly that this assumption has been backed by EU institutions – first and foremost, the Commission itself – and acknowledged also by the European Ombudsman. When it comes to civic society associations (grouped in organising committees), they often highlight the too bureaucratic and 'Commission-centric' nature of an ECI's lifecycle, pointing out that administrative hurdles – e.g. demonstrating, *a priori*, that the subject matter falls within the framework of the Commission's powers – are too difficult to be grasped and eventually overcome. Another critical issue is the follow-up stage. Indeed, it is an empirical observation that, to date, the Commission tergiversated and applied a sort of self-restraint attitude in its communications. The Court of Justice will dispel this problem in the much awaited

⁴ General Court, case T-450/12, judgment of 30 September 2015, Alexios Anagnostakis v. Commission.

⁵ Court of Justice, case C-589/15P, judgment of 12 September 2017, Alexios Anagnostakis v. Commission.

Speech: European Union, Brexit – the future of workers' rights – European Association of Lawyers for Democracy & World Human Rights, London, 11.11.2017

*One of Us*⁶ case, in which an organising committee challenged the Commission's communication, i.e. the expression of its legal and political stance. These aspects, in turn, could be linked to the concept of legal act for the implementation of the Treaty, as the Court's ruling in *Efler*⁷ shows.

Second, despite widespread criticisms regarding the breadth of the powers the Commission enjoys, it is interesting to note that three ECIs linked with Brexit have been so easily registered. Indeed, the fact that UK citizens will soon be third country nationals triggered the idea that the Commission can very well commence an ordinary legislative initiative to regulate their status. At this point, other ECIs (Greek debt?) – although, perhaps, less carefully drafted – would have deserved the same fate. In other words, and I leave the question open for the Q&A session, is the Commission more inclined to treat more favorably ECIs linked to current hot topics, such as Brexit?

The fact that ECIs have largely failed their goals prompted the Commission to propose a new Regulation. Amongst its salient features, and for reasons of time constraints, I only mention the possibility to partially – although what 'partially' means will surely give rise to new litigation- register an ECI, the setting up of a centralised system to gather statements of support and the possibility for organising committees to delay phase 2. In essence, thanks to wide and open consultations with the main stakeholders involved in the lifecycle of an ECI, the Commission is seeking to reinforce the effectiveness of this instrument of democratic participation.

In conclusion, it is still too early to make an ECI's full and conclusive appraisal. On the one hand, few ECIs have concluded an entire lifecycle; on the other, the Commission still keeps its 'steering' powers. It remains to be seen, in particular, whether the Commission will finally trigger an ordinary legislative procedures stemming from a successful ECI. Given the nature of Brexit and its disruptive effect on the EU, it cannot be entirely ruled out that the three abovementioned ECIs will be used as a 'stress test' to verify the Commission's discretion in phase 3 and to enhance the feeling that citizens have their say in setting up legislative priorities.

Thank you for your attention.

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General Court, case T-361/14, judgment of 5 April 2017, HB. v. Commission

⁶ One of Us and Others v Commission, case T-561/14.

⁷ General Court, judgment of 10 May 2017, case T-754/14, Efler et al. v. Commission.

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