European Citizens' Initiative

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Article I-46.4[1]

Introduction

The European citizens' initiative (ECI) is a new device of participatory democracy, which has its own characteristics, unknown to date at any level of national or trans-national government. It is designed to allow the citizens to take an active role within the law-making process of the EU. The specific features of this process affect the legal nature as well as the functioning of the new participatory device. Both will depend strongly on the European law, which shall determine the procedures and conditions required for the ECI.

Legal nature

In order to find out what the ECI is, it seems convenient to determine what it is not.

The ECI is not a petition, because a petition consists of a written submission, individual or collective, to any state organ, to undertake some action lying within its powers. There is no required number of signatures and no legal duty of the state organ to fulfil, nor even to answer, a petition. The Constitution grants the right to petition to any citizen of the Union (Article II-44).

The ECI is not a 'popular motion' consisting of a demand made, by a certain number of citizens, to Parliament asking it to enact some law or to take a decision within the range of its powers and competencies. In national Parliaments where each MP traditionally has the right to initiate a legislative act, popular motions give the same power to the citizens. Parliament, of course, is not obliged to adopt the act promoted by a parliamentary or a popular motion.

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

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The ECI is even less a 'popular initiative', which would grant the right to a number of citizens to submit a draft constitutional or legislative provision to the voters, with no possibility of it being blocked by Parliament, although the latter may submit a counter-proposition to the voters. Popular initiatives have a long history and tradition in Switzerland[2] as well as in a number of American states and have also become quite important in Slovenia, Latvia, and Lithuania.

Whereas a petition is a request by an individual or a group of individuals to any state authority, a popular motion is an appeal by the people to Parliament and a popular initiative is an appeal by the people to the people, the ECI is a popular appeal to the Commission to initiate legislation.

Provisions related to Article I-46 are Article I-25(2), which gives the Commission the exclusive power to initiate Union legislative acts, and Article III-234, which allows a majority of the members of the European Parliament to request the Commission to make use of its initiative power. Article I-46(4), whose wording is almost identical to the last provision, gives the citizens the same right, with regard to initiating Union legislation, as the European Parliament enjoys. This right is only of an indirect nature.

The ECI is not mentioned among the citizens' rights (right to vote and to stand as a candidate at elections to the EP and at municipal elections, right to good administration) enumerated in Title V of the Charter of fundamental rights (Articles II-39 to II-46). Nor is the new body, composed of at least one million citizens, included in the institutional framework summarised in Articles I-18 to I-31. It does not alter the principle of representative democracy on which the working of the Union is founded (Article I-45(1)), nor does it put an end to the exclusive power of the Commission to initiate legislation.

In spite of all these undoubtedly deliberate omissions and precisions, Article I-46(4) does create a new constitutional competence for the citizens, the right to sign an initiative. It also creates a new institutional body, comprised of at least one million citizens coming from a number of Member States, who have the right to ask the Commission to initiate a legal act of the Union. So the ECI definitely does, although timidly, enrich the representative scheme by an element of participatory, not to say direct, democracy.

Threshold requirements

The ECI belongs to a specific body of natural persons, which is defined by four elements.

The first element is personal. The right to sign an ECI is reserved to citizens of the Union, i.e., to nationals of a Member State (Article I-8(1)). There is and

[2] <http://c2d.unige.ch>.

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there should be no restriction as to the state of residence. Citizens of the Union may sign an ECI in every Member State. Non-nationals of any Member State residing within the Union, however, are precluded from doing so. So, of course, are corporate, non natural, persons.

The second element is quantitative. In order to be valid, an ECI must be signed by at least one million citizens. This amounts to some 0.3% of the Unions' citizens, not a very high hurdle.[3]

The third element is territorial. The signers must 'come from a significant number of Member States'. The basically democratic scope and nature of the ECI is thus tempered by a territorial consideration, referring directly to the Member States. Territorial distribution requirements, like double majorities,[4] are typically of a federalist nature. The one million citizens entitled to promote legislation not only represent the people but also the Member States. The distribution requirement can be established by different methods. One method is to define a maximum number of signatures coming from one Member State, e.g., 25%, meaning that additional support from one state would have no legal value and that at least four states must be implicated. Another method would determine a minimum number of states, e.g., eight, contributing with a minimum number of signatures, e.g., 50,000, thus allowing one highly motivated state to produce as many as 650,000 signatures. The term 'coming from' should be interpreted as referring to residence rather than national origin of the signers. The clause also means that the signatures are to be collected on a national basis.

The fourth element is temporal. There must be a time limit for exercising the right to launch an ECI. Although the constitution does not refer to this requirement, it can be seen as a necessary consequence of the rule of law (Article I-2). Its definition depends on the chosen method for determining the distribution requirement: More time would probably be needed to co-ordinate collection of signatures in a great number of states than to collect even a higher percentage of signatures in a small number of states. A period of 8 to 16 months seems appropriate.

Subject matter: form

The ECI basically has a normative purpose. It is not designed to merely criticise policies and actions undertaken by the EU institutions. It is aimed at the adoption, by the competent organs, of a legal act of the Union. The adoption may have a positive or a negative effect, promoting a new legal act, amending an ex-

[3] In Switzerland, the right of initiative belongs to 100,000 citizens, representing approximately 2.2% of the electorate.

[4] Comp. Article I-24.

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isting one or abolishing another. The ECI is legislative and not constitutional: It does not give the citizens the right to launch the process of amending the constitution (Article IV-7).

The legal acts of the Union are either binding or non-binding (Article I-32). The former encompass both legislative and non-legislative measures, i.e., European laws, European framework laws, delegated regulations adopted by the Commission, European regulations and European decisions (Articles I-33-I-36). Recommendations and opinions have no binding force (Article I-32(1); I-34(2)). The ECI maybe related to any one of these legal acts.

A delicate question to be answered by the European law implementing the ECI is to decide who is to determine the appropriate level of legislation for realising an initiative: the initiative committee or the Commission? What if an initiative invites the Commission to promote the enactment of a law, while the latter prefers to take a regulation? What if it is the other way around? Generally, one would expect that the decision as to the appropriate form used to implement an ECI could only be taken by the organ, which has the sole power to initiate legal acts. But one might also expect that, if the Commission operates a change in the implementing form, it should state the reasons why it does so.

Subject matter: content

Whatever legal act be taken following an ECI, it must be consistent with the Constitution as a whole. This means specifically that the act i) lies within the competencies conferred to the Union, ii) does not contradict superior levels of European legislation and iii) is in harmony with the fundamental rights of the Union.

The ECI may thus be related to any area in which the Union, according to the Constitution, has competencies, be they exclusive (Article I-12), shared (Article I-13) or other (Articles I-14 to I-16), provided that they encompass the right to take legal acts. The range of areas is extremely wide, embracing not only every single internal policy and action of Part III Title III, but also external actions like, for instance, common commercial policy (Article III-217(2)), development co-operation (Article III-219), humanitarian aid (Article III-223(3)). ECIs seem to be excluded in areas dominated by the Council, like Common Foreign and Security Policy (Articles I-15; III-195 to 215). They are strictly excluded in all areas where the Constitution has conferred no powers to the Union (Article I-9(2)).

An ECI, which asks for enactment of a specific legal act, like a decision, must not contradict superior legal acts, like European Laws or framework laws. In other words, ECIs must respect the internal hierarchy among the legal acts of

the Union. Problems of consistency may sometimes be solved by changing the level of implementation. But it is doubtful that the Commission, asked to initiate a decision, would be obliged to initiate an amendment to a European law in order to provide the legal basis for the said decision.

Finally, the ECI must be consistent with the fundamental rights of the Union as defined in Part II. Yet it is difficult to see how a mere invitation to promote a legal act could be a violation of a fundamental right. The responsibility for implementing ECIs in a way that does not contradict fundamental rights lies therefore with the Commission, the Council and the EP.

Powers of the Commission

The ECI is an appeal from the people to the Commission. Its impact and importance will entirely depend on the definition of the powers of the Commission as the addressee of the ECI. Two opposite views should be avoided while implementing the new participatory device: total submission and total control.

Total submission would give the ECI binding force, obliging the Commission to initiate the required law-making process without regard to its own political appreciation. In other words, the Commission would be a mere connecting link between the citizens who signed the initiative and the Council who would have to implement it. The wording of Article I-(46(4)) does not support such a far-reaching interpretation, which would never have been accepted by the Convention and which tends to consider the ECI like a popular motion.

Total control would mean that the Commission would be able to block an ECI and simply refrain from using its initiative powers, even though the ECI meets all formal requirements. In other words, citizens' access to the law-making process would not go further than the Commission, which remains sovereign in deciding to initiate or not initiate a legal act. Although this view gets some support from the wording of the Constitution ('... *invite the Commission to submit* ...'), it would degrade and deface the ECI to a mere petition, allowing the Commission to deny any legal effect to the explicit will of more than one million of citizens. One should not forget that, generally speaking, the Commission would hardly favour an ECI, which promotes an act it could and would have initiated itself. Moreover, it is doubtful that anyone would agree to spend time, effort and money for such a useless device.

Between these two extreme views, there are different ways and means to define the powers of the Commission when confronted with an ECI. One would be to oblige the Commission, in case it does not want to submit a proposal requested by the ECI, to inform the initiative committee and the EP of the reasons, as it does when dealing with an initiative signed by a majority of the EP

(Article III-234). Another proposition would oblige the Commission to express its political disagreement with an ECI through a separate, alternative proposal.

Duties of the Commission

Before even considering an ECI on the merits, the implementing law required in Article I-46(4) will give the Commission the duty to accomplish a number of steps in order to i) launch the signature collecting process and ii) ensure the formal validity of the ECI.

There is hardly any doubt that the promoters of an ECI should file a preliminary request with the Commission, indicating both the form and content of the planned initiative. At this early stage, the Commission should be allowed to change the title, the form and the language of the initiative before it gives its formal assent, which opens the time period for collecting signatures.

There is no doubt either that, at one point, the Commission should check the constitutionality of the initiative with regard to its confinement to the competencies of the Union, to its legality and to its consistency with the fundamental rights. If the initiative fails to meet one of these conditions, it should be declared void. In that case, the initiative committee should be able to address the Court of Justice (Article III-270(4)). If, on the other hand, the Commission certifies the initiative as being constitutional, one could well imagine that a Member State, the EP or the Council would want to bring an action to the Court of Justice (Article III-270(2)).

The implementing law will have to decide if the administrative and eventual judicial review of the initiative takes place before or after signature gathering process. Arguments in favour of the first solution are protection of the citizens' signatures and security of law: only initiatives that are consistent with the constitution can be signed and must be dealt with on the merits by the Commission. But this solution could have the disadvantage of mobilising the Commission and even the Court on an initiative that, once certified, will maybe not even get the requested number of signatures. The mere intention of a committee to launch an initiative does not have the popular legitimacy attached to an initiative signed by more than one million citizens. Pre-signature review of an initiative amounts therefore to something like an advisory opinion. There is a strong case for checking and deciding upon the constitutionality of an initiative only once it has been signed.[5]

[5] In Switzerland, popular initiatives are checked as to their formal and material validity only after the signatures have been collected; in the United States, courts generally decline to review initiatives before their acceptance by the people.

Finally, after the required number of signatures have been filed and certified, the Commission has to take the one decision that is at the very core of the ECI: to initiate a legal act of the Union. From that point, the ECI has reached its goal. As the initiative lies solely with the Commission, there is no use and no need to provide for an involvement of the electoral committee in the deliberations of the Council.

Miscellaneous

The implementing law will have to decide upon the composition, the powers and the duties of the initiative committee. Each Member State in which signatures have been gathered should have its representative in the initiative committee. The committee is responsible for submitting the signatures for validation to the competent national authorities and for representing the citizens before the Commission as to both constitutional review and implementation.

Should the initiative committee have the right to withdraw an initiative? Such a privilege would only be justified if the ECI would be formally addressed to the legislative body, in case of enactment of an act meeting, at least partially, the demand advocated by the initiative. As the ECI is only directed at the initiating body, there is apparently no need to withdraw the initiative when the legislator acts appropriately.

Only national authorities will be able to validate the signatures. Judicial review of decisions relating to the validity of the signatures will also take place before national courts or administrations. European law should prevent the ECI from being blocked by dilatory handling of the validation process.

Should the ECI be entitled to financial support from EU resources? Signature gathering campaigns do cost money, even more so when they have to be conducted on a trans-national scale. But to finance an initiative committee on the basis of a mere draft could have some adverse and even perverse effects, unrelated to the democratic scope of the ECI.

Conclusion

Promoted by individual members of the European Convention,[6] the ECI was born on 11 June 2003, when the Presidency accepted the idea. Its existence however is far from guaranteed. Everything depends on the procedures and conditions defined by the implementing law, on the attitude of the Commission once it is confronted with an ECI and on the will of the people to use the new device.

[6] Jürgen Meyer and Alain Lamassoure.

Questions for scholarship and further reading

1. Will the implementing Act in one way or another restrict the possibility for the Commission to block an ECI?
2. Should the ECI be entitled to financial support from EU resources?
3. In what way will judicial oversight of the ECI be given shape?

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