

THE EUROPEAN CITIZENS' INITIATIVE REGISTRATION: FALLING AT THE FIRST HURDLE?

Analysis of the registration requirements and the
"subject matters" of the rejected ECIs

ECAS Brussels, December 2014

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This study was undertaken by the European Citizen Action Service within the framework of the ECI Support Center and with the kind assistance of Freshfields Bruckhaus Deringer LLP.

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1. EXECUTIVE SUMMARY

The European Citizens' Initiative (ECI) gives citizens of the EU the unique opportunity to directly place their interests right at the heart of European policy-making by asking the European Commission (the Commission) to legislate on a matter of its competence. However, since its entry into force on 1 April 2012, this instrument has demonstrated both its potential as well as its limitations when it comes to connecting with citizens in an honest dialogue aimed at answering citizens' concerns and providing a space where they can contribute to policy-making.

More than two years after the entry into force of Regulation No. 211/2011 (or: the ECI Regulation), 49 initiatives have been presented to the Commission but 40% were refused registration.

The first challenge encountered by ECI organisers is to get their proposed initiative registered by the Commission. Registration can only take place if the proposal satisfies all four conditions set out in Art. 4 of Regulation 211/2011 – the so-called 'legal admissibility test'.

The European Citizen Action Service (ECAS) has been coordinating the activities of the ECI Support Centre since June 2013. The ECI Support Centre is a joint initiative of ECAS, Democracy International and Initiative and Referendum Institute Europe. The ECI Support Centre is a not-for-profit service, whose purpose is to provide advice and information to ECI organisers before and during the process of launching and implementing an ECI.

This study has been conducted by ECAS within the framework of the ECI Support Centre with the kind assistance of Freshfields Bruckhaus Deringer LLP.

The study aims to promote a better understanding of the ECI Regulation, particularly on the registration procedures for a proposed initiative, and it suggests a number of recommendations to be discussed when the review of the Regulation takes place based on an analysis of the "subject matters" of the ECIs that have been refused registration by the Commission.

1. The "Legal Admissibility Test"

All four conditions set out in Art. 4(2) of the ECI Regulation must be satisfied before a proposed initiative is registered and the campaign to collect statements of support is officially launched.

In order to pass the so-called 'legal admissibility test' and be registered by the Commission, a proposed initiative must not "manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purposes of implementing the Treaties". This requirement (Art. 4.2 (b)) has proven to be a hurdle for all the proposed initiatives that have so far been refused as well as a challenge for the initiators of those ECIs that have been registered.

2. The Types of Actions that the Commission can initiate

The types of legal act that citizens can request the European Commission to submit are based on Art. 288 TFEU. They are:

- legally binding legislative measures, adopted as a result of the EU's legislative procedures (ordinary or special) and initiated by the European Commission - such as regulations, directives and decisions; or
- non-legislative measures which are not legally binding, such as recommendations and opinions.

At this stage, it is unclear whether the reference in Art. 2(1) to the Commission's submission of "proposals" is intended to limit the scope of the ECI to legal acts whose decision-making procedure is initiated by the Commission but completed by one or more other institutions (e.g. the European Parliament or European

Council), thus excluding legal acts adopted by the Commission itself (Art. 290 TFEU). The EU Courts will further clarify the types of legal acts that can be proposed by a European Citizens' Initiative. The Commission should also clarify the scope of the ECI in terms of what precisely it can propose and in what format. In the meantime, and under current circumstances, a citizens' initiative can call for the Commission to propose the adoption of legislative acts, be they binding or non-binding measures.

3. What does “Manifestly Outside” the Commission’s powers actually mean?

The Regulation does not define the meaning of “manifestly outside” (Art. 4.2 (b)) the Commission’s powers. The Commission argues that a citizens' initiative falls “outside” the framework of the Commission’s powers if there is no Treaty provision, which allows for a legal act to be adopted following a proposal from the Commission that can serve as the legal basis for a Union act covering the subject matter of the proposed initiative.

The Commission goes on to argue that an initiative falls “manifestly outside” the framework of the Commission’s powers if the conclusion that none of the provisions in the Treaties could serve as a legal basis does not depend on factual circumstances. Based on those elements, it is clear that EU citizens will not be able to easily identify, without receiving proper legal advice, the valid legal basis for registering an initiative and will find it difficult to assess and decide on the dependence of the legal basis from factual circumstances.

4. The Practice

The practice of applying the Regulation by the Commission suggests that in a number of cases:

- the legal admissibility test was too narrowly applied (e.g. because the proposed initiative correctly identified a legal basis in the Treaties, and the subject matter of the initiative fell within the scope of the EU’s competence);
- the decision to refuse registration was arbitrary (e.g. because initiatives with similar characteristics were treated differently); and/or
- the reasons given for rejection were incomplete (e.g. because the Commission did not fully address all the Treaty provisions cited as a legal basis).

5. Recommendations regarding the up-coming Review of the Regulation

- Clarify through public debate the nature of the ECIs as an agenda-setting instrument: whether it is limited to requesting a legally binding act from the Commission or whether it also can be further developed as a policy-setting tool extended to non-legislative acts.
- Define the remit of the “legal act” and/or of the political actions that the European Commission can initiate or undertake.
- Provide a definition of “manifestly outside” the Commission’s powers that is clear, easy to understand and is not subject to arbitrary interpretation.
- Clarify the procedure for the legal admissibility test and increase the transparency of the decision-making process.
- Establish an ECI officer, similar to the Hearing Officer for competition law.
- Secure adequate legal advice for ECI organisers with regard to the legal basis of their initiative.

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3. INTRODUCTION

The European Citizen Action Service (ECAS) coordinates the ECI Support Centre¹ – a joint initiative of ECAS, Democracy International and Initiative and Referendum Institute Europe – which aims at providing advice and information to ECI organisers before and during the process of launching and implementing an ECI.

In light of the up-coming review of the European Citizens' Initiative (ECI) Regulation in 2015 (established by Art. 22 of Regulation No. 211/2011) and the decisions that have been taken so far on the registration of the 49 initiatives already submitted to the Commission, ECAS has conducted a preliminary analysis of the application of the ECI Regulation².

This Report is intended to promote a better understanding of the ECI Regulation, particularly on the registration procedures. It puts forward a number of recommendations to be discussed when the review of the Regulation takes place.

This Report does not represent a full legal analysis of all the European Citizens' Initiatives that have been submitted. Its focus is on the requirements that must be met for a proposed initiative to be registered as these are the first big hurdle that organisers face. It is only after an initiative has been registered with the Commission that organisers can start collecting statements of support. The registration of a proposed initiative is thus a key step in the ultimate success of an ECI.

4. BACKGROUND AND KEY STATISTICS

The European Citizens' Initiative

As the first trans-national instrument of participatory democracy, the European Citizens' Initiative was launched on 1 April 2012 when Regulation 211/2011, based on the Treaty of Lisbon, Art. 11(4) TEU, entered into force. The Regulation determined the main criteria for registering, running and presenting an ECI. This report looks at the criteria set out in the Regulation for the registration of a proposed citizens' initiative.

Before the introduction of the ECI, the opportunity for citizens to directly participate in the policy-making process at EU level was limited to the right to petition the European Parliament (Art. 20 TFEU).

However, this right has its limitations, as the European Commission is the only body at EU level that can initiate proposals for legislative measures. The Treaty of Lisbon, therefore, provided EU citizens with the right to invite the Commission to legislate, provided that they collect more than 1 million statements of support (signatures) within a timeframe of 12 months.

Key statistics

As of November 2014, a total of 49 initiatives had been proposed and submitted to the Commission for registration. Of the initiatives proposed, nearly 40 per cent were refused registration by the Commission and therefore were not able to start the process of collecting statements of support. The full figures are as follows:

- 29 were registered;

¹ The ECI Support Centre <http://www.ecas.org/civic-engagement/eci-support-centre/>

² Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65, 11 March 2011, p. 1.

- 20 were refused registration by the European Commission; and
- 9 were withdrawn.

Only two of the 24 initiatives registered have so far been submitted to the Commission, having obtained sufficient statements of support in the year following registration. They have already received a response setting out the Commission's legal and political conclusions.³ One further initiative appears to have received sufficient statements of support but has not yet been submitted to the Commission. The figures of registered initiatives are as follows:

- 20 failed to collect 1 million statements of support within the required timeframe (i.e. received insufficient support following registration);
- 2 were open (i.e. still collecting statements of support);
- 1 were closed but not yet submitted to the Commission;⁴ and
- 2 were submitted to the Commission and had received a response.

Note that the figure for total registered initiatives (29) includes four initiatives that were withdrawn and then re-registered. This means that, if double-counting is ignored, a total of 25 'unique'⁵ initiatives were registered and 45 'unique' initiatives proposed. Two initiatives were permanently withdrawn.

Annex 1 provides a full list of the initiatives proposed between 1 April 2012 and 1 November 2014.

This study takes into consideration the ECIs presented before 1 July 2014, therefore, the latest ECIs refused registration ("STOP TTIP" and "Vive l'Europe sociale!") are not considered.

5. CRITERIA FOR REGISTRATION

Regulation 211/2011 sets out the steps that organisers must follow in order to initiate and submit a valid citizens' initiative. These are, broadly, as follows:

1. Formation of a citizens' committee (Art. 3(2));
2. Registration of the proposed initiative with the Commission (Art. 4(1));
3. Collection of statements of support (Art. 5);
4. Verification of statements of support by Member States (Art. 8);
5. Submission of initiative to the Commission (Art. 9).

This preliminary report does not look at all five steps in detail but focuses on the requirements for the proposed initiative to be registered with the Commission (step 2).

³ The initiatives in question are "Water and sanitation are a human right! Water is a public good, not a commodity!", which received a response from the Commission on 19 March 2014; and "One of us", to which the Commission responded on 28 May 2014.

⁴ The collection period for "Stop vivisection" closed on 1 November 2013. As of 27 November 2014, organiser's website reported that it had verified 1.170.326 signatures.

⁵ In 2012, four ECIs (End Ecocide in Europe: A Citizens' Initiative to give the Earth Rights, European Initiative for Media Pluralism, Single Communication Tariff Act and Let me Vote) were given the opportunity to withdraw and re-register their initiatives due to delays in setting-up the online collection of signatures.

Condition for registration

Art. 4(2) of Regulation 211/2011 envisages four conditions which a proposed initiative should meet in order to be registered by the European Commission:

- a) A citizens' committee must be in place;
- b) The proposed initiative must not "manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purposes of implementing the Treaties";
- c) The proposed initiative must "not be manifestly abusive, frivolous or vexatious"; and
- d) The proposed initiative must "not be manifestly contrary to the values of the Union", as set out in Art. 2, TEU.

If these conditions are not met, the Commission must refuse registration. It should inform the organisers of its reasons and advise them of all possible remedies (Art. 4(3)).

It is "requirement (b)" of the four conditions listed above, that has proved to be the major challenge to ECI organisers so far. All 20 ECIs for which registration has been refused by the European Commission were deemed to "manifestly fall outside the framework of the Commission's powers". The Commission's assessment (the so-called 'legal admissibility test') of whether an initiative is "manifestly outside" the framework of its powers is based on information provided by the organisers when submitting their proposed initiative for registration.

Requirement for a valid legal basis in the Treaties

As part of the registration process, the organisers of a proposed initiative are required to provide the Commission with the information listed below (Art. 4(1)):⁶

1. The title of the proposed citizens' initiative;
2. The subject matter of the initiative;
3. A description of the objectives;
4. The provisions of the Treaties considered relevant by the organisers for the proposed action;
5. The full names, postal addresses, nationalities and dates of birth of the seven members of the citizens' committee; and
6. All sources of support and funding at the time of registration.

The main challenge for organisers is the requirement to identify a provision in the Treaties that can serve as a legal basis for the proposed initiative (point (4) above). The Commission has consistently held that, unless the organisers can point to a valid legal basis in the Treaties, their proposal for an initiative will fall "manifestly outside" its powers to propose a legal act of the Union and will therefore not be registered.⁷

What constitutes a 'valid legal basis'?

The question of whether a proposed initiative has a valid legal basis in the Treaties depends on whether

⁶ The information is listed in Annex II to Regulation 211/2011.

⁷ Based on documents analysed.

- (i) the EU has the competence to act in the subject area proposed, and
- (ii) the action requested by the initiative falls within that competence.

The EU can act only within the scope of the competences conferred on it by the Treaties.⁸ This means that there must be a legal basis within the Treaties for every legal act it adopts. The type of legal act the EU can adopt depends on the category of competence conferred on it by the Treaties: exclusive competence; shared competence; competence only to take action to support, coordinate or supplement Member State action; or competence to provide arrangements for economic and employment policies coordinated by the Member States.⁹ Competences that are not conferred on the EU remain with the Member States, meaning that the EU cannot act.¹⁰

Therefore, it is the “subject matter” of an ECI that is the key factor in determining whether the EU has competence to act— and if so, what category of competence it has. The subject areas in which the EU has exclusive competence (i.e. only the EU can adopt legislation) are listed in Art. 3(1) TEU, the areas in which the EU has supporting, coordinating or supplementary competence are listed in Art. 6 TEU, and the areas of shared competence (both the EU and the member states can act) are listed in Art. 4(2) TEU, although this is a residual category, so the areas listed are not exhaustive.

In order to assist ECI organisers identify Treaty provisions that are relevant to their proposals, the ECI website (<http://ec.europa.eu/citizens-initiative>) has a list of broad policy areas in which the EU has competence to act, along with Treaty articles that can provide a legal basis for action in these areas.¹¹

A corollary of the EU’s limited competences is that a proposed initiative will not be registered by the Commission if the legal act it requests falls outside the subject areas for which the Treaties have given the EU competence to act. Furthermore, the type of legal act requested must correspond with the category of competence that applies to the subject matter in question. For instance, the EU cannot pass harmonising laws in matters where its competence is limited to supporting, coordinating or supplementing Member State action, e.g. protection and improvement of human health or culture.¹² Thus, it is vital for organisers to identify provisions in the Treaties that provide an appropriate legal basis for the action they are requesting the Commission to take.

What actions can a citizens’ initiative validly request?

Even if organisers can identify a provision in the Treaties that provides a valid legal basis for EU action in the policy area of the initiative, the ECI Regulation appears to limit the action that organisers can validly request.

Art 2(1) of the ECI Regulation states that an initiative will be valid if it “invites the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties”.

What is clear from this wording is that an initiative may request a “legal act of the Union”. It follows that initiatives are not limited to proposals for the Commission to exercise its prerogative to initiate the EU’s *legislative* procedures (ordinary or special); they may also request that the Commission submit proposals for the adoption of *non-legislative* measures, e.g. non-binding recommendations.¹³ This breadth of scope is inherent in the term ‘legal act’, which Art. 288 TFEU defines to include both regulations, directives and decisions (which are legally binding), and recommendations and opinions (which are non-binding). It is also

⁸ Art.5(2) TEU.

⁹ Art. 2 TFEU.

¹⁰ Art/ 4 TEU.

¹¹ The list of EU competences are available at <http://ec.europa.eu/citizens-initiative/public/competences>.

¹² Art. 2(5) TFEU.

¹³ See Dougan, M., *What are we to make of the Citizens’ Initiative*, Common Market Law Review 48: 1807-1848, 2011, p. 1834.

clear from the ECI Regulation that initiatives cannot be used to request a legal act where an EU institution other than the Commission has the prerogative to initiate legislation.

It is unclear, however, whether the reference in Art. 2(1) to the Commission's submission of "proposals" is intended to limit the scope of the ECI to legal acts whose decision-making procedure is initiated by the Commission but completed by one or more other institutions (e.g. the European Parliament or European Council). If so, this would imply the exclusion of legal acts adopted by the Commission itself acting autonomously under decision-making powers conferred directly under the Treaties.¹⁴ Some commentators have argued against this literal interpretation, on the basis that "an interpretation of Art. 11(4) TEU tied too slavishly to Commission proposals *stricto sensu* would remove from the potential scope of the ECI some very important categories of Union public power which happen to be exercised by the Commission directly rather than merely at the Commission's initiative", e.g. delegated acts supplementing or amending Union legislation provided for under Art. 290 TFEU".¹⁵

From the ECI Regulation, it is also unclear whether a citizens' initiative can validly ask the Commission to put forward proposals to amend the Treaties under either the ordinary revision procedure in Art. 48(2)-(5) TEU or the simplified revision procedure in Art. 48(6) TEU.¹⁶ The argument against being able to amend the Treaties is the reference in Art. 11(4) TEU to legal acts of the Union "required for the purpose of implementing the Treaties". However, it may also be argued that "certain perspectives on how best to further the Union's values and objectives as laid down in Articles 2 and 3 TEU could well necessitate the amendment of existing Treaty provisions or the introduction of new ones".¹⁷ The Commission's position and interpretation of the rules on this question, as stated on the ECI website, are that a citizens' initiative may not validly request an amendment of the Treaties.

At present the European Commission's practical guidance for organisers, on its ECI website, stipulates that the Commission will have the power to submit a proposal for a legal act only when:

- a Treaty article refers to a legislative procedure (i.e. 'ordinary legislative procedure' or 'special legislative procedure'), except in specific cases where an institution other than the Commission makes the proposal; or
- a Treaty article explicitly mentions that the Commission is responsible for making a proposal ("*The Council, on a proposal from the Commission [...]*").

It is clear that there are still uncertainties as to the type of legal act an ECI can request. We believe that clarity will be provided by the EU court and by the review of the ECI Regulation in 2015. The Support Centre for ECI organisers shares the opinion that an ECI can call for the Commission to propose both the adoption of non-legislative measures (e.g. recommendations) and binding legislative measures (regulation and directive).

When is a proposal "manifestly outside" the Commission's powers?

If a proposed citizens' initiative falls "manifestly outside" the framework of the Commission's powers to propose a legal act of the Union, it cannot be registered.

Regulation 211/2011 does not give any guidance on how to determine whether a proposed initiative is "manifestly outside" the Commission's powers, so the import of this condition for registration is far from clear. However, the Commission has indicated its own interpretation of the requirement in its Defence against the

¹⁴ Dougan, p. 1834-1835.

¹⁵ Dougan, p. 1835.

¹⁶ Dougan, p. 1835.

¹⁷ Dougan, p. 1836.

appeal by the organisers of *Right to lifelong care* against the Commission's refusal to register this initiative.¹⁸ The Commission argues that a proposed citizens' initiative will fall:

- "outside" the framework of the Commission's powers, if none of the Treaty provisions which provide for the adoption of legal acts based on a proposal from the Commission can serve as the legal basis for a legal act of the Union covering the subject matter of the proposed citizens' initiative; and that it will fall
- "manifestly" outside the framework of the Commission's powers if the conclusion – that none of the provisions in the Treaties could serve as a legal basis for legal acts of the Union covering the subject matter of the proposed citizens' initiative – does not depend on factual circumstances.

The Commission cites Art. 114 TFEU (*harmonising laws for the functioning of the internal market*) as an example of a Treaty provision whose suitability as a legal basis for adopting a Union legal act depends on factual circumstances – specifically, the measure in question must be designed to prevent future obstacles to trade that are likely to emerge as a result of differing national laws. Absent this factual scenario, Art. 114 TEU cannot constitute a valid legal basis for a Union act.

It follows from this interpretation that a proposed citizens' initiative will not be "manifestly" outside the Commission's powers if:

- (i) a Treaty provision, which provides that a legal act can be adopted following a proposal from the Commission, can serve as the legal basis for a Union act covering the subject matter of the proposed initiative; and
- (ii) the application of that Treaty provision is dependent on factual circumstances.

While the Commission's interpretation above may yet be approved by the EU courts, it is doubtful whether organisers without legal training will be in a position reliably to determine whether the suitability of a particular Treaty provision as a legal basis for a Union legal act is dependent on – or independent of – factual circumstances. This is all the more so, since the fact-dependent nature of Art. 114 TFEU is not indicated in the wording of the article itself but has been determined by the case law of the EU courts.¹⁹ This means that, in practice, it may be difficult for organisers to know, without professional legal advice, whether or not their proposed citizens' initiative is "manifestly outside" the Commission's powers to propose a legal act of the Union.

6. THE COMMISSION'S APPLICATION OF THE CRITERIA

As indicated above, the Commission has so far refused to register nearly 40 per cent of the initiatives that organisers have proposed. In all of these cases, three of the four criteria listed in Art. 4(2) of Regulation 211/2011 have been satisfied, i.e. a citizens' committee has been formed; the proposed initiative was not manifestly abusive, frivolous or vexatious; and it was not manifestly contrary to the values of the Union. According to the Commission's refusal letters, all of the refused initiatives failed because the proposal in question fell "manifestly outside" the Commission's powers to propose a legal act of the Union. Each rejection letter has wording along the following lines: "*The Commission considers that there is no legal basis in the Treaties which would allow a proposal for a legal act with the content you envisage.*"

¹⁸ Case T-44/17 *Bruno Costantini and Others v European Commission*.

¹⁹ See Case C-350/92 *Spain v Council* [1995] ECR I-1985, para. 35; Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para. 86; Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, para. 15.

Three categories of initiatives refused registration

An analysis of the rejection letters sent by the Commission to unsuccessful organisers suggests that some of its decisions to refuse registration might be questioned. More specifically, it appears that the Commission may have too narrowly applied the legal admissibility test set out in Art. 4(2) of the ECI Regulation, and that some of the refused initiatives may not fall “manifestly outside” the Commission’s power. This report proposes that the refused initiatives can be split into three broad categories:

1. Initiatives that were “manifestly outside” the Commission’s powers, because they would clearly have required a Treaty amendment or a legal act that was evidently beyond the EU’s competence under the Treaties (category 1);
2. Initiatives that, on balance, were outside the Commission’s powers, because the specific proposal was beyond the EU’s competence, even though the general policy area was – or appeared to be – dealt with in the Treaties (category 2); and
3. Initiatives that were probably within the Commission’s powers, because it is a matter of Treaty interpretation whether the proposals fit within the EU’s competence under the Treaties (category 3).

Considering this categorisation, our analysis suggests that initiatives in the third category should not have been refused registration by the Commission. In such cases, the Commission appears to have misapplied the ECI Regulation in the following ways:

- the legal admissibility test was too strictly/narrowly applied (e.g. because the proposed initiative correctly identified a legal basis in the Treaties, and the subject matter of the initiative fell within the scope of the EU’s competence);
- the decision to refuse registration was arbitrary (e.g. because initiatives with similar characteristics were treated differently); and/or
- the reasons given for rejection were incomplete (e.g. because the Commission did not fully address all the Treaty provisions cited as a legal basis).

It should be noted that the categorisation above does not constitute a legal opinion and has been devised only as a tool for understanding the Commission’s decisions.

Category 1: Initiatives that were clearly outside the EU’s competences

Over one third of the initiatives refused registration so far fall into this category. An example of a proposed initiative that evidently was “manifestly outside” the framework of the Commission’s power to propose a legal act of the Union is below.

1. *“Citizens of a new State, which has seceded from a Member State should be citizens of the EU”*²⁰
 - Concept: The organisers of this initiative called on the Commission to create a rule that citizens of a State, which formed following secession from an EU Member State, would automatically be citizens of the EU.
 - Legal act proposed: None. No description was given of the legal act of the Union that the organisers wished the Commission to propose.

²⁰ Original Spanish title “Fortalecimiento de la participacion ciudadana en la toma de decisiones sobre la soberania colectiva”.

- Legal basis proposed: None. No Treaty provisions were identified, which could provide a valid legal basis for the proposal.
- Commission's response: The Commission refused to register the initiative, referring to Art. 20 TFEU, which states that only people holding the nationality of an EU Member State can be citizens of the EU.
- Assessment/verdict: Implementing this initiative would have required a Treaty amendment, which is outside the scope of the ECI and beyond the competences of the EU. The proposed initiative covered subject matter that is not dealt with in the Treaties and involves complex issues of international law. The Commission was clearly correct to refuse to register the initiative, as it was manifestly outside the framework of the Commission's power to propose a legal act of the Union.

Other examples of proposed initiatives that fall into Category 1 are listed below:

2. *Proposal to create a European, public bank founded on social and ecological development*²¹. The organisers suggested Art. 3(3) TEU as a legal basis for the initiative. However, Art. 3 TEU sets out the aims of the EU, and Art. 3(3) provides for the establishment of an internal market. There is nothing in this article – or any other Treaty provision – which can provide a valid legal basis for this proposal, meaning that a Treaty amendment would be required. The Commission was therefore correct in refusing to register this initiative.
3. *"A new EU norm, self-abolition of the European Parliament and its structures, must be immediately adopted"*. The organisers suggested no Treaty provisions which could form a legal basis for this initiative. There is no legal basis in the Treaties for a legal act of the Union which covers the subject matter of this initiative. Since the initiative could be implemented only by a revision of the Treaties, the Commission was correct to refuse registration.

Category 2: Initiatives that, on balance, were outside the EU's competences

Over one third of the initiatives refused registration so far fall into this category as well. An example of a proposed initiative that, on balance, was outside the framework of the Commission's power to propose a legal act of the Union is below.

1. *"Abolition of bullfighting in Europe and cruelty to bulls for entertainment"*²²
 - Concept: The organisers of this initiative called on the Commission to create a rule that would abolish bull-fighting in Europe.
 - Legal act proposed: [Legislation to ban bull-fighting.]
 - Legal basis proposed: The organisers suggested several Treaty provisions as legal bases for the Commission to act, namely:
 - i. Art. 13 TFEU requires the EU to have full regard to animal welfare when formulating and implementing EU policies, *inter alia*, on agriculture, fisheries, and transport;
 - ii. Art. 114 TFEU empowers the EU to adopt measures to harmonise Member State laws on the establishment and functioning of the internal market (so as to achieve the

²¹ Original French title: *"Cr ation d'une banque publique europ enne ax e sur le d veloppement social,  cologique et solidaire"*.

²² Original Spanish title *"Abolici n en Europa de la tauromaquia y la utilizaci n de toros en fiestas de crueldad y tortura por diversion"*.

objectives of Art. 26 TFEU, which requires the EU to adopt measures for the establishment and functioning of the internal market);

- iii. Art. 38 requires the EU to adopt a common agricultural policy;
 - iv. Art. 7 TFEU requires the EU to ensure that it is consistent in its policies and activities;
 - v. Art. 2 TEU says that the EU is founded on values of human dignity, freedom, etc; and
 - vi. Art. 6 TEU requires the EU to recognise the rights, freedoms and principles in the EU charter.
- o Commission's response: The Commission accepted that Arts. 26, 114 and 38 TFEU can be a legal basis for legal acts of the Union. However, it argued that the subject matter of the initiative (animal welfare) did not fall within these provisions. The Commission cited Case C-189/01 *Jippes*, in which the EU court stated that "ensuring animal welfare is not part of the objectives of the Treaty". Art. 13 TFEU requires that Member States and the EU take into account the welfare of animals when carrying out the objectives of the Treaties; however, it does not mandate rules on animal welfare outside of this context. The Commission therefore held that the proposed citizens' initiative fell "manifestly outside" the framework of the Commission's powers.
 - o Assessment/verdict: The Commission's decision appears to be legally sound, since the case law of the EU courts makes clear that animal welfare *per se* is not an objective of the Treaties. It therefore stands to reason that the subject matter of the proposed initiative fell outside the EU's competence. However, the organisers pointed to several Treaty provisions that could be used as a legal basis for the Commission to act. Furthermore, at least one of those provisions (Art. 114 TFEU) is 'fact-dependent'. The Commission has indicated in its written pleadings in the *Right to lifelong care* appeal that it considers the legislative action called for by the initiative not 'manifestly outside' its powers in cases in which the suitability of the legal basis proposed is dependent on factual circumstances. As such, the Commission holds that it will register initiatives when factual circumstances determine whether the Treaty provisions suggested can form a legal basis for the initiative in question. Thus, while on balance the Commission made the correct decision, it is not clear that this proposal was "manifestly outside" the Commission's power. On this basis, the initiative should have been registered.

Other examples of proposed initiatives that fall into Category 2 are listed below:

2. *"Concern for pets and stray animals"*.
3. *"Ethics for animals and kids"*.
4. *"For a European without legalised prostitution"*.

Category 3: Initiatives that were (possibly or probably) within the EU's competence

Around one quarter of the initiatives refused registration so far fall into this category. An example of a proposed initiative that was possibly or probably within the framework of the Commission's power to propose a legal act of the Union is below.

1. *"Right to life-long care: leading a life of dignity and independence is a fundamental right!"*

- Concept: The organisers of this initiative called on the Commission to propose legislation that would guarantee adequate social protection and access to quality, long-term care on a lifelong basis, so as to ensure the fundamental right to human dignity.
- Legal act proposed: [Legislation to ensure lifelong care.]
- Legal basis proposed: The organisers proposed three Treaty provisions, Art. 14 TFEU (*service of general economic importance (SGEI)*), Art. 153 TFEU (*social policy*) and Art. 352 TFEU (*flexibility clause*), as a legal basis for the Commission to propose legal acts. Art. 153 TFEU requires the adoption of minimum rules relating to social security for workers, and so relates closely to the subject matter of the proposed initiative. Art. 352 TFEU provides a legal basis for legal acts of the Union when no other Treaty provision applies.
- Commission's response: The Commission held that Art. 153 TFEU could not be a valid legal basis for a legal act whose main object was the one proposed by the initiative. It argued that, as far as social security was concerned, the article covered only the adoption of rules for *workers*, whereas the proposed initiative also covered non-workers, i.e. long-term care and care for the elderly. The Commission also held that Art. 14 TFEU could not be used as a legal basis for the proposed initiative, as the Union legislature did not have competence to impose obligations on Member States to provide an SGEI, but only to define the principles and conditions that Member States must respect if they decide to provide a particular SGEI. The Commission did not respond to the suggestion to use Art. 352 TFEU as a legal basis.
- Assessment/verdict: The Commission's refusal to register this initiative seems wrong, since it is a matter of interpretation whether the subject matter of the initiative (*provision of long-term social care*) falls outside the scope of Arts. 153 and 352 TFEU. Since the Commission also failed to address Art. 352 TFEU as a basis for a legal act of the Union, it is hard to understand why it concluded that the proposed initiative fell "manifestly outside" its powers to propose a legal act.

Other examples of proposed initiatives that fall into Category 3 are listed below:

2. "*Unconditional Basic Income*".

Other anomalous decisions

A review of the initiatives that the Commission has registered also raises questions about its decision-making in this area. In particular, a number of initiatives that were registered appear, on their face, to fall "manifestly outside" the Commission's power to propose a legal act of the Union, e.g.:

1. "*Termination of the EU/Swiss Agreement on Free Movement of Persons*"
2. "*For responsible waste management, against incinerators*"

Neither of these initiatives have an (explicit) legal basis in the Treaties. Nevertheless, the Commission decided to register them. Given the fact that the Commission normally adopts a highly formalistic approach when deciding whether a proposed legal basis for an ECI is 'manifestly outside' its powers, it is unclear why the Commission nevertheless decided to register the initiatives listed above. Its decision in these cases makes the Commission's refusal to register the initiatives in Categories 2 and 3 above even more surprising. This is another reason why it can be challenging for EU citizens to understand the reason for the Commission's decision to register one initiative but its refusal to register another.

7. PRACTICAL TIPS FOR ORGANISERS FOR A SUCCESSFUL REGISTRATION

To improve the chances that a proposed initiative is registered, organisers should take the following steps:

1. Specify what ‘legal act of the Union’ the Commission should propose. The legal act proposed:
 - a. must be in a policy area in which the EU has competence; and
 - b. may be legally binding legislation (e.g. a regulation) or a non-binding act (e.g. a recommendation).
2. Identify a Treaty provision that empowers the Commission to act.
 - a. this will almost always come from the TFEU (or very rarely, from the TEU) – other sources (e.g. EU Charter of Fundamental Rights) can be used only in support;
 - b. it should directly relate to the subject matter of the action being requested;
 - c. listing multiple provisions won’t necessarily help it get registered;
 - d. review the submissions of successfully registered initiatives for ideas (e.g. ‘Water is a human right!’);
 - e. resubmit a refused initiative (e.g. Unconditional Basic Income)

Organisers can appeal to the General Court or complain to the European Ombudsman over a refusal to register an initiative (Articles 263 and 228 TFEU).

Four applications for annulment are before the General Court: (links to be added)

1. *A Europe of Solidarity* – action brought on 11th October 2012
2. *Minority SafePack* – action brought on 22nd November 2013
3. *Right to lifelong care* – action brought on 15th January 2014
4. *Cohesion policy for the equality of the regions and preservation of regional cultures* – action brought on 10 January 2014

There are three complaints to the European Ombudsman: *Stop vivisection*; *Dairy cow welfare*; *Act4 Growth*. The European Ombudsman has also launched an own-initiative inquiry of the functioning of the ECI Regulation.

8. CONCLUSIONS

ECAS’ analysis of the subject matters of the refused initiatives suggests that, at least in a number of cases, the Commission has erred in its decisions to refuse registration. While it may be that all of the refused initiatives do, in fact, fall outside the EU’s competence to act, the question is a delicate one. In order to be refused a registration, the subject matter of a proposed initiative should fall “manifestly outside” the Commission’s powers to propose a legal act of the Union for the purpose of implementing the Treaties. The Commission appears to have applied the legal admissibility test too strictly/narrowly in some cases. The Commission also appears to have acted arbitrarily by registering initiatives that clearly have no legal basis in the Treaties (see “Other anomalous decisions”).

The conclusion of this review is that the ECI Regulation (No. 211/2011) should be reformed so that:

1. It is clear to ECI organisers how the “legal admissibility test” is applied by the European Commission and what exactly it implies; and
2. Initiatives addressing topics of genuine concern to citizens of Europe are allowed to be registered and debated.

A key question to be clarified, as it directly affects the criteria to be applied in the registration stage, is what the ECI Regulation is intended to achieve or, in other words, in what manner the ECI Regulation is intended to enable EU citizens to participate in the democratic life of the European Union. Currently, the ECI Regulation, seemingly as the result of a compromise between Parliament and the Commission/Council, restricts ECIs to legal acts which implement the Treaties.²³ In this respect, at least based on the Commission’s interpretation, political debate can only be instigated through proposals for legal acts. Initiating a “political debate”, for example on the current competences of EU institutions, is unlikely to be successful. The same goes for initiating an EU campaign to raise awareness on specific issues not directly related to a particular Treaty provision.

First set of recommendations regarding the up-coming Review of the Regulation

A fundamental debate on the nature and the purpose of the ECI needs to take place. This debate should shed light on the responsibilities of the various EU Institutions to achieve an effective and meaningful implementation of Art. 11 TEU.

A number of initial recommendations are outlined below based on our observations of the ECI process. ECAS will follow-up in the upcoming months with further views on the debate surrounding the review of the Regulation.

1. Clarify through public debate the nature of the ECIs as an agenda-setting instrument.

There is confusion regarding the nature of the instrument, both from citizens and policy-makers. It is, in fact, unclear whether the ECI is mainly an agenda-setting instrument limited to initiating legally binding legislation or whether it could also be a policy-setting instrument allowing citizens to put certain issues on the EU policy agenda. The public debate should, in any case, address the potential to elaborate further on the other forms of citizens’ participation in the political life of the EU as envisaged in Art. 11 (1)-(3) TEU.

2. Define the remit of the “legal act” and/or of the political actions that the European Commission can initiate or undertake.

Based on the previous recommendation, the Commission, under the framework of the review of the ECI Regulation in 2015, should define what it means by “legal act” and what specifically an ECI can propose, whether this is only legally-binding legislation or also non-legally binding acts.

3. Provide a definition of “manifestly outside” that is clear, easy to understand and is not subject to arbitrary interpretation.

Art. 4 (2) of Regulation 211/2011 should be clarified and the definition of “manifestly outside” should be articulated in a clear way that is understandable to both citizens and practitioners. The definition should also be based on what the EU courts decide regarding the four cases presented on ECIs.

Currently, the ECI Regulation provides no specific guidance on how to determine whether a subject matter is ‘manifestly outside’ the Commission’s competence to submit a proposal for a legal act. The criterion

²³ See in this regard also: M. Dougan, ‘What are we to make of the citizens’ initiative?’, 2011 *Common Market Law Review* 48, p. 1807-1848.

‘manifestly outside’ is vague and requires further clarification. This is especially so given the fact that EU citizens must be able to understand how the Commission assesses what it considers to be ‘manifestly outside’ the EU’s competence in order to decide whether their proposal is likely to meet the requirements for registration. Recitals or legally binding guidance should be added to clarify how this criterion is applied.

4. Clarify the procedure for the legal admissibility test and ensure transparency of the decision-making process.

The current ECI Regulation states that the legal test must be applied at the moment of registration. Given the relatively strict application of the registration eligibility test, this results in certain initiatives not being able to start collecting statements of support, even though the mere collection of signatures already sends a strong democratic signal.

More transparency in the rules of procedures and internal guidelines of the Commission on the registration process, especially the legal admissibility test, should be disclosed and made publicly available.

Any amendment to the test must reflect the fact that the current test is applied too strictly and should acknowledge that EU citizens are normally not very well versed in EU law.

Clarifications should be made at the outset as to whether a Treaty provision could provide a suitable legal basis for an initiative (as this can be dependent on a particular interpretation of the Treaty provisions) and whether the legal test applied should be more lenient in its wording and application. This will allow initiatives that call for legal action based on provisions that are prone to multiple interpretations to be registered.

5. Establish an ECI officer, similar to the Hearing Officer in competition law.

An ECI officer post should be established, based on the experience of the Hearing Officers under competition law²⁴.

“The Hearing Officers' main roles are to organize and conduct the oral hearing and act as independent arbiters where a dispute on the effective exercise of procedural rights between parties and DG Competition arises in antitrust and merger proceedings. In such matters, the Hearing Officers generally intervene only where a dispute cannot be resolved by the parties and DG Competition. The Hearing Officers also decide on applications to be heard by third persons in the proceedings. Such applications must be submitted directly to the Hearing Officers.”²⁵

An ECI officer would ensure that a constructive dialogue is established between the institutions and the ECI organisers during the registration process and beyond. The role of the ECI officer would be to liaise with the organisers throughout the registration process and to provide support in identifying the possible legal basis of the ECI as well as to resolve disputes between DG SEC GEN and the organiser, in case of refusal of registration.

6. Secure adequate legal advice for ECI organisers with regard to the legal basis of initiatives.

Legal advice, which is independent and outside the remit of the Commission, should be made available and provided to ECI organisers in order to work on the registration of the initiative with the Commission.

²⁴ Decision 2011/695/EU of the President of the European Commission of 13 October 2011 ;

²⁵ The Hearing Officers, DG Competition, http://ec.europa.eu/competition/hearing_officers/legislation.html

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10. ANNEX I

No.	Name	Status (as of 18 Sept. 2014)	Date of registration / rejection
1.	Fraternité 2020 - Mobility. Progress. Europe.	Closed (Insufficient support)	09-May-12
2.	Single Communication Tariff Act [original]	Withdrawn	10-May-12
3.	Water and sanitation are a human right! Water is a public good, not a commodity!	Submitted (response received)	10-May-12
4.	EU Directive on Dairy Cow Welfare	Withdrawn	10-May-12
5.	One of us	Submitted (response received)	11-May-12
6.	Let me vote [original]	Withdrawn	11-May-12
7.	Fortalecimiento de la participación ciudadana en la toma de decisiones sobre la soberanía colectiva	Refused	30-May-12
8.	Recommend singing the European Anthem in Esperanto	Refused	30-May-12
9.	My voice against nuclear power	Refused	30-May-12
10.	Stop vivisection	Closed (results being verified)	22-Jun-12
11.	High Quality European Education for All	Closed (Insufficient support)	16-Jul-12
12.	Pour une gestion responsable des déchets, contre les incinérateurs	Closed (Insufficient support)	16-Jul-12
13.	Abolición en Europa de la tauromaquia y la utilización de toros en fiestas de crueldad y tortura por diversión.	Refused	19-Jul-12
14.	Suspension of the EU Climate & Energy Package.	Closed (Insufficient support)	08-Aug-12
15.	Central public online collection platform for the European Citizen Initiative	Closed (Insufficient support)	27-Aug-12
16.	Création d'une Banque publique européenne axée sur le développement social, écologique et solidaire	Refused	06-Sep-12
17.	One Million Signatures for "A Europe of Solidarity"	Refused	06-Sep-12

18.	Unconditional Basic Income [original]	Refused	06-Sep-12
19.	End Ecocide in Europe: A Citizens' Initiative to give the Earth Rights [original]	Withdrawn	01-Oct-12
20.	European Initiative for Media Pluralism [original]	Withdrawn	05-Oct-12
21.	30 km/h - making the streets liveable!	Closed (Insufficient support)	13-Nov-12
22.	Kündigung Personenfreizügigkeit Schweiz	Registered / Withdrawn	19-Nov-12
23.	Single Communication Tariff Act [re-application]	Closed (Insufficient support)	03-Dec-12
24.	Unconditional Basic Income (UBI) - Exploring a pathway towards emancipatory welfare conditions in the EU [re-application]	Closed (Insufficient support)	14-Jan-13
25.	End Ecocide in Europe: A Citizens' Initiative to give the Earth Rights [re-application]	Closed (Insufficient support)	21-Jan-13
26.	Enforcing self determination Human Right in the EU	Refused	21-Jan-13
27.	Let me vote [re-application]	Closed	28-Jan-13
28.	ACT 4 Growth	Closed	10-Jun-13
29.	Teach for Youth -- Upgrade to Erasmus 2.0	Withdrawn	17-Jun-13
30.	Ensemble pour une Europe sans prostitution légalisée	Refused	18-Jul-13
31.	Cohesion policy for the equality of the regions and sustainability of the regional cultures	Refused	25-Jul-13
32.	Stop cruelty for animals	Refused	25-Jul-13
33.	Do not count education spending as part of the deficit! Education is an investment!	Closed (Insufficient support)	06-Aug-13
34.	European Initiative for Media Pluralism [re-application]	Closed	19-Aug-13
35.	Minority SafePack – one million signatures for diversity in Europe	Refused	13-Sep-13
36.	To hold an immediate EU Referendum on public confidence in European Government's (EG) competence	Refused	29-Oct-13
37.	Right to Lifelong Care: Leading a life of dignity and independence is a fundamental right!	Refused	05-Nov-13

38.	Our concern for insufficient help to pet and stray animals in the European Union	Refused	06-Nov-13
39.	Weed Like to Talk	Closed	20-Nov-13
40.	European Free Vaping Initiative	Closed (Insufficient support)	25-Nov-13
41.	The Supreme Legislative & Executive Power in the EU must be the EU Referendum as an expression of direct democracy	Refused	23-Jan-14
42.	A new EU legal norm, self-abolition of the European Parliament and its structures, must be immediately adopted.	Refused	23-Jan-14
43.	Turn me Off!	Withdrawn	03-Feb-14
44.	New Deal 4 Europe - for a European Special Plan for Sustainable Development and Employment	Open	07-Mar-14
45.	MOVEUROPE	Withdrawn	24-Mar-14
46.	Ethics for animals & kids	Refused	26-Mar-14
47.	Vite l'Europe sociale ! Pour un nouveau critère européen contre la pauvreté	Refused	05-Aug-14
48.	STOP TTIP	Refused	10-Sept-14
49.	An end to front companies in order to secure a fairer Europe	Open	01-Oct-14



European Citizen Action Service
77, Avenue de la Toison d'Or
B-1060 Brussels, Belgium
+32 (0) 2 548 04 90
+32 (0) 2 548 04 99
info@ecas.org
www.ecas.org