



EU-Commission's proposal for ECI needs improvement!

ECI-update, 23. November 2009

1. Defining the legal nature of ECI
2. Analysing the Commission's Proposal on ECI
3. Next steps

In these days the Lisbon Treaty enters into force (December 1) and various groups have contacted us seeking for advice on how to prepare and conduct a European Citizens' Initiative (ECI). Educational issues are at stake, calling for a new structure of the European Bachelor/Master study programme (we currently have the biggest pan-European student protests since 1968) as well as environmental and social issues such as the protection of water and public services. In other words: people are looking forward to lift their voices through ECI.

For the moment however it is not possible to start an ECI on a legal basis. But the next step to make ECI operational is on the way. As expected the European Commission has now published a Green Paper on ECI. This action coincides with the launching of a public consultation process, which aims at seeking views of all interested individual citizens and organizations on how to design the implementation laws for the European Citizens' Initiative.

Experience in EU member states has shown that citizens' initiatives, if they are to be truly workable, need to be designed in a citizen-friendly way. This is all the more true for a European Citizens' Initiative due to the far more difficult circumstances at the transnational level. After we have analysed the EU-Commission's proposal, we urgently recommend everyone to discuss this recently published Green Paper within your organization and contribute actively to the consultation-process. Within the weeks to come (until January 31st) we still have the chance to improve the Commission's Proposal on ECI. Please find the Green Paper translated in all 23 official languages at:

http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/index_en.htm

Launching the public consultation, Commissioner Margot Wallström promised “the new democratic tool must be accessible, transparent and user-friendly”. Since the EU however has no experience yet to deal directly with Citizens through European Citizens’ Initiatives, the EU-Commission urgently needs your support and asks us all to assist on adequately drawing up user-friendly implementation rules for ECI, which will finally be written down in an extra EU-Regulation, so that ECI can enter into force by the end of 2010.

In the following we give you a first general overview and analysis of the Commission’s proposal, contained in the Green Paper, which still needs considerable improvement, due to several misunderstandings, connected to the legal and practical nature of a Citizens’ Initiative right at transnational level. While the Commission requires to reduce the restrictions for itself, it actually does increase restrictions for future ECIs, compared to well-designed Citizens’ Initiative rights at national level. So far the Commission also refuses to provide any supportive elements for ECI, which do exist in citizen-friendly procedures at national level.

In this context it is reasonable to look at the experience with the first 20 informal ECIs, that do already exist at European level, as we have documented in the ECI-Handbook 2008:

http://www.iri-europe.org/fileadmin/user_upload/media/IRI-Handbook2008.pdf

None of the three ECIs, which have succeeded to collect a million signatures, would have fulfilled the restrictive and burdensome criteria lined out in the Commission’s proposal for ECI. We thus need to bring together the world of ideas (the legal nature of ECI) and the world of concrete experience. Only then we have a chance that ECI will be an accessible democratic innovation.

1. The legal nature of ECI and its practical consequences

The authors of the Green Paper are using the so called method of “reasoning by analogy”, which means that the analysts compare ECI with the existing procedures in EU-legislation, in order to draw conclusions from them for ECI. Since however ECI is the first element of its kind at transnational level, there is no comparable procedure at European level. Thus the Commission compares national Citizens’ Initiative rights in Member States and tries to draw adequate conclusions from them for the implementation for ECI. To a certain degree this is an appropriate approach, in order to get a taste for the important detail questions. “Reasoning by analogy” to procedures in Member States however is insufficient in so far, as it is impossible to copy a design of a national procedure and apply it at EU level. Instead, the procedure needs to be an original creation, according to its own nature and adapted to the needs of democratic life at European level, where it is significantly more difficult to conduct a Citizens’ Initiative.

For the moment there still are some misunderstandings among analysts within the Commission, which basically circle around three types of democratic instruments, that have to be clearly differentiated. They partially have identical names depending on the context and country, but are connoted with vital different contents.

Firstly, there is the right of petition, which does not bind the addressed institutions to act. The institution is free to remain inactive and ignore the collected signatures of citizens.

Secondly, there is the Citizens' Initiative as an Agenda Initiative, which obliges the addressed institution to act legislatively on the topic raised by the Citizens' Initiatives, but the institution is free to interpret and define the content of the legislative act.

Thirdly, there is the Citizens' Initiative, as a Popular Initiative, which leads to a popular vote, with the consequence that the result of the vote, that is a referendum, is binding.

What exactly is the European Citizens' Initiative? ECI neither is a petition (which already exists in respect to the EU parliament) nor is it a full citizens' initiative in the sense of a popular initiative leading to a popular vote. Instead ECI establishes for the very first time a direct legislative channel for European citizens as an Agenda Initiative. That means, once an ECI has collected one million signatures and is declared as admissible, ECI has a binding nature for the Commission in the sense that it has to take some legislative action on the topic proposed by the ECI and then forward it to the Council and European Parliament. Only then the issue is put on the European agenda, and only then the instrument is taken serious as an Agenda Initiative. If the EU-Commission would be free to ignore one million citizens' signatures, this would be of great disappointment and a tragic misunderstanding.

The EU-Commission surprisingly speaks in its press-release of a "petition", apparently relating to ECI, see:

http://ec.europa.eu/news/eu_explained/091111_en.htm This misunderstanding, has led to many misunderstandings within European media as well, suddenly reducing the power of ECI to a "petition". Here we have to be most attentive in the next weeks and carefully continue our engagement for ECI.

A summary of the academic debate on the legal nature made by Democracy International:

<http://www.mehr-demokratie.de/fileadmin/pdfarchiv/di/2008-10-eci-criteria-eng.pdf>

and the German government think tank SWP, on page 29 (only in German):

http://www.swp-berlin.org/common/get_document.php?asset_id=6431

2. A first analysis of the proposal by the EU-Commission

The Commissions' Greenbook raises many essential questions concerning the role of future ECIs and the EU-Commission itself. This includes time-limits for ECIs and other hurdles an ECI has to overcome such as "how many countries constitute a significant number of member states?" And "how many of signatures must come from each of those countries?" But also "how signatures are allowed to be collected?" and "what time limit is foreseen for the Commission to act and respond to an ECI?"

What specific criteria for a European design are needed?

As the ECI is a historic primer on the transnational level, we enter new territory and it thus is not possible to just copy a regional or a national model for the European Citizens Initiative right. We need to develop our own appropriate design for ECI that takes into account the specific needs and circumstances at the European level. It

quickly becomes clear that it is much more a challenge to carry out a signature collection at transnational level than at any other level, because of

- huge geographic distances, which makes it difficult and expensive to meet and plan.
- more than 20 official languages, which make it difficult to communicate across borders
- the absence of a strong common public space

We therefore need to adopt, and that is most important, the implementation rules for ECI to the needs of democratic life at the European level. This has two decisive implications.

- Firstly, one should keep the formal restrictions lower than at national level.
- Secondly, the supportive elements for citizens' initiatives should be stronger than at national level.

Without these two criteria ECI can not be workable. We would run the risk to kill the instrument before it is born. In fact we are warned since it has happened with many national citizen's initiatives rights, that they never could be used because of too restrictive rules.

Regarding the supportive elements, the following rights, which also exist at national level, should be included in the design of ECI:

- the right to receive legal advice.
- the right to receive translation of the signature text.
- the right to receive reimbursement in part of the costs.

In how far does the Commission adopt the needs for ECI at transnational level?

Surprisingly the Commission's Greenpaper does not foresee yet any of these three vital supportive elements. At the moment it remains silent about the question of translation of signature texts and refuses to get in touch with citizens, when they are about to organize a ECI and seek for legal advice, saying: "organizers can normally be expected to have fully assessed whether the initiative legally falls within the framework of the Commission's powers before launching an initiative" (page 10 point 7). Experience with Citizens' Initiatives in Member States and informal "Test-ECIs" shows, that the Commission's current position relies on a misunderstanding. There are Citizens' Initiatives and ECIs, which have or would have been not admissible after huge amount of signatures were collected. For the design of ECI we should reduce such avoidable and painful waste of civil energy by learning from the multilingual Swiss practise, where Citizens' Initiatives are provided for with translation and legal advice, when Citizens plan to start a Citizens' Initiative.

Moreover the Commission so far explicitly rejects "reimbursement in part of the costs". While the Commission does not give any content-related reasons for its position against this idea, which exists at national level, the Commission only writes that this would be "in the interest of preserving the independence and citizen-driven nature of initiatives" (page 11, point 8). Here it is necessary to ask, "how does the

Commission comes to the assumption, that Citizens' Initiatives would lose their independence, once they get parts of their costs reimbursed?" If the Commission consequently reasons by analogy, it could for example learn from reimbursement procedures in Austria and Spain, where parts of the costs of Citizens' Initiatives can be reimbursed without endangering their independence.

In how far does the Commission lower the restrictions for ECI compared to those within national procedures?

Here it is interesting to see that the Commission indeed suggests to lower the restrictions when it comes to its own role. It requires more resources in time (half a year) concerning its own time limit to respond to an ECI and start legal action. The Commission justifies this with the complex nature an issue could create at transnational level. When however it comes to the proposed time limit for ECI to collect signatures (12 months), the Commission unfortunately has increased restrictions, compared with citizen-friendly rules at national level (18 months for Swiss Citizens' Initiatives).

Looking at the experience with "Test-ECIs", we can see that none of the two informal ECIs, which succeeded to collect 1 million signatures on paper, managed to do this within 12 months, even so this are very large organisations (Greenpeace and the European Disability Forum), who thought to manage a Million verifiable signatures quickly.

What additional quorums beyond one million signatures?

While one million signatures is already defined as an extremely high number, which often is a much under-estimated figure by politicians, media and by those, who plan to organize an ECI, the way how signatures are to be distributed still needs to be specified.

That means the "significant number" of member states, from where the signatures need to come from, as well as the minimum number of signatures per Member State (MS) still needs to be defined. Here the Commission suggests, that every ECI should be signed in at least nine MS by at least 0,2% percent of their populations.

Compared to the EU Parliament's resolution on ECI, the Commission does unnecessarily increase the country quorum from one fourth to one third.

It tries to justify these high hurdles, by drawing analogies to the Swiss Cantonal Initiative procedure: "the Swiss threshold for the number of cantons required for optional referenda is also close to one third" (page 5, point 1). This is an invalid analogy, since this does not refer to Citizens' Initiatives, but to Swiss Cantons, which also can trigger a fully binding popular vote, when they have reached the support of 8 out of 23 cantons. First of all such a right to call an optional referendum on a law enacted by the national parliament, naturally imposes higher hurdles, than an Agenda Initiative (like the ECI) and secondly it needs to be said, that for Swiss Citizens' Initiatives there is no regional threshold at all for collecting signatures.

In the same way it is invalid to draw analogies to the provisions on "enhanced cooperation" and the "subsidiarity procedure" having a threshold of nine Member

States. These thresholds refer to national Governments and Parliaments, which have incomparable stronger resources than ECIs.

With regards to the signature quorum, the Commission does not give a complete picture of the existing procedures in Member States and draws similarly invalid analogies. The Commission tries to justify this high number of 0.2% saying: “that the proportion of citizens required to support an initiative in most of the Member States where such an instrument is in place, is significantly higher than 0.2%.” (point 2, page 5). In this context the Commission remains silent about important facts. Firstly, it should be said, that the majority of the procedures existing at Member States are below 1% and vary between 0.08% (Italy) and 0.69% (Portugal). A minority of four countries have quorums over 1% going up to 1.43% (Lithuania). Secondly, the Commission’s reference to the Citizens’ Initiative in “Latvia where it is set at 10% of the population” (point 2, page 5) is misleading, since the Latvian Citizens’ Initiative is not an Agenda Initiative as the ECI is. Instead the Latvian Citizens’ Initiative triggers a referendum, on which, as explained above, higher restrictions are applied than to Agenda Initiatives due to their binding effect (compare the clarification of terms in Chapter 2 of this Newsletter).

What is the concrete experience with a citizen-friendly quorum in Italy?

It is an essential weak point, that the Commission so far does only look at the issue from a formal point of view at ECI and does not analyse the concrete experience with Citizens’ Initiative rights in countries, where they exist. The scientific literature brings clear light into the fact, that Citizens’ Initiatives are hardly used, where these thresholds are such high. Following criteria one, one should look at the lowest restriction in Member States and give them a model character for ECI. In relation to the threshold this is the case with Italy, where merely 0.08 % of citizens need to sign, which is less than half of percentage, which the Commission proposes. And even in Italy the instrument was used only on a very moderate level. From 1948 till 2005 only 213 Citizens’ Initiatives were conducted, from which 29 were adopted as law. That means in Italy we have an average for four Citizens’ Initiatives per year.

Thus the Commission should by no means be afraid to be flooded with ECIs, but instead we need to fear that with such a too high quorum of 0.2%, the restrictions for ECI are overstretched, so it will dry up and hardly be usable.

Summing this point up: both distribution quorums are higher than existing citizen-friendly quorums in Member States and thus do not fulfil criteria one to “lower the restrictions compared with Member States”. This stems from a misunderstanding within the Commission, drawing wrong analogies to Member States procedures that are not Agenda Initiatives, but Citizens’ Initiatives triggering referendums. On the other hand the Commission forgets about the specific requirements for Citizens’ Initiatives at transnational level.

Last, but certainly not least, the Commission remains silent about another essential question. Can an ECI propose to change EU-treaties or is it restricted to secondary law? Here the Commission should clearly define that the subject-matter of an ECI must lie within the area where the EU-Commission has the right to make proposals. However, as the Commission itself is entitled to propose amendments to treaties, it should be possible to launch initiatives which relate to treaty amendments.

3. Next Steps

The next steps to come should comprise a further reading and analysis of the Commission's proposal, an exchange among civil society organisations about it and finally intensified concrete engagement in the consultation process. There is not much time left to improve the quality of the ECI-proposal, thus I very much hope to see and hear many of you within a final and successful "birth-process" of ECI. If you have further questions or intelligent ideas how to help and proceed, feel free and get in contact with us. ECI has found its place in the Lisbon Treaty (Constitutional Treaty) thanks to many citizens' engagement from many different countries. For a truly workable ECI-design we need again this kind of transnational engagement from all over Europe.

Best Regards

Carsten Berg

berg@democracy-international.org

<http://www.citizens-initiative.eu/>