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## ***Issues for reform:***

### **7. Reform ECI Registration and Expand Public Debate: Reconsidering Legal Admissibility**

James Organ

*Legal scholar James Organ reviewed registration decisions for early ECIs and discovered that the Commission applied overly strict legal admissibility criteria – leading to a startling 40% rejection rate. This limits the power of the ECI both to promote public debate and impact policy. In this article, he outlines four potential ways to reform the ECI registration process so more ECIs may be introduced and the ECI's democratic potential realised.*

#### **Registration decisions limit two main democratic benefits of the ECI**

The European Citizens' Initiative (ECI) was introduced with high hopes that it would alter the democratic landscape of the EU. Commissioner Šefčovič stated that the ECI would add a “whole new dimension of participatory democracy to the Union” and lead to “a significant step forward in the democratic life of the Union”. The ECI has had some success: 40 ECIs have been proposed, three ECIs collected over one million signatures and over five million citizens supported an ECI.

But the European Commission also refused to register almost 40% of proposed ECIs. Organisers of these ECIs were thus denied the opportunity to even seek support from citizens, let alone impact EU policy. This limited the two main democratic benefits of the ECI: cross-border public debate on EU policy and the opportunity for citizens to directly influence the EU agenda.

In light of the upcoming review of ECI legislation, it is useful to consider what might lead to more ECI proposals being registered. This article considers four potential avenues:

1. Remove the pre-registration legal admissibility test altogether.
2. Change the criteria for admissibility in the ECI Regulation.
3. The Commission alters its approach to applying admissibility criteria.
4. Rely on decisions taken in the EU courts to ease admissibility.

#### **Legal admissibility criteria for registration behind all ECI rejections**

*Article 4(2) of the ECI Regulation 211/2011 sets out four criteria that each ECI proposal must initially meet to be registered. It requires that the organising committee be established appropriately; that the proposed ECI is not ‘manifestly abusive, frivolous or vexatious’; and ‘not manifestly contrary to the values of the Union as set out in Article 2 TEU’.* These criteria have been easily met and ensure the ECI's appropriateness for discussion in an EU context.

Most problematic for ECI organisers is the fourth criteria of *legal admissibility*. An ECI proposal 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 purpose of implementing the Treaties’. The Commission's strict

application of this legal admissibility test led to *all* ECI registration refusals. In most cases, ECI organisers simply failed to identify a specific legal basis in the Treaty to support their ECI's objectives. Every refusal letter included the phrase "*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*". The removal of the legal admissibility test from the registration phase of the ECI process would thus dramatically increase the percentage of ECI proposals being registered.

### **Move legal admissibility check to end of ECI process**

A single legal admissibility check *only* at the end of the ECI process, at the same time as the Commission decides whether it could or should make a legal proposal, would be more appropriate than the current two (one at registration and a second if successful). The Commission could still block from registration ECIs that are frivolous or clearly outside the principles of the EU. But *citizens* would control what policy issues they want publicly debated. It would also limit the Commission's role to assessing the small number of ECIs that had cleared the democratic test of popular support rather than the dozens of proposed ECIs.

There is a concern that negative impressions of EU democracy could increase if popular ECIs are declared legally inadmissible *after* considerable campaigning work. It is questionable, however, whether this would outweigh the democratic benefits of increased participation in and awareness of EU policy debates. This impact could be mitigated if the Commission provided *non-binding* advice to ECI campaigns on the likelihood of their proposal leading to a legal outcome.

### **Change the legal admissibility criteria in the ECI regulation**

If a legal admissibility test is kept at registration, an alternative could be to *modify* the criteria it contains. Changes would address the two principal reasons ECIs are declared inadmissible: failure to identify a *legal basis in the Treaties* and requiring *an amendment to the Treaties*.

The requirement that an ECI proposal should not be '*manifestly outside*' the Commission's powers could be broadened even further to make it clear that only in circumstances where there is *no possibility of any legal act whatsoever* would registration be refused. The Commission might refer to the area of competence (policy subject) to make this decision.

The phrase '*for the purpose of implementing the treaties*' in the ECI regulation has been cited to exclude treaty amendments from ECI proposals. Whether prohibiting treaty amendments was ever the intention for the ECI process or is required by the provisions in *Article 11(4), TEU* that established the ECI has been the subject of much debate. Nevertheless, rewording the ECI regulation so that treaty amendment is allowed would mean that some of the most important issues facing the Union, such as the scope of its competences, can be addressed by citizens through the ECI.

These two modifications may require significant change to the ECI legislation. Alas, at least in the short term, there may be no political appetite for this or such alterations may be deemed too extensive.

### **Change the Commission's approach to the legal admissibility check**

A third way to make ECI registration less restrictive would be to adjust the *Commission's interpretation and application* of the admissibility criteria in the ECI Regulation. The current approach has been described as '*remarkably strict*'.

The Commission could require less certainty from ECI organisers about which treaty articles provide a legal basis for action. The ECI regulation does not ask that the ECI proposal be *clearly inside* the Commission's powers only that it '*not be manifestly outside*' of them.

ECI proposals have also been refused registration because only some, but not all, of their objectives had identified acceptable legal bases. Current ECI legislation does not stop the Commission from registering a proposal in these circumstances. Yet ECIs have been rejected for this reason. One objective with an appropriate legal basis in an ECI could be enough for it to be registered.

The criterion '*for the purpose of implementing the treaties*' is already broad enough to allow treaty amendment. This fact would appear to have been confirmed by the Commission's registration of the *Let Me Vote* ECI which would require an amendment to *Article 20(2) TFEU* to be implemented. Yet the Commission rejected the ECI *Enforcing selfdetermination Human Right in the EU* stating that '*amending the treaties...falls outside the scope of the citizens' initiative.*' Each ECI cited a different legal basis. The self-determination ECI referred to *Article 48(2) TEU* while *Let Me Vote* referred to *Article 25 TFEU*. Although the former uses the *ordinary revision procedure* while the latter is an example of a *passarelle clause*, both ECIs would require treaty amendment in order to be implemented. Why reject one and register the other? The Commission has effectively decided that they can use *Article 48(2)* to make a proposal for treaty amendment *on their own initiative*, but one million EU citizens cannot ask them to do so.

### **The Commission could advise ECIs on wording proposals to facilitate registration**

The Commission has so far taken a neutral, formalistic approach to registration. As well as making a legal assessment of ECI proposals, though, the Commission could do more to facilitate their registration. Official refusal letters just give brief reasons and mention the *European Ombudsman* or court as avenues for recourse. They do not suggest constructive steps like further discussion with the Commission or offer any support to redraft or resubmit the proposal.

The task of identifying a legal basis to achieve an ECI's objectives currently falls to ECI organisers and requires resources and legal knowledge. Alternatively, citizens could just propose the subject and broad objectives of their ECI, and instead the Commission could indicate possible legal bases. With all refusal letters stating that the Commission has carried out an '*in depth examination...of all other possible legal bases*' it would seem that most of the work to do this is already done, and since this examination is not required it might already indicate some willingness from the Commission to assist organisers.

### **Court decisions will significantly impact the future of the ECI**

The final avenue for change is that decisions by EU courts could lead the Commission to alter its approach to ECIs' legal admissibility. The ECI *One Million Signatures for a Europe of Solidarity* has already submitted an application to the European Court of Justice and *Right to Lifelong Care* is due

to do so shortly. These cases are challenging the Commission's strict interpretation of the legal admissibility criteria (*Art 4(2)(b) of the ECI Regulation 211/2011*). The Court has also been asked to address the question of treaty amendment.

It is impossible to know what the courts will decide. Will they support an increased openness to registering ECI proposals in line with the democratic principles of the Union? Or will they uphold the Commission's strict interpretation of legal criteria? If the Court sides with the Commission, legislative change will be necessary if the ECI is to fulfil its democratic potential. Whatever the decision from the Court, which for the first time has been given a means of intervening in the Commission's role of initiating legislation, it is likely to have a significant impact on the future of the ECI process.

### **Registering more ECIs is 'risk free' to the Commission and necessary for democracy**

Even with the above-mentioned changes, not all proposed ECIs would be registered. They would still need to be 'serious', appropriate to the principles of the Union and in line with the other registration criteria. The Commission is still only required to *consider* proposing a legal act, not actually to do so. Increasing the number of ECIs that are registered and can generate debate is 'risk free' in terms of EU institutions' control over EU legal output and policy. ECIs with strong popular support will of course exert some political pressure over the Commission to act. This democratically generated pressure to reflect the wishes of their citizens is of course part of the purpose and benefit of the ECI.

The question of legal impact should *follow*, not precede, democratic deliberation. The high proportion of ECIs blocked at registration (40%) not only significantly restricts citizens' influence over the policy agenda, but also excludes many worthy and EU appropriate topics from public debate – such as legalised prostitution, nuclear power, care services and referendums on EU governance. Public debate should be as broad as possible.

Change to the ECI registration process is both possible and needed. The upcoming review of the ECI regulation and decisions from the Court could improve the ECI's democratic potential. But the Commission already has the power to change its approach to the legal admissibility of ECI proposals at registration and so reap immediate democratic rewards.

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