

Decommissioning Direct Democracy?

A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals

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INTRODUCTION

Following the enactment of the Lisbon Treaty the European Union (EU) sought to bolster its democratic legitimacy by supplementing its existing representative basis with the first instrument of direct democracy at the supranational level: the European Citizens' Initiative.¹ The potential, theoretical significance of the European Citizens' Initiative for the democratic legitimacy of the EU is widely recognised,² and the Commission itself expected it to be 'a significant step forward in the democratic life of the Union' that would add a 'whole new dimension of participatory democracy'.³ However, despite these high expectations, the regulation

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¹ For discussion of the development and limitations of European Union democracy *see* for example B. Kohler-Koch and B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union* (Rowman and Littlefield 2007); J.H.H. Weiler et al., 'European Democracy and Its Critique', 18 *West European Politics* (1995) p. 4; S. Hix, *What Is Wrong with the European Union and How to Fix It* (Polity 2008); D. Beetham and C. Lord, *Legitimacy and the European Union* (Longman 1998). For alternative views on democracy in the EU *see* for example, A. Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', 40 *JCMS* (2002) p. 603; A. Moravcsik, 'The Myth of Europe's Democratic Deficit', *Intereconomics: Journal of European Public Policy* (2008) p. 331; and G. Majone et al., 'Europe's Democratic Deficit: The Question of Standards', 4 *European Law Journal* (1998) p. 5.

² *See* for example A. Warleigh, 'On the Path to Legitimacy? The EU Citizens Initiative Right from a Critical Deliberativist Perspective', in C. Ruzza and V. Della Sala (eds.), *Governance and Civil Society in the European Union* (Manchester University Press 2007) p. 55.

³ Quoted from speech by Vice President of the European Commission Maros Sefcovic, 'The Lisbon Treaty: Enhancing Democracy' on 30 Sept. 2010, p. 2. Available at <europa.eu/rapid/press-release_SPEECH-10-502_en.htm>, visited 26 March 2014.

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implementing the European Citizens' Initiative was strongly criticised early on for its potential to limit its impact.⁴ This article examines the extent to which these high expectations have been met in practice and whether this new facet of EU citizenship is a strong opportunity for citizen-led democratic participation in the EU or one that is throttled by institutional mediation.

In the first twenty months after Regulation 211/2011 implementing the European Citizens' Initiative came in to force on April 1st 2012, the Commission received requests to register 37 initiatives: 20 of these were registered,⁵ 15 were refused registration by the Commission, and two were withdrawn and not resubmitted. By the time of the first deadline for collection on 1 November 2013 about five million statements of support had been collected by the registered proposals. Three initiatives,⁶ which account for approximately four million of these statements of support, had successfully reached the support thresholds needed to proceed to the final phases. There is clearly interest in using this democratic instrument, but questions remain about how strongly this democratic engagement is being conditioned by institutional mediation. The potential democratic benefits of the European Citizens' Initiative derive from increasing citizen influence over the policy agenda, including allowing established policy preferences to be challenged; and also, indirectly, through developing the political activity of EU citizens. It will be argued, however, that the Commission has restrictively applied the rules relating to the admissibility of European Citizens Initiative proposals during the registration process and reduced the likelihood of these democratic benefits being realised.

This argument is developed in three sections. The first section introduces the key democratic criteria against which the European Citizens Initiative might be assessed and contains a summary of the European Citizens Initiative legal framework. The second section of the article reviews and analyses critically the Commission's interpretation of the legal admissibility test applied when considering the registration of citizens' initiatives. The initiatives submitted for registration prior to 1 November 2013 will initially be categorised, and then the two parts of the admissibility criteria contained in Article 4(2)(b) of the implementing Regulation 211/2011, which have been the basis for all refusals to register an European

⁴ M. Dougan, 'What Are We to Make of the Citizens' Initiative?', 48 *CML Rev* (2011) p. 1807; B. Kaufmann, 'Transnational Babystep: The European Citizens Initiative', in M. Setälä and T. Schiller (eds.), *Citizen's Initiatives in Europe: Procedures and Consequences of Agenda-Setting by Citizens* (Palgrave Macmillan 2012), p. 229.

⁵ Four initiatives were withdrawn and then resubmitted for registration. Although these proposals were registered twice they are counted here only once in the total of registered proposals. Commission figures count the number of times they have considered registration rather than the number of proposals that have been registered.

⁶ *Right to Water* initiative, *One of Us* initiative, and *Stop-vivisection* initiative.

Citizens' Initiative proposal, are assessed. The third and final section of the article draws conclusions in relation to the degree of citizen control the European Citizens' Initiative delivers in practice, and the potential democratic benefits therefore of introducing this instrument of direct democracy to the EU.

DIRECT DEMOCRACY: POWER TO THE PEOPLE?

In recent decades there has been increasing use of instruments of direct democracy to provide citizens with more direct means of democratic participation across the member states of the EU that supplement the well-established institutions of representative democracy.⁷ The EU, which is also founded on representative democracy,⁸ now formally recognises the role of participatory democracy in Article 11 TEU,⁹ and in Article 11(4) TEU has introduced the European Citizens' Initiative, the EU's first instrument of direct democracy. The introduction of these extended democratic provisions into the treaties indicates that the EU is seeking to supplement its democratic legitimacy. But how might the democratic potential of an instrument of direct democracy such as the European Citizens' Initiative be assessed? One of the key criteria for a democratically legitimate polity is that control of the political agenda is exercised, or at least influenced, by the citizens it will affect.¹⁰ A popular initiative, of which the European Citizens' Initiative is an example, is a democratic instrument intended to achieve this end.¹¹ The European

⁷ See G. Smith, *Democratic Innovations – Designing Institutions for Citizen Participation* (CUP 2009) for comment on current writings on participation, p. 6. For definition of participation see for example, T. Schiller, 'Direct Democracy and Theories of Participatory Democracy', in Z.T. Pallinger et al. (eds.), *Direct Democracy in Europe: Developments and Prospects* (VS Verlag für Sozialwissenschaften 2007) p. 52-63; A. Weale, *Democracy* (Macmillan Press 1999); J. Zimmerman, *Participatory Democracy* (Praeger 1986). See B. Barber, *Strong Democracy Participatory Politics for a New Age* (University of California Press 1984) for how such instruments may be used. One recent example is the introduction of a statutory requirement for referendum in the UK in relation to EU changes through the EU Act 2011. For a full list of UK referendums see <www.parliament.uk/get-involved/elections/referendums-held-in-the-uk/>, visited 26 March 2014. Switzerland is the world leader in use of direct democracy. On the use of referendums in the EU see for example S. Hobolt, *Europe in Question: Referendums on European Integration* (OUP 2009) p. 9.

⁸ Art. 10(1) TEU.

⁹ For further comment on Art. 11 TEU, see V. Cuesta Lopez, 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy', 1 *European Public Law* (2010) p. 123-138.

¹⁰ *Inter alia* see R. Dahl, *On Democracy* (Yale University Press 1998).

¹¹ T. Schiller and M. Setala, for example, define popular initiatives as 'procedures that allow citizens to bring new issues to the political agenda [...] through collecting a certain number of signatures in support of a policy proposal', *Citizen's Initiatives in Europe; Procedures and Consequences of Agenda-Setting by Citizens* (Palgrave Macmillan 2012) p. 1. Similarly P. Uleri described popular initiatives as 'a procedure enabling a predetermined number of registered electors to submit a politi-

Citizens' Initiative is designed to pass some control to citizens over the subject matter that is discussed as part of the legislative agenda.¹² The extent to which the European Citizens' Initiative increases the direct influence of citizens over the EU's policy and legislative agenda is therefore a key measure of its democratic impact.¹³ If citizen influence over the political agenda is accepted as enhancing democratic legitimacy, 'the crucial normative question is then the extent to which there should be an institutional capacity for the public at large to have a final say on issues of public policy' – a final say that includes not just influence over legal outcomes but also the ability to influence what is discussed in the first place.¹⁴ Democratic theorists suggest that the greater the extent to which citizens, rather than political representatives or the bureaucrats, influence the political agenda, the stronger the democratic legitimacy of the polity.¹⁵ Conversely, the greater the degree of control that remains in the hands of the existing bureaucracy, the greater the potential for citizen participation to be ignored or to fail to instigate meaningful change. This is one of the most common objections raised by those who are critical of the value of citizen participation through direct democracy.¹⁶ The institutional mediation by the Commission is a key factor in how strongly the European Citizens'

cal demand', cited in V. Cuesta Lopez, 'Comparative Approach to the Regulation on the European Citizens Initiative', 13 *Perspectives on European Politics and Society* (2012) p. 257-269. For outline of different forms of direct democracy instruments see B. Kaufmann, 'The "New" Participative Paradigm. How the European Citizens' Initiative Can Become the Standard Bearer of 21st Century Super-Democracy', in B. Kaufmann and J. Pichler (eds.), *The European Citizens' Initiatives – Into New Democratic Territory* (Intersentia 2010). For a typology of forms of democracy based on the manner that direct democracy and representative/indirect democracy are combined see Weale, *supra* n. 7.

¹²The European Citizens' Initiative also passes control to citizens through establishing legal obligations that citizens trigger by supporting a proposal for a legal act of the Union. This obligation on institutions generated by a popular initiative distinguish the European Citizens' Initiative from the existing right to petition in the EU set out in Art. 20 TEU and Art. 24 TFEU. It is not, however, the focus in this article.

¹³T. Schiller, 'Direct Democracy and Theories of Participatory Democracy', in Pallinger, *supra* n. 7.

¹⁴Weale, *supra* n. 7, p. 85. The possibility that public debate and its associated democratic benefits are restricted by the Commission's approach to the registration of initiatives is referred to in this article, but the European Citizens' Initiative is addressed here primarily as an instrument of direct democracy that formally enables increased citizen influence over the political agenda.

¹⁵See for example J.S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (Yale University Press 1991) p. 24: 'Anything that supplants effective decision-making at the representative level with effective decision-making by the peoples themselves, comes to be perceived as more democratic.' See G. Majone for alternative view that for the EU expert led technocracy is more legitimate than democracy in, for example, G. Majone, *Regulating Europe* (Macmillan 1998).

¹⁶Smith, *supra* n. 7. For discussion of elite control in relation to the use of direct democracy more generally see S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012). For discussion of importance of challenging established policy preferences, see R. Blaug, 'Engineering Democracy', *Political Studies* (2002), p. 102. D. Held, *Models of*

Initiative process can facilitate genuine citizen-led participation and influence over the policy agenda.¹⁷ This is particularly evident through the Commission's influence on the need for legal action proposed in a European Citizens' Initiative to fit within the framework of the treaties; and the extent to which citizens are permitted to invite the Commission to propose an amendment to the treaties. This article critically analyses the manner and degree of institutional control that the Commission exerts over the European Citizens' Initiative process as a result of the interpretation and application of the admissibility criteria for the registration of a European Citizens' Initiative. In so doing conclusions are drawn as to whether the Commission has restricted the potential for direct citizen participation to influence the policy agenda, and therefore the democratic benefits that the EU might enjoy in practice from introducing the European Citizens' Initiative.

EUROPEAN CITIZENS' INITIATIVE LEGAL FRAMEWORK

Article 11(4) TEU, which establishes the treaty provisions for the European Citizens' Initiative, stated that

Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European 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.*

The provisions in Article 11(4) TEU could have been interpreted as allowing citizens to choose the subject matter of and seek popular support for proposals in relation to almost any issues that the citizens themselves, not the Commission, believe need some sort of legal action taken to implement the treaty principles, with the legal test of the proposals only taking place once they were submitted to the Commission.¹⁸ However, the implementing Regulation 211/2011 adopted a more restrictive approach than this by establishing a legal admissibility test for the registration of European citizens' initiatives, removing the reference to it being the

Democracy (Polity 2006) for discussion of bureaucratic interference in participatory democracy, p. 209-216.

¹⁷The extent to which the 'final say' on the policy agenda falls to citizens for any instrument of direct democracy depends in large part on the institutional mediation that is built in to the regulatory design of the democratic instrument and also the role of institutions in its implementation. See e.g., A. Gross, 'The Design Determines the Quality – Some Criteria for Determining the Design and Quality of Direct Democracy', in Pallinger, *supra* n. 7; Smith, *supra* n. 7.

¹⁸Art. 4(2)(c) and (d) limit European Citizens' Initiative proposals to those that are within the principles of the EU.

citizen's opinion that legal action is required for implementing the treaties, and removing the reference to citizens being able to make 'any appropriate proposal'.

Regulation 211/2011 provides for a four-part admissibility test that the Commission assesses each initiative against at registration. Article 4(2)(a) only requires that the organising committee is established appropriately.¹⁹ Article 4(2)(b), (c) and (d) are the three substantive parts to the admissibility test. Article 4(2)(c) and (d) require, respectively, that the proposed initiative is not 'manifestly abusive, frivolous or vexatious' and 'not manifestly contrary to the values of the Union as set out in Article 2 TEU'. The second highlighted part of Article 11(4) became Article 4(2)(b) in the implementing regulation and requires that the proposed citizens' initiative does 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'. It is the interpretation and implementation by the Commission of these two parts of the admissibility criteria in Article 4(2)(b) that have led to all refusals to register an initiative so far. It is therefore the decisions taken in relation to these criteria that are analysed in this article; particularly in relation to their impact on the potential of the European Citizens' Initiative to increase citizen influence over the policy agenda.

Both parts of the admissibility criteria of Article 4(2)(b) – 'not manifestly outside the framework of the Commission's powers' and 'for the purpose of implementing the Treaties' – allow for some discretion in the Commission's implementation. The requirement for an initiative proposal to not be manifestly outside the framework of the Commission's powers could be interpreted as suggesting that it will only be refused registration if there is clearly no available legal act that can be taken that would contribute to the implementation of its objectives.²⁰ This broad interpretation would mean that organisers of an initiative only need to propose objectives for registration purposes consonant with the broad system of competences set out in the treaties. The Commission, as opposed to the initiative organisers, would then have to decide, once the support thresholds had been reached, precisely what sort of legal act to propose. A narrower interpretation of this first part of the admissibility criteria in Article 4(2)(b) would be to require organisers at the outset to clearly identify a legal base within the treaties, for all aspects of their proposal, that would allow the Commission to propose a legal act of the Union at the end of the process. This interpretation would require a formal test of an initiative at registration as if it were initiating the legislative process, and would increase the burden on organisers to discharge the legal admissibility requirements.²¹

¹⁹ Requirements for establishing the European Citizens' Initiative organising committee are set out in Art. (3)(2), Reg. 211/2011.

²⁰ Dougan, *supra* n. 4, p. 1807.

²¹ D. Szeligowska and E. Mincheva, 'The European Citizens' Initiative – Empowering European Citizens within the Institutional Triangle: A Legal and Political Analysis', 13 *Perspectives on*

For the second part of Article 4(2)(b), ‘for the purpose of implementing the Treaties’, a broad interpretation would mean that initiatives could be registered that had proposed legal acts for the purpose of implementing the principles of the treaties, as set out in Articles 2 and 3 TEU, and which would not necessarily exclude treaty amendment. However, before the implementing regulation came in to force the Commission stated that treaty amendment would be outside the scope of the European Citizens’ Initiative and a narrower interpretation of this second part of the criteria in Article 4(2)(b) would be applied.²² This was stated despite the fact that this is not explicitly required by Article 11(4) TEU²³ and there are treaty articles that could provide a legal base for the Commission to propose treaty amendment.²⁴

Review and critical analysis of Commission registration decisions for European Citizens’ Initiative proposals

Categorisation of European Citizens’ Initiative proposals

The proposed categorisation of European citizens’ initiatives to support the subsequent discussion relies on three factors: how specifically the subject matter is defined, the type of legal acts proposed, and the extent the proposal appears to challenge existing policy.

The first grouping is of initiatives that submitted proposals with specific subject matter and with specific legal acts included in the objectives of the proposal. For example, one proposal cites a previously used legal base to request a further restriction on speed limits to 30 km/h in urban areas²⁵; and another seeks to complete the move to ending mobile roaming fees, again citing a previously used legal base in relation to the proposed legal act²⁶; and there is a proposal asking for an extension of the use of the Erasmus programme.²⁷ All the proposals in this group invite

European Politics and Society (2012) p. 270 at p. 277 for comment on expectation that the use of ‘manifestly outside’ could leave legal admissibility decision to be finalised at the end of the process.

²² Jens Nymand-Christensen at the conference ‘*The EU Citizens’ Initiative: Normative, Legal and Policy Perspectives*’ (University of Liverpool, 6th May 2011).

²³ Some commentators went further and said that it was never the intention of the drafters of the treaty provision to exclude treaty amendment, e.g. M. Efler, ‘European Citizens Initiative, Legal Nature and Criteria for Implementation’, in B. Kaufmann and J. Pichler (eds.), *The European Citizens’ Initiatives – Into New Democratic Territory* (Intersentia 2010).

²⁴ E.g. Art. 48(2) TEU and Art. 20(5) TFEU that are discussed later in the context of the European Citizens’ Initiative.

²⁵ The initiative titled *30 km/h – making the streets livable*. For description go to <ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000014>, visited 26 March 2014.

²⁶ The *Single Communication Tariff Act* initiative. For description of proposal go to <ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000002>, visited 26 March 2014.

²⁷ The *Teach for Youth – Upgrade to Erasmus 2.0* initiative. For description of proposal go to <ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2013/000005>, visited 3 Feb. 2014.

legal action from the Commission within an existing policy area and offer little challenge to the established policy preferences of the Commission. All the proposals in this group were registered.

The second grouping is of initiatives whose subject matter is more widely construed and more challenging to existing policy than those in the first group. The majority of the proposals in this group are supported by civil society organisations and have broad mission statements or campaign objectives associated with these organisations as their subject matter.²⁸ Within their broad campaign objectives, however, these initiatives all invite the Commission to propose specific legal acts for which their legal team has found a specific legal base in the treaties.²⁹ For example, the *High Quality Education for All* initiative seeks to ‘establish a multi-stakeholder discussion/collaboration platform [...] [to] debate and formulate a European policy for a quality, pluralistic and EU 2020-oriented educational model’.³⁰ This is typical of the ‘softer’ legal acts proposed by initiatives in this group, which appear more likely to be registered than harder legislative proposals such as those in the third group below.³¹ The *Universal Basic Income* initiative originally proposed legislation they called a ‘legal rights act’. This was refused registration and the reason given was that the suggested treaty article, Article 153(2) TFEU, did not provide a legal base for legislation to be proposed that might introduce an act of this sort. However, the initiative was resubmitted and registered with the same subject matter and long term goal after the legislative proposal was replaced by softer legal action, based on Article 156 TFEU, of an examination of

²⁸ For example, The *One of Us* initiative that is supported by church backed right to life groups and whose subject matter is stated as the ‘juridical protection of the dignity, the right to life and of the integrity of every human being from conception’: <ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000005>, visited 26 March 2014. Two other examples are the *Stop Vivisection* initiative that is ‘proposing a European legislative framework aimed at phasing out animal experiments’ and the *Right to Water* initiative, titled ‘Water and sanitation are a human right! Water is a public good, not a commodity!’ who want legislation to implement ‘the human right to water and sanitation’. For description of these initiatives go to <ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000007>, visited 26 March 2014 and <ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003>, visited 26 March 2014.

²⁹ Two of the initiatives in this group, the *education spending* initiative and the *EU climate and energy package* initiative have been presented slightly differently. They both have specific legal acts that they wish to invite the Commission to propose, but these are presented as the subject matter of the initiative rather than the objectives.

³⁰ For description of the *High Quality European Education for All* initiative go to <ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000008>, visited 26 March 2014. Other examples include the *anti vivisection* initiative that invites the ‘Commission to abrogate directive 2010/63/EU on the protection of animals used for scientific purposes’ and the *One of Us* initiative asks the EU not to finance activities which presuppose the destruction of human embryos.

³¹ One exception is the *stop vivisection* initiative which is seeking the abrogation of Directive 2010/63/EU on the protection of animals used for scientific purposes.

the issue through pilot studies. The only other initiative in this category refused registration was the Friends of the Earth backed *Anti Nuclear Power* initiative.³²

The third and largest group of initiatives are those that contain the proposals that are more novel and most strongly seek a new direction in EU policy, although the extent to which this is true varies from proposal to proposal. The subject matter of these initiatives tends to be reasonably specific, but not just an extension of existing EU policy as is the case for those in the first group; and the objectives tend to be more ambitious in the sense of being new or extensive legal acts, which distinguishes these proposals from those in group two. The subject matter in this group is wide-ranging: to create a social, ecological and solidarity European bank,³³ to sing a European anthem in Esperanto,³⁴ to end legalised prostitution,³⁵ and to guarantee EU citizenship for citizens of newly independent regions, amongst others.³⁶ The initiatives in this group have all been refused registration either because of a lack of a legal basis for action or because they propose treaty change, which relate to the two-part criteria in Article 4(2)(b) and are discussed in more detail next.

First part of admissibility criteria: manifestly outside the framework of the Commission's powers

Restrictive interpretation of treaty articles due to uncertain legal base for action

The first part of the criteria in Article 4(2)(b) states that the legal acts proposed by initiatives must not be 'manifestly outside the framework of the Commission's powers'. There is no requirement in Regulation 211/2011 that uncertainty about the final legal outcome of a proposal should be reason alone for refusing registration. However, the Commission has strictly applied the requirement that a proposal must not be 'manifestly outside' the framework of their powers. The *Cohesion Policy* initiative, for example, invites the Commission to propose a legal act with-

³²The refusal though was on the basis that the initiative was seeking treaty change, which is discussed further below. For initiative details see <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/429>, visited 26 March 2014.

³³For details of the initiative proposal and the letter informing organisers that registration has been refused go to <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/539>, visited 26 March 2014.

³⁴For details of the initiative proposal and the letter informing organisers that registration has been refused go to <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/449>, visited 26 March 2014.

³⁵For details of the initiative proposal and the letter informing organisers that registration has been refused go to <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1486>, visited 26 March 2014.

³⁶For details of the initiative proposal and the letter informing organisers that registration has been refused go to <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/469>, visited 26 March 2014.

in an EU policy area of equality between regions and indicates specific legal bases to support the action proposed.³⁷ Three specific actions were set out that the organisers of this initiative wished to have implemented; two of which are relatively soft legal acts that are not manifestly outside the framework of the Commission's powers: 'defining the concept of "national" regions' and 'identifying the "national" regions by name'.³⁸ The basis of the registration refusal was that 'promoting the conditions of national minorities cannot be understood as helping to reduce the "disparities as to the level of development between regions" and underdevelopment of certain regions'. This aim of reducing disparities between regions is required by Article 174 TFEU to trigger Article 177 TFEU, which is the legal base that was suggested as relevant to the proposal. It is far from certain that the proposal in relation to national minorities meets the criteria of Article 174 TFEU, but it is at least arguable. For instance, in areas where there is a correlation between minority groups and poor economic performance actions that are taken to increase the understanding and definition of minority groups may well help to improve economic performance through enabling better targeting of funds and project development. Article 167(2) TFEU was also indicated as a possible legal base by the *Cohesion Policy* initiative: 'Action shall be aimed at encouraging cooperation between member states and, if necessary, supporting their action in the following areas: improvement of the knowledge and dissemination of the culture and history of the European peoples [...]'. Although defining the concept of national minorities in an EU context and identifying them could be considered to meet this aim in relation to European peoples and been a basis for registering the proposal, Article 167 TFEU was simply dismissed as not providing a legal base for the objectives proposed by the initiative without further explanation.³⁹ Despite the possibility of meeting the Article 174 TFEU criteria and Article 167 TFEU, and the relatively 'soft' nature of the legal outcome invited of a reprioritisation of funds, the Commission took the decision not to register the initiative. This strict interpretation of Article 4(2)(b) implies that rather than just needing to avoid being manifestly outside the framework of the Commission's powers, an initiative will only be registered if the legal acts proposed by the organisers meet the more stringent test of being clearly inside the framework of the Commission's powers.

³⁷ For details of the initiative go to <<http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1488>>.

³⁸ The first objective of 'ensuring that Member States entirely fulfil their international commitments regarding national minorities' is manifestly outside the Commission's powers.

³⁹ The implication of the lack of explanation when refusing registration of initiatives is discussed further below.

Refusal when criteria for admissibility partially met

The Commission has refused to register European citizens' initiatives unless they meet the criteria for admissibility for all aspects of their proposal, despite there being no provision in the Regulation that states that an initiative cannot be registered in part or that resubmission without the offending part(s) cannot be suggested. This was clearest in the *Minority SafePack* initiative⁴⁰ which proposed a range of measures to achieve progress towards its overall goal of improving the protection of persons belonging to national and linguistic minorities and strengthening cultural and linguistic diversity. The Commission response stated that although some measures were within their powers to submit a proposal for a legal act of the Union for the purpose of implementing the treaties the 'Regulation on the citizens' initiative does not provide for the registration of part or parts of a proposed initiative'. It appears problematic for the registration of an initiative if it invites the Commission to propose a number of legal acts, and when an initiative does so, then all the actions need to have an applicable legal base. This reduces the scope of proposals and limits the public debate generated by an initiative in relation to its overall subject matter.

Inconsistency in registration decisions

The *No Legalised Prostitution* initiative⁴¹ sought to use Article 83 TFEU to invite the Commission to propose legal acts that would lead to the criminalisation of issues related to prostitution. Even though it was accepted that aspects of this proposal could be covered by EU level legislation, it was decided by the Commission that the initiative could not be registered as it was not specific enough about the types of prostitution related issues it was trying to address, and that it was not clear whether there was a legal base for the Commission to propose a legal act or not; even though Article 83 TFEU specifically mentions sexual exploitation of women. Not only did the response to this initiative reiterate the Commission's restrictive approach indicated in the previous paragraphs, it is also unclear from the explanation provided by the Commission why the *No Legalised Prostitution* initiative should have received a different registration decision from the *Ecocide* initiative, which supports its proposal to criminalise ecocide using the same treaty article, Article 83 TFEU, and which was accepted as a relevant legal base despite environmental crime not being specifically mentioned.⁴² One possible explanation is that the environment is an established EU policy area and there is case law that

⁴⁰ See information about initiative at <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1507>, visited 26 March 2014.

⁴¹ See information about initiative at <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1486>, visited 26 March 2014.

⁴² See <ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2013/000004>, visited 26 March 2014, for information on the *Ecocide* initiative.

supports the possibility of the EU criminalising environmental damage.⁴³ This would mean, though, that the *No Legalised Prostitution* initiative has failed the admissibility test not because criminalisation per se is not a competence of the EU, but because sexual exploitation is not a subject area that has already been dealt with by the EU, which is not a registration requirement.

Another initiative related to environmental issues, the *Anti-incinerator* initiative, would also appear to have been dealt with more leniently than the *No Legalised Prostitution* initiative with respect to the need for a legal base to be clearly and specifically linked to all aspects of the proposal. The *Anti-incinerator* initiative⁴⁴ suggested ‘Maastrich (JO 29.07.1992) / Art 3 – alinéa k “politique dans le domaine de l’environnement”’ as their relevant treaty article, which does not provide a legal base for the proposed legal acts. This initiative stated seven wide-ranging framework principles as the legal action to be invited and the Commission considered there to be a sufficient legal base for the proposal of a legal act and for the initiative to be registered even though a legal base is not clearly linked to each of the seven objectives. This seems to be a more lenient interpretation of the admissibility criteria than when applied to the *Solidarity Bank* initiative which also only indicated Article 3 TEU as a supporting treaty article relevant to its proposal, but was refused registration.⁴⁵

Increased legal burden on European citizens’ initiative organisers

Organisers are only required to provide limited information to register a European citizens’ initiative, such as the legal outcomes that are being sought and the relevant treaty articles.⁴⁶ A draft legal act and further detailed information can also be provided but are not required. On the face of it therefore the registration of an initiative is not complex and should not impose a strong legal burden on organisers. The Commission decisions though have increased this burden by confirming that it is not enough to be within the general principles of the Union or an existing area of EU policy to be registered; and that an initiative will only be registered if a suitable legal base is identified for the specific legal act(s) the organisers are inviting the Commission to propose. Furthermore, the increased burden of meet-

⁴³ ECJ 13 Sept. 2005, Case C-176/03, *Commission v. Council*; ECJ 23 Oct. 2007, Case C440/05, *Commission v. Council (Ship Source Pollution)*.

⁴⁴ See <ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000009>, visited 26 March 2014, for information on initiative.

⁴⁵ See <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/539>, visited 26 March 2014, for information on initiative.

⁴⁶ In summary organisers must provide Committee and funding details; a title and subject matter, which usually set out the broad aims of the proposal; the objectives of the proposal in less than five hundred words. For complete list of registration requirement see Annex 1 of Regulation 211/2011.

ing this higher threshold of legal admissibility has been reversed on to the organisers who must demonstrate that their initiative is clearly inside the framework of the Commission's powers, rather than the Commission being required to establish that the initiative is manifestly outside the framework of its powers before refusing registration.

The legal burden placed on the initiative organisers could have been mitigated if the Commission had taken a more facilitative approach to the registration process; an approach perhaps that checked the appropriateness of a proposal in an EU context and then assisted organisers to identify a legal base or to frame objectives that had a chance of achieving a legal outcome at the end of the process. The Commission's role at registration so far though has been a passive one limited to formally confirming whether or not the organisers have been successful in framing their proposal so as to meet the strict test of legal admissibility in Article 4(2)(b). The letter informing organisers that their initiative has been refused registration usually provides limited information about the reasoning behind the decision taken, offers no further support to organisers, does not indicate resubmission as an option, and simply tells organisers that the General Court or the Ombudsman are the avenues for challenging a decision without inviting any further discussion with the Commission.

Despite this formally unsupportive position, the Commission has actually provided further information and assistance for organisers to be able to resubmit an initiative when requested, which, if continued, could indicate a move towards being more supportive of registering initiatives.⁴⁷ Furthermore, all the refusal letters include a statement that the Commission has carried out an 'in depth examination [...] of all other possible legal bases',⁴⁸ which is not required by the Regulation and would also appear to indicate some willingness on the part of the Commission to assist organisers in bringing their proposal within the framework of the Commission's powers. However, no alternative legal bases have yet been suggested by the Commission that would allow a legal act of the Union to be proposed in relation to any of the objectives of any of the initiatives, which makes it seem rather more like a phrase by rote that discourages resubmission.⁴⁹

⁴⁷The *Universal Basic Income* initiative was resubmitted at the second attempt following discussion with the Commission about its objectives. The organisers of the *Anti Nuclear power* initiative were eventually given a ten page document that provided information regarding the Commission's decision to refuse to register their initiative.

⁴⁸All refusal letters available at <ec.europa.eu/citizens-initiative/public/initiatives/non-registered>, visited 26 March 2014.

⁴⁹The Commission could, for example, have suggested Art. 25 TFEU, which was accepted for the *Let Me Vote* initiative with a similar objective, as the legal base for the proposal that sought to guarantee that citizens of a newly independent state would maintain their status as EU citizens.

The burden on organisers is also increased by applying the admissibility test at the start of the European Citizens' Initiative process. If it had been applied at the end of the process then this legal burden would have been more likely to fall to the Commission when exercising their responsibility to make the legal and political decisions about whether and how an initiative that has gathered the necessary support will be responded to.⁵⁰ If the Commission were to initiate the legislative process in response to an initiative then it would fall to them to find a legal base to do so. Having the admissibility of the possible legal outcomes of a proposal tested at registration brings legal decisions, such as whether there is an applicable legal base, to the start of the process where the burden can more easily fall on the citizens proposing the initiative.

Front loading the admissibility test in the process also denies organisers the chance to put their case for action and to receive a comprehensive explanation of why their proposal does not fit in the treaties, both of which are formally provided for at the end of the process.⁵¹ This significantly reduces input from organisers in to the decision-making about possible legal bases and outcomes and also allows for an increase in political factors influencing the registration of initiatives. There is some early indication that certain subject areas, such as the environment, may be more likely to be registered.⁵² If this were the case, and it is certainly not proven yet, then political decisions that should be part of the final phase of the European Citizens' Initiative process, after the opportunity for democratic participation, are being taken in a closed manner without public deliberation.⁵³

Second part of admissibility test: for the purpose of implementing the treaties

The second part of the legal admissibility criteria in Article 4(2)(b) is that the legal act the Commission is invited to propose must be 'for the purpose of implementing the Treaties'. Three initiatives – the *Anti-Nuclear Power* initiative,⁵⁴ the *Self-Determination Human Right* initiative,⁵⁵ and the *Let Me Vote* initiative⁵⁶ – have required its interpretation and application by the Commission. The first two were refused registration, but the *Let Me Vote* initiative was registered despite the fact that it seeks an amendment to primary law: Article 20(2) TFEU.

⁵⁰ Art. 10 Reg. 211/2011 sets out the requirements at the end of the European Citizens' Initiative process.

⁵¹ Art. 10 and Art. 11 of Reg. 211/2011.

⁵² See comments above on *Anti-incinerator* (*supra* n. 44) and *Ecocide* (*supra* n. 42) initiatives.

⁵³ Dougan, *supra* n. 4, p. 1807.

⁵⁴ <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/429>, visited 26 March 2014, for further details.

⁵⁵ <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1175>, visited 26 March 2014, for further details.

⁵⁶ <ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2013/000003>, visited 26 March 2014, for further details.

The Commission stated prior to the regulation coming into force that the European Citizens' Initiative cannot be used to propose treaty change.⁵⁷ The Commission tried to confirm this principle when refusing the registration of the *Anti-Nuclear Power* initiative; notwithstanding the fact that the principal reason for refusal was that its subject was the Euratom Treaty.⁵⁸ Nevertheless, and despite the fact that amendment to the treaties was also not specifically invited by the initiative or intended by the organisers, the Commission took this early opportunity to assert, for the first time, that an initiative cannot seek treaty change, and registration of this initiative would have been refused on this ground as well. The Commission stated in the registration refusal that 'the legal bases of the TEU and TFEU cannot be interpreted as giving the Commission the possibility to propose a legal act that would have the effect of modifying or repealing provisions of primary law'.⁵⁹ This assertive statement is not strictly correct as there are treaty articles that give the Commission the possibility to propose a legal act that could lead to the modification of provisions of primary law. Two such treaty articles, Article 48(2) TEU and Article 25 TFEU, have been cited as relevant treaty articles in the *Self-Determination Human Right* initiative, and the *Let Me Vote* initiative respectively. The different registration decisions for these initiatives are discussed next.

The refusal letter sent to the organisers of the *Self-Determination Human Right* initiative stated that, 'amending the Treaties, as implicitly suggested by your reference to Article 48(2) TEU (ordinary revision procedure), falls outside the scope of the citizens' initiative, as the latter may only be used to request the Commission to submit a proposal for the purpose of implementing the Treaties'. Despite this clear legal base for a Commission proposal of the sort envisaged by the *Self-Determination Human Right* initiative, it was decided that this type of proposal did not meet the requirement that a European citizens' initiative must be for the purpose of implementing the treaties. Article 48(2) TEU provides that the Commission may 'submit to the Council proposals for the amendment of the treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties'. As a result of the Commission's

⁵⁷ Nymand-Christensen, *supra* n. 22.

⁵⁸ A legal challenge to the Commission's refusal to register this initiative was considered by the organisers on the grounds that their proposal was for the purpose of implementing the TEU or TFEU not the Euratom Treaty, but this did not happen. The organisers also decided not to resubmit their proposal. Information provided at Conference 'European Citizens Initiative: Early Experience' in Austria Nov. 2012 by Klaus Kastenhofer from the organising committee of this initiative. Report from conference available at <www.ecas-citizens.eu/content/view/416/>, visited 26 March 2014.

⁵⁹ Quote is from p. 2 of letter refusing registration, which can be found at <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/429/>, visited 26 March 2014.

rejection of the use of Article 48(2) TEU to support a European Citizens' Initiative proposal, the EU is in a position where the Commission can propose changes to the treaties using Article 48(2) TEU, but a body of EU citizens cannot use this treaty provision to ask the Commission to make such a proposal. As democratically unappealing as this position may appear, legally it is arguable that Article 48(2) TEU, as it provides a basis for amendment rather than implementation of the treaties, should fall outside the scope of the European Citizens' Initiative. However, this explanation of the Commission's stance is challenged by the decision to register the *Let Me Vote* initiative discussed next.

The *Let Me Vote* initiative invites the Commission to propose that EU citizens can vote in all elections in the member state in which they are resident. Article 25 TFEU, which is a passerelle clause that provides for strengthening or adding to the rights listed in Article 20(2) TFEU, is submitted as the legal base for this proposal. This initiative was registered despite inviting a proposal from the Commission that would lead to a change in primary law. This means that in some circumstances Treaty amendment can fall within the scope of the European Citizens' Initiative and meet the requirement that a proposal must be 'for the purpose of implementing the Treaties', and begs the question of what might exclude Article 48(2) TEU from its scope but not Article 25 TFEU.

One distinction between the two proposals that could explain the Commission's approach – other than that the *Let Me Vote* proposal might be a more attractive proposition for the EU – is that the legal base for this initiative is a passerelle clause in the treaties specifically related to the article in question, Article 20(2) TFEU, whereas the *Self-Determination Human Right* initiative suggested a legal base that was not linked to a specific topic and would invite a proposal that would feed in to the ordinary revision procedure instead. Another distinction that might go some way to explaining the Commission's approach is that the *Let Me Vote* initiative proposal, based on Article 25 TFEU, does not require a new competence to be introduced in to the treaties for the legal act to be proposed by the Commission, whereas the *Self-Determination Human Right* initiative requires an amendment to the treaties that introduces a new legal base before its objectives can be realised. It might be argued therefore that the structure of the legal basis for Union legislative action is not in itself being amended by an Article 25 TFEU action, but it would be if an Article 48(2) TEU proposal led to a legal act of the Union.

However, neither of these distinctions avoid the fact that they are both treaty articles that provide for a legal proposal from the Commission that could lead to the amendment of the treaties, albeit of differing character. The decision to register the *Let Me Vote* initiative means that amendment of the treaties is possible through use of the European Citizens' Initiative process. An amendment that creates a new legal base in the treaties might be excluded, but left open are the

questions of how the other passerelle clauses and the special revision procedure might be treated if they are indicated as relevant treaty articles in future initiatives and, more broadly, precisely when treaty amendment is acceptable as part of the European Citizens' Initiative process and when it is not.

This fine distinction between legal bases of the treaties that are within the scope of the European Citizens' Initiative does not feel like a very satisfactory basis on which to justify the variation in application of the admissibility criteria or particularly sustainable if one examines the relevant legal framework. Article 48(2) TEU is not clearly excluded by the wording of Article 11(4) TEU that the Commission can make 'any appropriate proposal within its powers' or by the requirement that it not be manifestly outside the powers of the Commission, and if treaty amendment is considered to fall within the Commission's understanding of 'for the purpose of implementing the Treaties' in other situations then why not for Article 48(2) TEU as well? Without an explicit statement in either the primary or secondary law that treaty amendment is excluded from the scope of the European Citizens' Initiative any decision to reject the registration of an initiative on this basis is left open to legal challenge.⁶⁰

Allowing the European citizens' Initiative to be used to invite proposals for treaty change, whether using Article 48(2) as a legal base or using a differentiated process for European citizens' Initiative proposals of this nature, would provide a common institutional opportunity for all EU citizens to have some direct influence on the treaty change agenda, albeit with its impact formally very weak and reliant on cooperation from the EU institutions. The member states would still have the leading role in treaty change and control decision-making, and the mere agenda-setting right of the European citizens' Initiative would not undermine their ability to decide on the outcomes of any treaty change process. Potentially, though, it could enhance the democratic legitimacy of the process through increased citizen participation and through enabling opinion formation by citizens thinking in a cross border mode.

In summary, the review of the Commission's application of the admissibility criteria in Article 4(2)(b) highlight a number of lessons for potential organisers of a European citizens' initiative, but also a degree of uncertainty about their applica-

⁶⁰ No legal challenge has reached the Court yet, but one case has been submitted: ECJ 11 Oct. 2012, Case T-450/12, *Anagnostakis v. Commission*, available at <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:399:0024:0025:EN:PDF>, visited 26 March 2014. The European Citizens' Initiative was refused registration because the Commission stated that there was no legal basis for the legal acts proposed in the initiative and therefore manifestly outside the framework of the Commission's powers. The case asks the Court to review whether this decision is correct. The decision was not made on the basis that treaty amendment should be excluded from the European Citizens' Initiative, but the court has been asked to consider this question. A second application is expected from the organisers of the *lifelong care* initiative.

tion. In practical terms an initiative's chances of registration are increased if it invites specific proposals for legal action from the Commission and does not just promote a general policy objective. A legal base needs to be indicated that directly authorises the legal acts that the Commission is being invited to propose, although this requirement is not always stringently applied. An initiative will not be registered if the admissibility criteria are not met for all legal acts in the proposal. The legal actions invited can be wide-ranging, from proposing or abrogating legislation to writing a report, but the more strongly the initiative challenges established policy the 'softer' the legal acts tend to be. Generally, if there is doubt about whether a legal base authorises the legal acts invited by the initiative, it is likely to be refused registration, but there does seem to be variation in how strongly an initiative must demonstrate it meets the criteria. Generally, a proposal for treaty amendment will not be registered by the Commission, but there has already been one exception to this general rule. Although organisers can informally discuss changes for resubmission with the Commission if they request it, this option is not formally promoted and no other support is offered when refusing registration. The burden of discharging the requirements imposed by the Commission's interpretation and application of the legal admissibility criteria therefore fall almost entirely on the initiative organisers. The Commission plays almost no proactive role in assisting organisers in the sometimes complex task of putting together a proposal that satisfies the admissibility test.

CONCLUDING REMARKS

Institutional mediation or direct democracy?

So what, finally, does the analysis above tell us about the potential for enhancing the EU's democratic legitimacy, through increasing citizen influence over the EU's policy and legislative agenda and the ability to challenge established preferences? Early comment on the legal framework identified the potential for institutional mediation at the end of the European Citizens' Initiative process due to the relatively weak legal obligation imposed on the Commission when responding to a successful initiative, their virtual monopoly over initiating legislation, and the legislative process involving other EU institutions.⁶¹ Less obvious was the extent to which Regulation 211/2011 provided for institutional mediation during the registration phase at the start of the process as a result of the Commission's control over the legal admissibility test. The Commission's narrow interpretation of the admissibility criteria in Article 4(2)(b), highlighted in the review above, has influ-

⁶¹ See comment in Dougan, *supra* n. 4, p. 1807 at p. 1482.

enced, and possibly reduced,⁶² the number of initiatives refused registration. As a result, the range, constitutional significance and critical capability of subject matter is affected in a number of ways. First, the need to specifically locate any proposal in the treaty framework and identify a particular legal base means that they will tend to be in areas of competence already within the EU legislative agenda. Secondly, although there has been some scope for the proposals in the initiatives registered to have added new aspects to, or invite redirection in, existing policy areas, usually a proposal will only be suggesting a modification of, not directly challenging, existing policy preferences. Thirdly, the exclusion of Article 48(2) TEU as a legal base that can be used to invite the Commission to pass on a proposal from citizens for Treaty amendment is also significant in limiting the ability of citizens to critically influence not only current policy preferences, but also the framework of the EU itself, with fundamental issues, such as the increase or reduction of the competences of the EU, not able to be the subject of an initiative. This all means that the likelihood of legal acts selected by citizens being enacted is reduced and the ability of citizens to influence the subject matter of the policy and legislative agenda is limited.

The Commission's legalistic approach to registration might also have increased the likelihood of judicial involvement in the European citizens' Initiative process.⁶³ The Commission's binary approach of refusing registration or not, and of indicating judicial review as the next step to challenge the decision without support offered to reformulate an initiative, gives those initiatives with borderline grounds for registration little option other than recourse to the courts. It is also possible that the converse is true: that the likelihood of recourse to the courts has influenced the legalistic nature of the Commission's approach. The Commission may have decided that if the registration of an initiative could end in a legal situation, then a legalistic approach from the outset would be appropriate and more suited to defending their decision-making if required. Whatever the reason for the approach taken by the Commission, it appears to be at odds with the Commission's willingness to enter in to informal discussions about registration refusals with those initiative organisers that insist on it.

The other source of mediation for the European Citizens' Initiative is through civil society organizations. Increasingly the European Citizens' Initiative looks like an instrument for existing civil society organizations to use rather than individual citizens.⁶⁴ The only initiatives to reach, or even come close, to the support

⁶² It is recognised that this cannot be empirically demonstrated, but there are a number of borderline initiatives that may have been registered, if a more generous interpretation of the admissibility criteria had been adopted.

⁶³ For cases *see supra* n. 60.

⁶⁴ On this distinction see for example Smith, *supra* n. 7.

thresholds necessary for verification and then submission to the Commission are strongly linked to civil society organizations: the *One of Us* initiative is linked to the Roman Catholic Church, the *Right to Water* initiative to Trade Unions, and the *Stop Vivisection* initiative to animal rights groups.⁶⁵ In placing such a heavy burden on the organisers of initiatives, the Commission's interpretation and application of the admissibility test is likely to accentuate the degree of civil society involvement because of the need for existing knowledge, research capability or resources to just get their proposal registered; let alone to embark on the resource hungry process of collecting statements of support.⁶⁶

The Commission has reinforced its existing control over the legislative output from a European citizens' initiative by additionally making registration an *ex ante* limitation on the subject matter that can seek to reach the support thresholds. Although this means that little formal influence over the role of legislative initiative has been passed to citizens, this is not to say that there is no potential impact on the Commission's role of initiating legislation in the Union. First, the principle of direct citizen participation in initiating EU legislation has been established, which in the long term may lead to further developments in direct democracy. Secondly, there is an increase in the avenues of accountability for the Commission's legislative decision-making through obliging the Commission to account directly to citizens for the first time and making recourse available to the courts for the first time for decisions that relate to a legislative proposal. Thirdly, although the character of the European Citizens' Initiative is of a legally reinforced petition because it only invites the initiation of the legislative process by other institutional actors, the collection of over a million statements of support from citizens is likely to have some indirect, political influence over the Commission's legislative decision-making. Taken together this means that there is a possibility that the European Citizens' Initiative, if widely used, comes to be viewed retrospectively as a significant step towards an EU agenda that more closely responds to citizen preferences.⁶⁷

The Commission's approach to legal admissibility has also blocked the amount and variety of democratic deliberation that initiatives can generate, which some

⁶⁵ These three campaigns reached over one million statements of support. No other initiative had reached more than 100,000 statements of support as of Nov. 1st 2013.

⁶⁶ On issues relating to civil society and the European Citizens' Initiative see for example J. Greenwood, 'The European Citizens Initiative and European Union Civil Society Organisations', 13 *Perspectives on European Politics and Society* (2012) p. 325 and J. De Clerck-Sachsse 'Civil Society and Democracy in the EU: The Paradox of the European Citizens Initiative', 13 *Perspectives on European Politics and Society* (2012) p. 299. More widely on the prevalence of elite citizens in EU political participation see P. Magnette, 'European Governance and Civic Participation: Beyond Elitist Citizenship?', 51 *Political Studies* (2003) p. 144

⁶⁷ E.g. Kaufmann, *supra* n. 4.

commentators place a great deal of emphasis on when discussing the democratic potential of direct democratic institutions.⁶⁸ This is despite the fact that the Commission itself recognised public debate as a major objective.⁶⁹ Even when there is little chance that an initiative can lead to a legal outcome, the deliberation generated can have a positive influence on the legitimacy of the policy agenda; for example through proposals for alternative policy preferences not receiving popular support, or policy being adapted in the long term following support for proposals that can only have limited or no legal impact in the short term. This type of citizen-led deliberation underpins the direct participation in the policy and legislative agenda resulting from instruments of direct EU democracy and would strengthen democratic legitimacy more broadly in the EU.⁷⁰ The Commission's approach to legal admissibility at registration means that the potential for democratic deliberation is strongly conditioned by institutional involvement, at the expense of control by citizens.

In short, the institutional mediation by the Commission at the start of the European Citizens' Initiative process that limits the opportunity for citizens to test their proposals democratically and generate public debate, restricts the possibility of influencing the legislative and policy agenda, and has also almost entirely removed the ability of citizens to challenge established policy preferences. The Commission has expressed its enthusiasm for the European Citizens' Initiative and its desire for it to succeed,⁷¹ but the formalistic, restrictive and sometimes selective approach taken, combined with the high number of proposals refused registration,

⁶⁸ On this point in relation to the European Citizens' Initiative see G. Smith, 'The European Citizens' Initiative: A New Institution for Empowering Europe's Citizens?', p. 286-289 in M. Dougan et al. (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart 2012). More generally on deliberative democracy see for example, J. Steiner, *The Foundations of Deliberative Democracy* (CUP 2012); J.S. Fishkin and P. Laslett (eds.), *Debating Deliberative Democracy* (Wiley 2008); for a different perspective on deliberative democracy see J. Dryzek, *Discursive Democracy: Politics, Policy and Political Science* (CUP 1990).

⁶⁹ The Commission described the European Citizens' Initiative as providing 'a singular opportunity [...] to foster greater cross border debate'. Explanatory memorandum in its proposal for a Regulation on the European Citizens' Initiative at p. 2, COM(2010)119, which can be accessed at <eur-lex.europa.eu/legal-content/EN/TXT/?qid=1395848793436&curi=CELEX:52010PC0119>, visited 26 March 2014

⁷⁰ See Cuesta Lopez, *supra* n. 9, p. 123

⁷¹ For example see speech by Vice President of the European Commission Maros Sefcovic, 'The Lisbon Treaty: Enhancing Democracy' on Sept. 30th 2010, p. 2, available at <europa.eu/rapid/press-release_SPEECH-10-502_en.htm> and speech by EESC president Staffan Nilsson at <www.eesc.europa.eu/?i=portal.en.former-eesc-presidents-staffan-nilsson-speeches.27471>, visited 26 March 2014.

leaves the Commission open to criticism in relation to its willingness to accept popular influence over the legislative agenda and a Union based on democracy.⁷²

A senior Commission official chairing a meeting about the European Citizens' Initiative expressed regret that a high number of requests for registration had to be refused despite the Commission's efforts to explain the rules.⁷³ This exemplifies the Commission's attitude of seeing initiative organisers as fully responsible for framing a proposal so that they can seek citizen support, and gives no acknowledgement of the Commission's influential role in interpreting and applying the legal admissibility criteria, or of the impact this has on the registration of initiative proposals and their variety and critical capacity. Commission mediation is directly limiting the capacity of citizens to use the European Citizens' Initiative process to augment their influence over the legislative and policy agenda of the EU, and therefore reducing the potential impact on the EU's democratic legitimacy of introducing direct democracy. It is early days, though, for this new democratic instrument. The Commission could still adapt its approach to legal admissibility at registration and facilitate greater scope for democratic participation and deliberation; and intervention by the Courts and the 2015 review of the European Citizens' Initiative regulation⁷⁴ may yet reduce the strength of institutional control provided by the legal admissibility test at registration, broaden the scope of the European Citizens' Initiative, and increase its ability to challenge established policy preferences. For the present, however, the analysis of the first round of European Citizens' Initiative registrations provides little cause to cheer the variety or critical debate of the proposals, or much expectation that in the short term it will lead to the strengthening of democracy's central virtues of participation, citizenship and political activity for EU citizens.⁷⁵



⁷²This issue of the Commission's reputation is raised in the explanatory memorandum in the European Citizens' Initiative Regulation Proposal, which can be accessed at <eur-lex.europa.eu/legal-content/EN/TXT/?qid=1395848793436&uri=CELEX:52010PC0119>, visited 26 March 2014.

⁷³Minutes of meeting available at <hec.europa.eu/citizens-initiative/files/summary-report-meeting-september-2013.doc>, visited 26 March 2014.

⁷⁴Art. 22, Reg. 211/2011 provides for a report to be presented to the European Parliament by April 1st 2015.

⁷⁵See Barber, *supra* n. 7, at p. 25, for summary of importance of these democratic virtues.