

The Promise and Perils of Direct Democracy for the European Union

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Abstract

Direct democracy exhibits both promise and peril for the EU. The referendum has been deployed by Member States in a way that has shaped and will continue to shape the EU's geographical boundaries, its constitutional evolution, and salient EU policy matters. The referendum's promise is to accord a high degree of legitimacy to a political decision, but that promise varies across different types of EU referendum. Their peril for the EU has become increasingly apparent as they have proliferated in number and type and with a growing failure rate. In contrast, the European Citizens' Initiative is intended to harness the promise of direct democracy for the EU. But current practice raises the question of whether the failure to satisfy the ambitions placed on this novel instrument could, paradoxically, become a source of peril. Contrary to an increasingly pessimistic narrative, it is concluded that practice under the ECI exhibits promise and that the future of this instruments appears bright.

Keywords: direct democracy, EU referendums, treaty revision referendum, membership referendum, policy referendum, European Citizens' Initiative

I. INTRODUCTION

The EU has had a turbulent relationship with direct democracy and in particular with the referendum. Although the EU cannot hold referendums, it has been the object of more than 50, as Member States, for the most part, have deployed this most well-known instrument of direct democracy to determine, amongst other things, whether they should join this organisation, whether they should leave it, whether other States should be allowed to join, whether they should agree to a revision to its founding treaties, whether they should join the single currency, or whether they should ratify agreements concluded by the EU with another country. In terms of maximising popular sovereignty, the promise of a referendum when appropriately configured is to accord the highest degree of endorsement and legitimacy to a political decision. Given the type of political system the EU has evolved into, a referendum on joining the EU is surely the most apt device for delivering accession to the EU. Much the same could be said for adopting the Euro. But the referendum tool can be a perilous

endeavour, especially in the EU. Popular votes have famously brought the EU's treaty revision process grinding to a halt on four different occasions and, most recently, have placed the EU in the wholly unprecedented position of dealing with a Member State (the UK) whose electorate have voted to leave.

Although it is possible to hold multi-option referendums, as has been the case for many sovereignty referendums, to date all EU referendums have followed a binary nature.¹ Since a referendum involves a change to the status quo, a pro-EU position usually takes the form of a Yes vote. However, it need not take this form. The pro-EU position in two recent EU referendums – Hungary's refugee quota referendum of 2016 and Greece's 2015 bailout referendum – was a No vote. Exceptionally, a referendum may not even be framed in terms of Yes vs No as was the case with the UK's 2016 EU membership referendum where the pro-EU position took the form of a Remain vote. Rejecting the pro-EU position can involve differing degrees of peril for the EU. In some cases, such as treaty revision, a national referendum on an EU matter in one Member State can have a direct extraterritorial impact on the rest of the Union. In other referendums, such as joining the EU or adopting the Euro for that matter, rejecting the pro-EU position could even be a promising result not only for the State holding the vote but also, paradoxically, for the EU too. Teasing out some of these diverging implications of EU related referendums is a core concern in this paper.

One of the reasons for the increased scholarly attention devoted to EU referendums is the growing difficulty of delivering pro-EU outcomes among the different types of referendums held on EU matters. This growing failure rate can be seen in Figure 1, which plots the 'Yes' vote share for all EU-related referendums over time grouped by their type (see discussion of referendum types below).² The 50 per cent pass threshold is depicted by the dashed horizontal line. The plot shows quite clearly that since the early 2000s, the number of cases failing to cross the pass threshold has begun to increase. Evidently, this is connected to the fact that there is also greater referendum activity in the post-2000 phase of European integration. Nonetheless, the difference is substantial. Before the 2000s, most of which period was characterised by what political scientists have referred to as a 'permissive consensus', the failure rate for EU referendums was actually 20 per cent.³ As we move into the post-2000 phase of European integration, now characterised as a 'constraining dissensus', the failure rate almost doubles to nearly 40 per cent.⁴ Since 2010, the failure rate has jumped to over 60 per cent. As the EU has become more

¹ On sovereignty referendums see F Mendez and M Germann, 'Contested Sovereignty: Mapping Referendums on Sovereignty over Time and Space' (2016) 46 *British Journal of Political Science* 1.

² See further on the accelerating EU referendum failure rate, F Mendez and M Mendez (eds) *Referendums on EU Matters* (European Parliament, 2017), ch 3.

³ The term 'permissive consensus' was deployed by Lindberg and Scheingold to refer to the state of public opinion on European integration: L Lindberg and S Scheingold, *Europe's Would-be Polity* (Prentice Hall, 1970).

⁴ On the constraining dissensus see L Hooghe and G Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39(1) *British Journal of Political Science* 1.

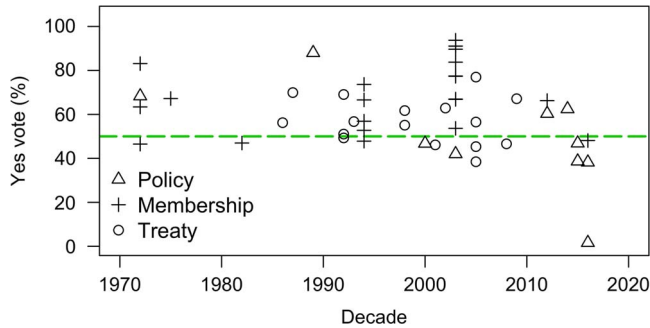


Fig. 1. 'Yes' vote by referendum type over time.

politicised there has been a corresponding increase in the failure to deliver pro-EU outcomes via the referendum device.

As more and different types of referendums have been deployed, and their peril for the EU has become more obvious in light of their increasing failure rate, the EU referendum phenomenon has generated growing scholarly attention. Political scientists and lawyers in particular have grappled with a range of questions that have included why such referendums are called, how they can be avoided, whether they can be legally challenged, the impact they have on the EU's constitutional evolution, what role political parties play, how campaigning and turnout affect outcomes, and how voters make their decisions.⁵

One line of enquiry has focused on the call for the EU to harness the potential promise of direct democracy by deploying such instruments at EU level. Many of these proposals have concerned EU-wide referendums primarily either for a new founding or for treaty revisions. When wedded to unanimous ratification we suggest that such proposals offer more peril than promise. Where they propose surmounting the unanimity hurdle via some form of double majority the promise becomes greater, albeit not without peril, but the political feasibility is absent. Some potential promise of direct democracy has however been harnessed by the inclusion of an EU level agenda initiative, the European Citizens' Initiative (ECI), in the Lisbon Treaty. Agenda initiatives are a less well-known tool of direct democracy that allows citizens to request legislative action following a signature gathering exercise. Their origins are usually attributed to an EU Member State, Austria, which first made constitutional provision for them in 1920.⁶ They now exist in mostly European states, a

⁵ To cite only a few examples since 2016: A Auer, 'The People Have Spoken: Abide? A Critical View of the EU's Dramatic Referendum (In)experience' (2016) 12(3) *European Constitutional Law Review* 397, p 406; Mendez and Mendez, see note 2 above; M Qvortrup, 'Referendums on Membership and European Integration 1972–2015' (2016) 87 *Political Quarterly* 61.

⁶ Prior to the Austrian variant, an alternative initiative model which can generate a referendum where the legislature rejects the proposed initiative was introduced in some US States and the 1919 Weimar Constitution: see V Cuesta-López, *Participación Directa e Iniciativa Legislativa del Ciudadano en Democracia Constitucional* (Thomson, 2008), ch 1.

range of Latin American states and some African and Asian countries.⁷ The literature generally points to agenda initiatives having limited policy impact and rarely leading to legislative action;⁸ one reason perhaps why this more limited direct democratic instrument was acceptable at EU level, along with the fact that it was not a wholly foreign democratic innovation as agenda initiatives exist in various EU Member States. Realising the ECI's potential promise, in terms of creating enhanced channels for direct participation on EU matters and increased policy responsiveness, would depend heavily on institutional design and political practice. However, the ECI's design and political practice are generating concerns that the promise is becoming illusory thus exacerbating popular discontent with the EU rather than alleviating it. In other words, that the ECI's promise may be giving way to peril for the EU. We suggest a more positive account of the ECI's design and more importantly of existing practice, to which the EU courts have already made a valuable contribution. The ECI's future is bright precisely because it is housed in a political system that has much to gain from unleashing its democratic promise. In contrast the praxis of national and sub-national EU referendums, albeit subject to variation relating to the diverse properties of such referendums, has arguably given rise to much more peril than promise for the EU. With a view to exploring these contrasts, this article is divided into two main sections. The first assesses both the practice pertaining to referendums on EU matters and proposals for using EU-wide referendums. The second assesses the ECI, including choices made at its birth, the outcomes from its first years in operation and its potential future. The concluding section then wraps up some of the main arguments relating to the dualism in outcomes pertaining to these two instruments of direct democracy practiced on EU matters.

II. REFERENDUMS ON EU MATTERS: MORE PERIL THAN PROMISE?

This section is structured around an assessment of the practice, and the promise and perils, of the three main categories of EU referendums: membership referendums, treaty revision referendums and policy referendums.⁹ A final sub-section assesses growing calls for use of EU-wide treaty revision referendums.

A. Membership referendums

Membership referendums account for the majority of EU referendums and those which most often pass. They take two distinct forms, an accession referendum or a withdrawal referendum, and we explore each in turn.

⁷ See *Direct Democracy: The International IDEA Handbook* (International Institute for Democracy and Electoral Assistance, 2008), ch 4.

⁸ See eg M Setälä and T Schiller (eds) *Citizens' Initiatives in Europe* (Palgrave Macmillan, 2012); OJ Suárez Antón, *La Iniciativa de Agenda en América Latina y La Unión Europea* (PhD thesis, Universidad Complutense de Madrid, 2017).

⁹ We exclude a fourth category of referendums held on European integration by third countries that are neither EU Member States nor candidate countries. See briefly on these referendums Mendez and Mendez, note 2 above.

Table 1. Membership referendums (22).

Case & Year	Turnout (%)	Yes Vote (%)	Result	Issue
Denmark 1972	90.14	63.39	Passed	Accession to European Community
Ireland 1972	70.88	83.10	Passed	Accession to European Community
Norway 1972	79.22	46.49	Failed	Accession to European Community
UK 1975	64.03	67.23	Passed	Remaining in the European Community
Greenland 1982	74.9	46.98	Failed	Remaining in the European Community
Åland Islands 1994	49.1	73.64	Passed	Accession to the EU
Austria 1994	82.35	66.58	Passed	Accession to the EU
Finland 1994	74	56.89	Passed	Accession to the EU
Norway 1994	89.04	47.82	Failed	Accession to the EU
Sweden 1994	83.32	52.74	Passed	Accession to the EU
Czech Republic 2003	55.21	77.33	Passed	Accession to the EU
Estonia 2003	64.06	66.83	Passed	Accession to the EU
Hungary 2003	45.62	83.76	Passed	Accession to the EU
Latvia 2003	72.53	66.97	Passed	Accession to the EU
Lithuania 2003	63.37	91.07	Passed	Accession to the EU
Malta 2003	90.86	53.64	Passed	Accession to the EU
Poland 2003	58.85	77.45	Passed	Accession to the EU
Romania 2003	55.7	91.06	Passed	Constitutional Amendment for EU Accession
Slovakia 2003	52.15	93.71	Passed	Accession to the EU
Slovenia 2003	60.41	89.64	Passed	Accession to the EU
Croatia 2012	43.51	66.27	Passed	Accession to the EU
UK 2016	72.2	48.1	Failed	Remaining in the EU

The accession referendum is usually undertaken by candidate states on the negotiated accession treaty, and accounts for the vast majority (19 out of 22) of the membership referendums;¹⁰ all but two have passed (as Table 1 illustrates). No founding Member State put accession to the people.¹¹ This is unsurprising for three reasons. Firstly, the constitutional significance of the organisation was not yet fully apparent. Secondly, the founding members, Belgium aside, had new constitutional clauses to legitimise the delegating of powers to international organisations. Thirdly, referendum practice was then largely non-existent. However, 16 of 22 candidate states have since put accession to popular approval. The accession referendum emerged with the first round of enlargement when three of the four candidate states held referendums on accession. The UK was the exception, but popular approval was forthcoming for continued membership only two years later (see further below). Norway is the only candidate state to have rejected accession, having done so in 1972 and again in 1994 when four other accession referendums delivered yes votes

¹⁰ We include Romania in the accession referendum category, but the referendum was actually on a substantial constitutional amendment to accommodate EU accession.

¹¹ The Treaty of Rome stipulated that ratification was to be 'in accordance with their respective constitutional requirements' (Art 247).

including the only sub-national accession referendum to have been held (by the Finnish Åland Islands).

A potential peril of accession referendums is that they reject the patiently negotiated accession agreement. But this is also part of their promise because it reduces the likelihood of a State joining the EU without popular support, something the EU can clearly do without. The referendum cannot be rivalled as a device for legitimising accession given the vast ramifications that now flow from EU membership, such as the obligation to join the Euro. It is thus unsurprising that constitutions have been amended to require an accession referendum (Hungary) or to provide for the possibility of such a referendum (Czech Republic, Poland, Slovakia, Slovenia and Sweden), and in some States (Austria and Finland) this has been the first national level referendum in generations. Of the five candidate States not to have held an accession referendum since the first enlargement, three were recent military dictatorships (Greece, Portugal and Spain) joining prior to the integrationist steps of the Single European Act (SEA). The outliers are the recent entrants of Cyprus (2004) and Bulgaria (2007), though until that point neither had held a referendum under their existing constitutional system.¹² It has been suggested that the European Council could impose a referendum requirement as a condition of EU accession.¹³ This would seem an imposition too far and certainly could not be required for the actual accession agreement itself precisely because Article 49 TEU itself stipulates that the ‘agreement shall be submitted for ratification by all the contracting states in accordance with their respective constitutional requirements.’ In any event, with rare exception since the 1990s, the accession referendum has become the norm for legitimising accession.

The withdrawal referendum accounts for 3 of 22 membership referendums. The UK has held two. First in 1975 when following renegotiations it held a referendum that delivered strong support for continued membership. Second, in 2016 when a Conservative government fulfilled its manifesto commitment to hold an in–out EU referendum on renegotiated terms of membership with 51.9% voting to leave. The UK’s second withdrawal referendum took place following the Lisbon Treaty’s inclusion of Article 50 TEU specifying that ‘[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.’ Normally, States very rarely constitutionally require a referendum for treaty withdrawal, but the EU is no ordinary treaty. Moreover, as so many States have held an accession referendum, and others have used a referendum to approve a treaty revision (eg France, Spain and Luxembourg), it is highly unlikely that a different route would be used for the constitutionally momentous step of withdrawal.¹⁴

¹² Cyprus held its first national level referendum a week before it joined the EU.

¹³ A Auer, ‘National Referendums in the Process of European Integration: Time for Change’ in A Albi and J Ziller (eds), *The European Constitution and National Constitutions: Ratifications and Beyond* (Kluwer, 2007), pp 269–70.

¹⁴ Spain and Luxembourg only held referendums on the Constitutional Treaty.

Given growing euroscepticism and populist parties seeking to exploit this, it may be that the UK's 2016 referendum will not be the last Member State withdrawal referendum. There is an obvious peril dimension to Member State withdrawal referendums because they have destabilising ramifications for the EU and all the more so when it is a State of the size and significance of the UK. A British 'Remain' vote, by contrast, might have brought some promise in terms of making the UK a less reluctant partner. A Brexit silver lining for the EU may be that it dampens demand for withdrawal referendums, and the willingness of politicians to call them unless they really do wish to leave the EU;¹⁵ as Prime Minister Cameron found out, there are no guaranteed outcomes when one calls such referendums and a comfortable poll lead can rapidly dissipate.

The other express withdrawal referendum was held by Greenland, a constituent part of Denmark, and the nature of the peril for the EU here is incomparable to that of the Member State withdrawal referendum, precisely because the EU does not risk becoming one Member State smaller as a result. Greenland voted overwhelmingly against joining in the 1972 Danish accession referendum and was granted a form of home rule by the late 1970s. In 1982 it held a consultative referendum in which a small majority approved of withdrawal. Following Greenland's parliamentary approval, Denmark negotiated Greenland's withdrawal, which took place in 1985.¹⁶

An important challenge to the membership dynamic comes from independence referendums within Member States. The 2014 Scottish independence referendum is clearly distinct from a constituent part of a Member State, as with Greenland, voting expressly and exclusively on withdrawing from the EU.¹⁷ The Scottish-style referendum is not on an EU question as such. However, it has potentially significant ramifications for the EU as the would-be seceding entity wishes to remain within the EU. It was much debated whether a seamless internal EU enlargement was possible via the treaty revision procedure, or arguably the more persuasive view, whether a seceding entity would need to apply to join.¹⁸ The 'No' vote on Scottish independence leaves this contentious question unanswered, but Catalonia's on-going pursuit of secession from Spain ensures that it remains firmly on the table. The UK withdrawal referendum also raised the intriguing reverse question of whether a

¹⁵ Early post-Brexit referendum polling has seen increased support for EU membership: see C de Vries and I Hoffman, *Supportive but wary: How Europeans feel about the EU 60 years after the Treaty of Rome* (Bertelsmann Stiftung, 2017) eupinions Policy Paper 2017/1.

¹⁶ P Athanassiou and S Laulhé Shaelou, 'EU Accession from Within? – An Introduction' (2014) 33 *Yearbook of European Law* 335.

¹⁷ On the Scottish referendum, see S Tierney, 'The Scottish Independence Referendum: A Model of Good Practice in Direct Democracy?' in S Ruth et al (eds) *Let the people rule? Direct Democracy in the Twenty-First Century* (ECPR, 2016).

¹⁸ For the former view, see S Douglas-Scott, 'How easily could an independent Scotland join the EU?' (2014) *Oxford Legal Studies Research Paper* 46/2014. For the latter view, see KA Armstrong, 'After "Ever Closer Union": Negotiating Withdrawal, Secession, and Accession' (2014) 37 *Fordham International Law Journal* 119; C Closa, 'Secession from a Member State and EU Membership: the View from the Union' (2016) 12(2) *European Constitutional Law Review* 240.

Table 2. Treaty revision referendums (16).

Case & Year	Turnout (%)	Yes Vote (%)	Result	Issue
Denmark 1986	75.39	56.24	Passed	Single European Act
Ireland 1987	44.09	69.92	Passed	Single European Act
Denmark 1992	83.1	49.29	Failed	Treaty of Maastricht
France 1992	67.32	51.04	Passed	Second Treaty of Maastricht vote
Ireland 1992	57.31	69.05	Passed	Treaty of Maastricht
Denmark 1993	86.47	56.73	Passed	Treaty of Maastricht
Denmark 1998	76.24	55.1	Passed	Treaty of Amsterdam
Ireland 1998	56.2	61.74	Passed	Treaty of Amsterdam
Ireland 2001	34.79	46.13	Failed	Treaty of Nice
Ireland 2002	49.47	62.89	Passed	Second Treaty of Nice vote
France 2005	69.37	45.33	Failed	Constitutional Treaty
Luxembourg 2005	55.7	56.52	Passed	Constitutional Treaty
Netherlands 2005	63.3	38.46	Failed	Constitutional Treaty
Spain 2005	41.77	76.96	Passed	Constitutional Treaty
Ireland 2008	53.13	46.6	Failed	Treaty of Lisbon
Ireland 2009	59	67.13	Passed	Second Treaty of Lisbon vote

constituent part of a Member State, Scotland, could remain in the EU while the larger political entity of which it formed a part departed.¹⁹

B. Treaty revision referendums

These are held by Member States as a precursor to ratifying a revision to the EU treaties and have been the second most common type of EU referendum. Treaty revision referendums, and the complications to which they give rise, stem from the fact that for a treaty revision to enter into force, the EU's rules (currently Article 48 TEU) require ratification 'by all the Member States in accordance with their respective constitutional requirements.' If those domestic constitutional requirements are, or become, a referendum, then this becomes a prerequisite to treaty revision entering into force for the EU.

As Table 2 illustrates, all six main rounds of treaty revision, including the attempted revision via the Constitutional Treaty, have generated these referendums. Only six Member States have actually held them. Three (Luxembourg, the Netherlands and Spain) did so only once, precisely for the only revision framed in bold constitutional language (the Constitutional Treaty).²⁰ Most are accounted for by Denmark and Ireland. The Danish Constitution's transfer of powers clause (s20) stipulates a five-sixths parliamentary approval requirement, with popular approval required if only an ordinary parliamentary majority is obtained. However, the SEA did not fall within that clause. The first ever treaty revision referendum was actually

¹⁹ See KA Armstrong, *Brexit Time – Leaving the EU: Why, How and When?* (Cambridge University Press, 2017), ch 13.

²⁰ Use of constitutional challenges, the parliamentary process, and bottom-up mechanisms to try and generate such referendums have been a regular and growing occurrence across many Member States: see F Mendez et al, *Referendums and the European Union* (Cambridge University Press, 2014), ch 2.

Denmark's non-constitutionally required consultative referendum on the SEA. The only other revising treaties to be subjected to Danish popular approval, Maastricht and Amsterdam, fell within the transfer of powers clause and referendums became constitutionally required as five-sixths majority approval was not forthcoming.²¹

The Danish 'No' to Maastricht ratification in 1992 gave the EU its first experience of a negative popular vote bringing the treaty revision process to a halt and thus clearly demonstrating the peril for the EU of such referendums. European leaders agreed on a range of opt-outs so that Danish ratification could take place, as it did following popular approval in Denmark. The Danish 'No' also contributed to the French President calling a referendum on the Maastricht Treaty. This delivered the narrowest of margins in favour (51%) and is often viewed as signalling the end of the 'permissive consensus' on European integration.²² This vote sent a powerful message to political actors that the discretionary treaty revision referendum – ie one that is not constitutionally required – should be deployed with utmost caution, for a yes vote could not even be guaranteed in a founding Member State with a generally favourable attitude towards European integration. This was made painfully clear when the Constitutional Treaty failed to surmount the referendums that political actors in France and the Netherlands decided to impose. Although discretionary referendums comfortably passed in Spain and Luxembourg, it seemed most unlikely that the Constitutional Treaty would have fared well in other States where referendums had been promised, such as the UK. The popular votes on the Constitutional Treaty underlined the peril of treaty revision referendums in the post-permissive consensus era and gave rise to its demise and repackaging (the Lisbon Treaty).

This brings us to Ireland, which, uniquely, has held a referendum on each major treaty revision that has come into force. This is owed to a constitutional challenge to the government's attempt to ratify the SEA in which the Supreme Court ruled that EU revising treaties going beyond the scope or objectives of the existing treaties, as the SEA was considered to, would require a constitutional amendment and therefore a referendum.²³ Since that ruling, Irish governments have put all main treaty revisions to a referendum.²⁴ Negative votes on two occasions (Nice and Lisbon) brought the treaty revision process to a halt and led to European leaders giving Ireland various assurances that allowed for second referendums to take place. This 'second referendum phenomenon', whereby the people vote again following a negative vote illustrates another peril of referendums for the EU: it fuels

²¹ Referendums were not required nor held on Nice and Lisbon because they were found by the Ministry of Justice not to fall within the transfer of powers clause, see Mendez et al, *ibid*, pp 53–4.

²² On the end of the permissive consensus see S Hix and B Høyland, *The Political System of the European Union*, 3rd ed (Palgrave Macmillan, 2011), pp 107–110.

²³ *Crotty v An Taoiseach* [1987] 1 IR 713. On which see G Barrett, 'Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence' (2009) 5 *European Constitutional Law Review* 32.

²⁴ The small-scale Art 136 TFEU revision post-Lisbon (see further note 30 below) saw the Irish government follow the Attorney General's advice that it did not require a constitutional amendment referendum.

euro-scepticism.²⁵ It has given rise to the damaging myth that Brussels will not take ‘no’ for an answer. This is most obviously incorrect in not distinguishing between different types of EU referendum. Thus, for example, Norway has not been forced to join the EU, nor was Greenland – or the UK – forced to remain. Moreover, even when focusing on the treaty revision referendums it should be underscored that certain relevant concerns were addressed to justify second referendums, and, on that basis, the Danish and Irish people turned out in larger numbers and voted comfortably in favour of the relevant treaties.

Treaty revision referendums can certainly have redeeming features, particularly so where they are constitutionally mandatory or politically obligatory rather than discretionary devices.²⁶ They are a powerful and salutary reminder to political elites that the treaty revision process must pay meaningful adherence to popular opinion. Indeed, it is part of their promise that they contribute to legitimising integrationist steps, particularly in those countries with stronger currents of euro-scepticism. One could contrast Denmark, which has held referendums on three treaty revisions, and the UK, where none were held, and where such a referendum might have contributed to blunting the demands for the leave/remain referendum with the many negative consequences for the EU and UK that will flow from that leave vote.²⁷ However treaty revision referendums can be called for partisan gain, as was transparently the case with the French Maastricht referendum, and to bolster the negotiating positions of Member States during the treaty revision process. And because every State has a ratification veto point, there are serious questions about the legitimacy of the treaty revision process of an organisation with over 25 Members being held hostage to the outcome of a popular vote in a single State.²⁸ This is accentuated by long-standing concerns about whether voters are even voting on the basis of the referendum issue (ie the treaty revision) or basing their vote choice on unrelated concerns, such as using the referendum to punish an unpopular government (a phenomenon known as second-order voting).

Given extant experience with direct popular veto points, and the well-documented growth in Euro-sceptic sentiment since the Lisbon Treaty was drafted, it is unsurprising that elites have avoided larger scale treaty revisions.²⁹ Tellingly, the EU has deployed an array of tools to deal with the Eurozone crisis, such that the constitutional architecture of European economic governance has been profoundly

²⁵ On the second referendum phenomenon, see G de Búrca, ‘If at First You Don’t Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change’ (2011) 33 (5) *Fordham International Law Journal* 1472.

²⁶ Morel contrasts the democratic value of politically obligatory referendums with those that are called to purely serve the partisan interests of a party leader or a President but are wholly unnecessary: L Morel, ‘The Rise of “Politically Obligatory” Referendums: The 2005 French Referendum in Comparative Perspective’ (2007) 30(5) *West European Politics* 1041.

²⁷ See also Armstrong note 19 above, pp 270–271.

²⁸ Memorably referred to as the ‘tyranny of the minority’: A Peters, ‘Referendums on the Constitutional Treaty 2004: A Citizens’ Voice?’ in D Curtin et al (eds) *The EU Constitution: The Best Way Forward?* (TMC Asser Press, 2005).

²⁹ See Fig 2 below.

Table 3. Policy referendums (10).

Case & Year	Turnout (%)	Yes Vote (%)	Result	Issue
France 1972	60.24	68.32	Passed	Enlargement of European Community
Italy 1989	80.68	88.03	Passed	European Parliament to elaborate a European Constitution
Denmark 2000	87.59	46.79	Failed	Adopting the Euro
Sweden 2003	82.56	42.01	Failed	Adopting the Euro
Ireland 2012	50.53	60.37	Passed	Fiscal Compact Treaty
Denmark 2014	55.85	62.47	Passed	Accession to Unified Patent Court
Greece 2015	62.5	38.69	Failed	Bailout package
Denmark 2015	72	46.89	Failed	Opting in to certain JHA issues
Netherlands 2016	32.28	38.21	Failed	EU-Ukraine Association Agreement
Hungary 2016	44.04	1.64	Failed	Hungarian refugee quota

changed, but with only the most minor of treaty revisions.³⁰ The treaty revision referendums may thus contain the seeds of their own destruction as their taxing and unpredictable nature leads to constitutional adaptation being pursued in ways that evade their application. This is another peril of the treaty revision referendum because it leads to the greater transparency and inclusiveness of the treaty revision rules being eschewed in favour of other routes to constitutional adaptation.

C. Policy referendums

Policy referendums are held by Member States on a specific EU policy field, such as monetary policy, fiscal policy or foreign policy, and have been the fastest growing category of EU referendums in recent years (Table 3). In terms of peril for the EU, the most troubling is the enlargement referendum. The EU's enlargement rules (currently Article 49 TEU) require accession treaties to be ratified by all the Member States 'in accordance with their respective constitutional requirements'. There was no such constitutional requirement in France, but the President called a non-binding vote on the first wave of enlargement in 1972 and if the outcome had been unfavourable it is unlikely that France would have simply ratified the accession agreement. In short, a 'No' vote would have imperilled the EU's first enlargement. More recently (2005) France introduced its first ever constitutionally obligatory referendum to require enlargement referendums following any accessions after Romania, Bulgaria and Croatia, although following a 2008 amendment this can be avoided via a particularly high super-majority in parliament.³¹ The French enlargement referendum lock threatens the future of the EU's most successful foreign policy

³⁰ See F Fabbrini, *Economic Governance in Europe* (Oxford University Press, 2016). The minor treaty revision was the addition of two short sentences to Art 136 TFEU purporting to authorise the creation of a permanent stability mechanism to safeguard the Euro area. The European Stability Mechanism Treaty actually entered into force prior to the Art 136 revision and the *Pringle* ruling indicated that the revision had not been necessary: see *Pringle*, C-370/12, ECLI:EU:C:2012:756.

³¹ Art 88-5 French Constitution (1958).

tool, especially if other Member States follow suit (an EU referendums domino logic was previously seen with the Constitutional Treaty).³² The new Dutch citizen-initiated referendum, considered further below, will surely see Eurosceptic groups seek its activation vis-à-vis future enlargements. In sum, future accessions will most likely need to navigate multiple enlargement referendums, and the peril for the EU, and the would-be entrant, is thus obvious. If a negative vote occurred, recourse to the strategy employed with treaty revision – a second referendum – would seem difficult to justify. What could the European Council offer? The repackaging solution to the French and Dutch referendums on the Constitutional Treaty would also not appear to be feasible, for how does one repackage the accession of one or more countries in a manner more palatable to voters?³³

Whilst the perils of enlargement referendums are easy to identify, their promise is much less so for there is something intuitively unattractive about holding enlargement hostage to the direct popular veto point of Member States. These referendums have been referred to by one direct democracy scholar as a ‘parody of democracy’ as ‘[t]he voters of one state have simply no legitimacy to decide on the accession of another state willing to join, especially if the people of that state have confirmed this will by way of a referendum.’³⁴ To contest the legitimacy of such a referendum is not to defend the approach to recent enlargements which, as Shaw emphasised, saw no effective public debate taking place until candidate states had already received firm commitments.³⁵ In terms of neutralising the peril of enlargement referendums, Hillion drew on the duty of loyal cooperation (Article 4(3) TEU) to suggest that as enlargement is one of the EU’s objectives, enforcement proceedings could be feasible where a State introduces constitutional requirements to make it virtually impossible to ratify an Accession Treaty.³⁶ It is not clear whether a referendum requirement on Turkish accession counts as making it virtually impossible or whether even more rigorous requirements were intended such as a referendum and quorums, and parliamentary super-majorities. But either way, Article 49 TEU expressly stipulates ratification ‘by all the contracting states in accordance with their respective constitutional requirements’ thus according virtually complete discretion as to those requirements. Article 4(2) TEU on the EU respecting Member States’ national identities inherent in their fundamental political and constitutional structures presents a further obstacle. Therefore, contesting enlargement referendums appears legally untenable to say nothing of it being politically damaging for the EU if a Commission-led challenge were to be seriously contemplated.

³² Bottom-up direct democracy instruments have been used to try and generate a Turkish enlargement referendum in at least two Member States: in relation to Austria see IDEA, note 7 above, pp 87–88; in relation to Bulgaria, see Mendez et al note 20 above, pp 39–40.

³³ Increased transitional measures for the acceding country is admittedly one possibility.

³⁴ Auer, note 5 above, p 406.

³⁵ Shaw presciently observed, given the UK withdrawal referendum, that this was profoundly problematic and can give rise to resentment: J Shaw, ‘Europe’s Constitutional Future’ (2005) *Public Law* 132.

³⁶ C Hillion, *The Creeping Nationalisation of the EU Enlargement Policy* (Swedish Institute for European Policy Studies, 2010) Report 6.

Referendums on adopting the Euro account for two policy referendums. This is relatively few given that 19 States have adopted the Euro. With the exception of Denmark and the UK, Member States are legally obliged to join once they fulfil the entry conditions which helps explain why many States – including Austria, Finland, Malta, Slovakia and Slovenia – that adopted the Euro relatively soon after EU accession referendums did not hold separate Euro referendums. It also helps to explain Latvian and Lithuanian adoption of the Euro, without a popular vote, during the Eurozone crisis. However, this legal obligation, and an accession referendum less than a decade earlier, did not prevent Sweden from holding a consultative Euro referendum in 2003. The negative vote makes it politically impossible for Sweden to join without popular approval. That Swedish referendum was likely to have been influenced by its Danish neighbour holding the first Euro referendum in 2000, with popular approval not forthcoming.³⁷

There is a clear promise dimension to Euro accession referendums as they supply popular legitimacy for the momentous decision of replacing a national currency and accepting Eurozone obligations. The main peril is that a popular veto prevents States from meeting their obligation to join. This is a very small price for the EU to pay to ensure that Eurozone accession has popular legitimacy. Unlike with a popular vote against a treaty revision or enlargement, a negative vote on Euro accession is not meaningfully extraterritorial: the Euro already exists and continues to exist regardless of referendums against joining.

The policy referendums category also includes two rather idiosyncratic policy referendums. The first was an Italian consultative referendum in 1989 in which the people voted for the European Parliament to be accorded a mandate to draw up a constitution for Europe. This referendum was distinctive in that nothing directly flows from a yes vote because it is not up to the Italian electorate to accord such a mandate. The second is the Greek bailout referendum in mid-2015, following protracted negotiations between Greece and its Eurozone creditors. Its distinctive features included the shortest time between a referendum announcement and the vote (just over one week), and that the terms of the bailout package on which the Greek people voted had already been withdrawn by the creditors – not to mention that the referendum decision was ignored.³⁸

Finally, three recent additions to the EU's referendum landscape have emerged. The first is referendums on 'extra-EU treaties'. These treaties are intimately connected to EU law, and indeed can even make use of the EU's institutions, but have hitherto only been concluded between a range of EU Member States and have also not required unanimous ratification. Accordingly, the promise of these referendums is to supply

³⁷ Denmark's referendum was constitutionally obligatory when a five-sixths parliamentary majority was not obtained, though it was already politically obligatory given the popularly approved Danish opt-outs from the single currency via their second Maastricht referendum. Denmark's opt-outs account for another policy referendum, when in 2015 the voters rejected an arrangement allowing them to opt-in to Justice and Home Affairs measures (see further D Beach, 'A tale of two referendums – the contrasts between low and high salience referendums in Denmark' in Mendez and Mendez, note 2 above).

³⁸ For detailed discussion, see V Triga and V Manavopoulos, 'The Greek bailout referendum of 2015', in Mendez and Mendez note 2 above.

popular endorsement for adhering to such treaties, while not generating the same level of peril for the EU as the treaty revision or enlargement referendum.³⁹ The Fiscal Compact Treaty, primarily aimed at enhancing fiscal discipline by Eurozone States, was the first extra-EU treaty to be put to a referendum. The Irish people supported this treaty in a 2012 vote following the Attorney General's recommendation that a referendum was required. In 2014 Denmark held the second extra-EU treaty referendum on the Unified Patent Court Agreement. The Danish Ministry of Justice concluded that the Agreement transferred sovereign powers and a referendum was successfully held once it became clear that a five-sixths parliamentary majority could not be obtained.⁴⁰

Unlike the extra-EU treaty referendums, the two latest additions to the EU's referendum landscape create considerable peril for the EU. The first flowed from the Dutch Advisory Referendum Act of 2015 requiring a referendum to be held on laws or treaties approved by Parliament where at least 300,000 support it. It was immediately deployed vis-à-vis the EU Association Agreements with Ukraine, Georgia and Moldova. Only the Ukraine Agreement met the initial threshold of 10,000 signatures within four weeks, and then easily satisfied the 300,000 signatures requirement. Popular approval was not forthcoming on the lowest turnout (32%) of any EU referendum held to date.⁴¹ Without Dutch approval the Agreement could not enter fully into force for the entirety of the EU.⁴² The Heads of State or Government of the EU's Member States adopted a decision on the interpretation of the EU-Ukraine Agreement at the European Council in December 2016 with a view to assisting the Dutch government in pursuing Parliamentary approval for ratification. Dutch ratification of this important EU Agreement is no small matter. The broader issue is that the new Dutch direct democracy instrument signals the birth of the citizen-initiated referendum on EU matters. As well as mixed agreements, the remit of this new instrument includes accession agreements and treaty revision and is becoming a focal point of activity for Eurosceptic groups. The peril from an EU perspective will be multiplied if the citizen-initiated referendum on EU matters spreads to other Member States.

The latest addition to the EU policy referendum landscape emerged in Hungary following the EU's response to the refugee crisis. Hungary was one of four Member States outvoted on the mandatory refugee relocation quota.⁴³ Prime Minister Orbán responded by calling a referendum on whether the EU should have the power to

³⁹ In some cases there are mandatory ratifications for such treaties. Thus, each of the four largest Eurozone States would have constituted veto points to the entry into force of the European Stability Mechanism Treaty, but both Italy and Germany would need a constitutional amendment to hold such a referendum, and although both France and Spain had previously held EU referendums no such referendums were considered. The Unified Patent Court Agreement has a mandatory requirement for French, German and UK ratification. The Fiscal Compact Treaty required ratification by 12 Eurozone States.

⁴⁰ The Irish government's legislative programme from June 2016 also foresaw a Unified Patent Court referendum.

⁴¹ The 30% threshold in the Dutch Referendum Act encouraged abstention.

⁴² For more details see J Van den Akker, 'The Dutch EU referendums on the Constitutional Treaty (2005) and the EU-Ukraine Association Agreement (2016)' in Mendez and Mendez, note 2 above.

⁴³ Council Decision (EU) No 2015/1601 [2015] OJ L119/80.

impose compulsory settlement of non-Hungarian citizens in Hungary without the Hungarian Parliament's approval.⁴⁴ This 2016 referendum resulted in a predictably overwhelming majority against such resettlement, though failing to meet the turnout quorum. There is a case for using infringement proceedings against such referendums for violating the Article 4(3) TEU duty of sincere cooperation. It is a discretionary referendum that can be viewed as doing the opposite of 'ensuring fulfillment of the obligations arising out of the Treaties' and refraining 'from any measure which could jeopardise the attainment of the Union's objectives.' The political circumstances in Hungary were such that Commission intervention would never have halted the referendum.⁴⁵ It is certainly advisable for domestic constitutional challenges to run their course, and ideally to prevent such a referendum from occurring, prior to Commission intervention.⁴⁶ Nevertheless, there is a case for establishing that a Member State would breach Article 4(3) TEU where it holds, or seeks to hold, a referendum of this nature on an already adopted EU measure. This could deter Member States from embarking on the collision course that such referendums pose for the EU legal order. Recourse to EU level enforcement tools would also have damaging ramifications for the EU, but it may be a price worth paying to try to halt *ex post* referendums on binding EU decision-making from re-emerging and spreading.

D. Assessing EU-wide referendum proposals

There have long been calls for EU-wide referendums from eminent scholars in a wide array of fields.⁴⁷ Our focus in this section is on EU-wide treaty revision referendums, but before doing so we comment briefly on proposals for an EU-wide referendum on a founding moment. De Gaulle suggested the use of a Europe-wide referendum for a founding document as early as 1949, as did Spinelli for a new federal constitution in the early-1960s.⁴⁸ Such proposals proliferated following the Maastricht Treaty, most significantly via a proposal supported by some 97 members of the Convention.⁴⁹ Although substantial legitimacy gains would flow from a popularly approved re-founding of the EU, where such proposals require popular approval in every Member State, as the convention proposal did, they impose the

⁴⁴ For detailed discussion see Z T Pállinger, 'The Hungarian Migrant Quota Referendum of 2016 in the Context of Hungarian Direct Democracy' in Mendez and Mendez note 2 above.

⁴⁵ It was clear early on from a response to a parliamentary question that the Commission was monitoring the situation: E-001991/2016, 12 May 2016.

⁴⁶ On the challenges in Hungary, see Pállinger note 44 above.

⁴⁷ Including social theorists (J Habermas, 'A constitution for Europe?' (2001) 11 *New Left Review* 5), political philosophers (F Cheneval, "'Caminante, no hay camino, se hace camino al andar": EU Citizenship, Direct Democracy and Treaty Ratification' (2007) 13 (5) *European Law Journal* 647), political scientists (R Rose, *Representing Europeans* (Oxford University Press, 2013)), legal scholars (Auer, notes 5 and 13 above), and public choice economists (B Frey, 'A Directly Democratic and Federal Europe' (1996) 7(4) *Constitutional Political Economy* 267).

⁴⁸ S Hobolt, *Europe in Question: Referendums on European Integration* (Oxford University Press, 2009), 245.

⁴⁹ See further on such proposals Mendez and Mendez note 2 above, p 68 ff.

unrealistic ratification hurdle of unanimity. Many EU-wide referendum proposals for a new founding emerged when the EU had nearly half its current membership, and prior to popular rejections of the Constitutional Treaty. Those advocates might not be so favourably disposed to an EU-wide referendum for a much enlarged EU, and thus additional veto points, in an increasingly eurosceptic climate.

Cheneval has called for using EU-wide treaty revision referendums in the much enlarged EU.⁵⁰ He advanced a powerful critique of the dysfunctional nature in which referendums have been haphazardly deployed in the treaty revision process, later accentuated by the Lisbon ratification saga where less than one per cent of the EU's population – in a single Member State – was popularly consulted. Cheneval articulates *prima facie* compelling legitimacy and democracy enhancing qualities for an EU-wide treaty revision referendum. However, this proposal faces the same criticism applicable to an EU-wide referendum for a founding moment wedded to unanimous ratification, namely it is an unrealistic ratification hurdle. The EU has arguably the most rigid rules of amendment in existence.⁵¹ To think in federal terms, no federation, even those with as few states as Australia – six – accord all constituent units a veto point over the general constitutional revision procedure. To convert the existing veto point into a popular veto point only exacerbates the rigidity of the EU's rules of change. Even the last major treaty revision, Lisbon, was unable in the first instance to surmount the only Member State referendum held (Ireland).

Cheneval's proposal emerged prior to the onset of the financial crisis and the Eurozone crisis, which has led to a considerable deterioration in the image of the EU as shown in Figure 2. This figure shows a marked downward trend in positive views of the EU and a commensurate rise in negative views of the EU since the crisis. However, this data is at EU-level and masks important differences among EU Member States. Hobolt and de Vries have rightly taken account of variation in national settings to provide a more nuanced and upbeat assessment of support for the EU.⁵² Even if there is not such a clear downward trend in support for the EU, these are inauspicious times to be proposing EU-wide referendums wedded to unanimous ratification as the standard treaty revision model. Making future treaty change theoretically democratic, becomes, paradoxically, an undemocratic proposal if treaty change is made practically unattainable. It would shield the treaty text from meaningful democratic contestation and heighten the existing pressure on other less democratic means of constitutional adaptation. In short, the promise of such proposals seems unattainable while the peril seems all too real.

Most EU-wide treaty revision referendum proposals have however argued for high double majorities (of both voters and Member States).⁵³ They aspire to unleash the

⁵⁰ Cheneval note 47 above.

⁵¹ Existing comparative analysis of constitutional amendment difficulty has not included the EU. For a brief overview of the literature, see R Albert 'The Difficulty of Constitutional Amendment in Canada' (2015) 39 *Alberta Law Review* 85.

⁵² S Hobolt and C de Vries 'Public Support for European integration' (2016) *Annual Review of Political Science* 413.

⁵³ For a recent example, see Rose note 47 above.

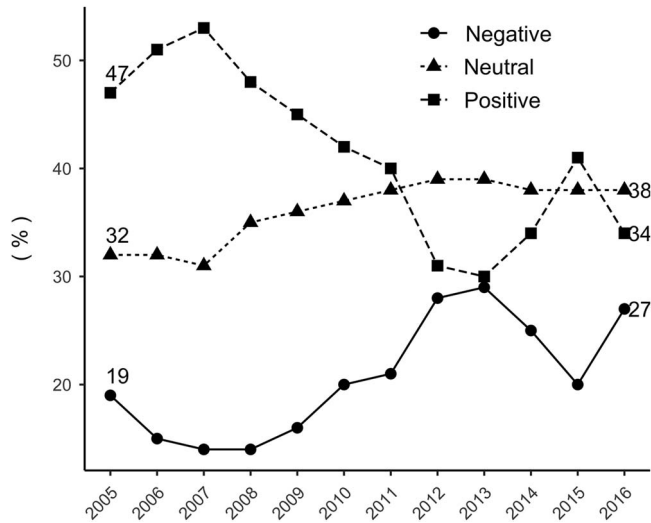


Fig. 2. Public image of the EU over time.

Data source: Standard Eurobarometer 86 (2016) *Public Opinion in the European Union*. Question asked: In general, does the EU conjure up for you a very positive, fairly positive, neutral, fairly negative or very negative image?

purported promise for the EU of popular voting, while avoiding the peril of increased rigidity via a single state popular veto point. Some have drawn on popular support for EU treaty revisions to take place via referendums to bolster the case for EU-wide treaty revisions.⁵⁴ Proposing to surmount the unanimous ratification requirement is often challenged as a federalist step too far, even though other large international organisations do not remain wedded to unanimity.⁵⁵ But adding a harmonised ratification requirement is considerably more intrusive in a way that federal regimes, unlike international organisations, often are. It also requires a device to be deployed that is either currently impermissible at the national level (eg Germany and Belgium) or impermissible in relation to treaties (eg Italy).⁵⁶

EU-wide referendum proposals also often ignore the nature of the EU's treaty text. Its overinclusiveness in particular, should lead one to caution against EU-wide referendums as the standard amendment procedure.⁵⁷ For example the recent revision to transitionally accommodate a greater number of MEPs, because the Lisbon Treaty provisions providing for this only entered into force after the 2009

⁵⁴ See Rose, *ibid*; Mendez et al, note 20 above, relying on 2009 European Election Studies data showing a clear majority of EU citizens (62.9%) either 'strongly agreed' or 'agreed' that EU treaty changes should be decided by referendum.

⁵⁵ See discussion in Mendez et al, *ibid*, ch 6.

⁵⁶ Art 75 Italian Constitution (1947).

⁵⁷ Overinclusive as the treaty text contains much that is not worthy of constitutional rank, but each major new treaty revision brought in more detail relating to policy areas and institutional procedures.

elections, would hardly be of sufficient constitutional import to warrant an EU-wide referendum. Determining which revisions warrant an EU-wide referendum could be modelled on the new treaty revision rules (Article 48(2) TEU). Under these the EU Convention route need not occur if the European Council determines, with European Parliament consent, as it did for the aforementioned MEP revision, that it is not justified by the extent of the proposed amendments.

An additional problem with EU-wide treaty revision referendum proposals is the absence of consideration to campaign regulation. Even within EU States that use referendums there is considerable regulatory divergence on questions that include the extent of public and private financing, constraints on broadcast and print media, regulation of information campaigns and civil society groups, as well as the role of independent electoral bodies.⁵⁸ EU-wide referendum proposals have not engaged with the sheer heterogeneity of referendum campaign practices across the EU. Nor has a regulatory model been suggested. One could propose the least intrusive model whereby, with perhaps the exception of the day to hold the referendum, matters are left to the domestic constitutional system, through to the most intrusive model whereby some of the aforementioned issues are regulated at EU level.

We conclude by highlighting the most obvious problem with these EU-wide referendum proposals. It is difficult to envisage circumstances in which the political will to overcome the unanimous ratification lock could be found, much less doing so while not only stipulating, but potentially even regulating, the ratification procedure. Thus promise there may well be, but political feasibility there is not. And there is a peril that contributes to this political infeasibility, namely what happens to one or more Member States unable to deliver popular approval for a treaty revision? The federal answer, subject to any opting out possibility, is that the amendments would still apply to all; the non-federal answer would permit withdrawal, and both create obvious peril for the EU.

III. THE EUROPEAN CITIZENS' INITIATIVE: MORE PROMISE THAN PERIL

This part turns to the EU's new instrument of direct democracy. The first two sections focus on the ECI's design choices as outlined in the treaty text and the implementing regulation. A third section assesses the outcomes over the first five years and a final section explores the potential future of the ECI.

A. *Origins and treaty-enshrined design choices*

The origins of the ECI are usually attributed to a proposal by a German Bundestag delegate included in the draft Constitutional Treaty at the culmination of the convention process.⁵⁹ This proposal underscored that its effect was 'to bring Europe closer to the people, as Laeken recommended' and represented 'a large step in the democratisation

⁵⁸ See eg T Reidy and J Suiter 'Do Rules Matter? Categorizing the Regulation of Referendum Campaigns' (2015) 38 *Electoral Studies* 159.

⁵⁹ See V Cuesta-López, 'A Comparative Approach to the Regulation on the European Citizens' Initiative' (2012) 13(3) *Perspectives on European Politics and Society* 257, p 258.

of the Union.⁶⁰ The Commission's right of legislative initiative was left intact as the request to submit proposals would be to the Commission. In effect it would equalise the position of EU citizens with the Council and the European Parliament's treaty-derived power to request Commission action.⁶¹ This made it a more palatable option than more adventurous direct democratic innovations put forth during the Convention process.

Crucially, the language proposed by the Convention expressly borrowed from the language of the Parliament's right to request a proposal from the Commission by stipulating a requirement for the 'citizens' to consider that such an 'act is required for the purpose of implementing this Constitution' ('treaty' under then Article 192(2) EC). The Parliament's right was never thought to extend to requesting proposals for treaty revision, that not being consistent with the language of being 'required for the purpose of implementing this treaty', and express reliance on the provision only ever involved requesting legislative proposals.⁶² Direct borrowing of this language for the ECI, retained in the Lisbon Treaty, renders it unreasonable to conclude that citizens were empowered to request treaty revision proposals. This restriction is of considerable consequence because the policy density of the EU's treaty text is such that much that might not be off limits in a national agenda initiative, because it falls within legislative competence, would be off limits in the EU. For citizens, this curtails the ECI's potential promise and could generate discontent with the EU, thus constituting part of the peril of the ECI.

The Convention ECI proposal left much to be determined by an implementing law. However, the end product in the draft Constitutional Treaty, retained in the Constitutional Treaty and the Lisbon repackaging, added into the primary text the minimum required threshold of signatures, namely no 'less than one million', and the additional constraint that signatures must come from 'a significant number of Member States'.⁶³ A territorial based constraint, the specifics of which were to be determined by the implementing regulation, is understandable given that we are dealing with a political system composed of sovereign states and the very premise behind the instrument is to generate a transnational dimension. The signature threshold is comparatively low in that the Constitutional Treaty was expected to come into force for an EU of around 480 million, thus barely over 0.2% of the EU's population and less than 0.2% by the time the Lisbon Treaty entered into force for an EU of then over 500 million.⁶⁴ To use examples of agenda initiatives within the EU's Member States, many have thresholds of over 1%, less than 0.5% is rare indeed, and only Italy has a requirement lower than the ECI at under 0.1%.⁶⁵ The ECI's low

⁶⁰ CONV 724/03.

⁶¹ The Council always had this power (currently Art 241 TFEU); the Parliament was given it by the Maastricht Treaty (currently Art 225 TFEU).

⁶² On use of this power to date, see R Corbett et al, *The European Parliament*, 9th ed (John Harper, 2016), pp 310–313. The Parliament was expressly accorded the power to propose treaty revisions via the Constitutional Treaty, which was retained in the Lisbon Treaty (Art 48 TEU).

⁶³ Respectively Art I-46(4) Draft Constitutional Treaty; Art I-47(4) Constitutional Treaty; Art 11(4) TEU.

⁶⁴ UK withdrawal from the EU would move this to over 0.2%.

⁶⁵ For details see Cuesta-López note 59 above.

threshold therefore points to a willingness to see its democratic promise unleashed. Comparative borrowing could have been used to justify a threshold two or more times the one million figure, that paradoxically could have resulted in a direct democratic instrument that, because of high triggering thresholds, exacerbates popular discontent with the democratic workings of the EU.

B. Design choices in the implementing regulation

The potential promise of the ECI depended crucially on design choices made via the implementing regulation. While the Lisbon ratification saga was ongoing, the European Parliament called for the Commission to bring forth a legislative proposal without delay after entry into force of the Lisbon Treaty.⁶⁶ The Commission Green Paper actually appeared before the Lisbon Treaty entered into force.⁶⁷ Within months the legislative proposal emerged, political agreement was reached by the end of the year, and the Regulation was adopted in February 2011, and became applicable on 1 April 2012.⁶⁸ This unusually fast journey through the legislative process attested to a desire to tap the potential of the Lisbon Treaty's most important democratic innovation. In what follows we focus on some central design choices taken by the implementing Regulation; some enhance the democratic promise of this instrument, while others make it less accessible and may accordingly generate citizen discontent that could bolster the ECI's peril for the EU.

The Treaty provides that the one million signatures must come from 'a significant number of Member States'. The Regulation stipulated that at least one-quarter of the Member States would be required (Article 7(1)), in line with the Parliament's initial call for a proposal and in contrast to the Commission's proposal for one-third. For ordinary language usage, and with a view to facilitating the threshold being surmounted, one could argue for an even lower number, in that, for example, one-fifth is arguably a significant number of Member States. For the Commission, the one-quarter threshold was thought too low to guarantee that the Union interest was adequately reflected. Fortunately, the Parliament's proposal prevailed which better serves the ECI's democratic promise.

A second crucial choice was a signature threshold from each of the minimum number of Member States required. No such constraint was outlined in the Treaty. However, given the requirement of a minimum number of Member States and the related logic of creating a meaningful level of European-wide support, it would be anomalous for wholly nominal support in one or more of the requisite minimum number of States to suffice. The Parliament's resolution proposed a 0.2% threshold, but the choice ultimately adopted (Article 7(2)) corresponds to the number of MEPs elected in each Member State multiplied by 750. The consequence of this degressive proportionality is that a number of the smaller Member States would have to obtain over 0.2% (considerably more in Luxembourg and Malta) to count as one of the seven Member States required, but with the major advantage that the vast majority

⁶⁶ P6_TA(2009)0389 (7 May 2009).

⁶⁷ COM(2009) 622.

⁶⁸ Regulation (EU) No 211/2011 [2011] OJ L65/1.

of States would need 0.2% or less, and the four biggest would not even need to obtain 0.1%.

Unsurprisingly for a twenty-first century agenda initiative, the possibility to collect statements electronically was expressly provided for (Articles 5(2) and 6) which considerably facilitates attaining the requisite statements in support. The minimum age adopted for supporting initiatives was the age at which citizens are entitled to vote in European Parliament elections (Article 3(4)), which is 18 in all Member States bar Austria, where it is 16. The consultation exercise saw some support for a threshold of 16 on the basis that this would encourage youth civic participation on European issues and that this is not an election but merely an agenda-initiative. Tying the age requirement for initiatives to that of elections is the comparative norm, but there remains much to be said for a lower age requirement for the previously mentioned reasons and to facilitate reaching the signature thresholds.⁶⁹ However, ultimately it does not appear to have been seriously contemplated, which is unsurprising insofar as it would require Member States (Austria aside) to produce new electoral lists.

The Commission Green Paper considered that requiring a citizens' committee to organise an initiative might be too burdensome and preferred not to impose any restrictions on who could present an initiative. The legislative proposal accordingly permitted both EU citizens and legal persons and other organisations to organise initiatives. At the behest of the European Parliament, a requirement for a citizens' committee composed of at least seven EU citizens resident in at least seven different Member States was introduced (Article 3(2)). Although additional hurdles make it harder to get an initiative up and running, the redeeming virtue here was to insert a transnational dimension that helps foster political debate across borders and hopefully creates a network for pursuing statements across at least seven Member States.

The citizens' committee would be responsible for preparing the proposed initiative and submitting it to the Commission. In terms of the form and content, the Green Paper rightly saw the draft legal act requirement in some legal systems as unnecessarily restrictive and burdensome as well as not being required by the treaty text.⁷⁰ The Regulation merely requires the title, the subject matter, the description of objectives (in respectively no more than 100, 200 and 500 characters) and the treaty provisions considered relevant.⁷¹ These are *prima facie* not especially taxing requirements, though identifying relevant treaty provisions in the complex legal system of the EU is no small feat. But this alone will not get an ECI registered so that the signature collecting process can begin. An *ex ante* registration test, applicable prior to commencing the signature gathering exercise, was introduced. The European Parliament resolution proposed such a test, but the Green Paper was against this. The consultation process saw many support an admissibility test prior to

⁶⁹ See Cuesta-López, note 59 above. See also M Dougan, 'What are we to make of the citizens' initiative?' (2011) 48(6) *Common Market Law Review* 1807, p 1820.

⁷⁰ In some national systems where such a requirement exists it is constitutionally enshrined as in Austria and Italy: see Cuesta-López, note 59 above, p 263.

⁷¹ Art 4(1) and Annex II.

all signatures being collected. The legislative proposal thus provided for an admissibility test following the collection of 300,000 signatures (Article 8), but during the legislative process this gave way to an *ex ante* registration test. The main logic is to avoid frustrating citizens who have supported an initiative that is later found to be inadmissible. On the other hand, an *ex ante* test could have democratically pernicious consequences for the EU by foreclosing the emergence of transnational debate. The extent to which debate will be foreclosed ultimately depends on the substance of the admissibility test and how it is applied.

The Regulation lays out four conditions before the Commission can register an initiative (Article 4(2)). The first concerns the organising committee being appropriately formed (Article 4(2)(a)). The second to fourth require respectively that it 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’ (Article 4(2)(b)), nor be ‘manifestly abusive, frivolous or vexatious’ (Article 4(2)(c)), nor ‘manifestly contrary to the values of the Union as set out in Article 2 TEU’ (Article 4(2)(d)). The second of these conditions textually replicates the Treaty text itself, albeit now adding the rider of ‘manifestly’ which suggests an exacting standard for refusing registration on this ground. The third and fourth conditions appear to leave more discretion to the Commission.⁷² Oversight is expressly stipulated in the Regulation, the Commission being required to inform organisers of its reasons for refusal and of judicial and extra-judicial remedies (Article 4(3)).

The Regulation adopted the 12 month period for signature collection of the Commission proposal (Article 5(5)), which reflected the earlier Parliament resolution. In comparative terms this seems defensible in that the collection period for agenda initiatives in EU Member States was generally six months or less.⁷³ The Commission emphasised the need to ensure that citizens’ initiatives remain relevant and that the collection period be sufficiently long in light of the complexity of working throughout the EU. However precisely the latter rationale justified a longer period and the 18 months which some consultation contributions suggested would have been preferable.⁷⁴ Whilst 12 months is more than any directly comparable instrument, the ECI is a novel transnational instrument for a complex political system to which citizens show great apathy.⁷⁵ If an 18 month period for the related instrument of a citizen-initiated referendum was thought appropriate for the most experienced user of direct democracy, Switzerland, then arguably the EU should not be opting for less with its fledgling instrument of direct democracy.⁷⁶

⁷² See further Dougan, note 69 above, pp 1840–1841.

⁷³ Spain has nine months, extendable by three months: see V Cuesta-López, ‘The Spanish Agenda Initiative and the Reform of its Legal Regime: A New Chance for Participatory Democracy’ in M Setälä and T Schiller (eds) *Citizens’ Initiatives in Europe* (Palgrave Macmillan, 2012).

⁷⁴ The European Economic and Social Committee (EESC) also called for 18 months: see [2011] OJ C44/34.

⁷⁵ Some agenda initiatives do not have time limits: eg Portugal.

⁷⁶ See on Swiss direct democracy, U Serdült, ‘Referendums in Switzerland’ in M Qvortrup (ed) *Referendums Around the World* (Palgrave Macmillan, 2014).

Further crucial design issues concerned data. No uniformity was imposed as to what data should be collected from signatories. The main distinction is between those States requiring personal ID numbers (whether from a passport or national identity card), a requirement that the European Data Protection Supervisor recommended dropping, and those that do not.⁷⁷ In principle the more data required, the more reluctant citizens will be to sign. When it comes to this personal data the organisers are, along with competent national authorities, the ‘data controllers’ for Data Protection Directive purposes (Article 12) and have obligations imposed upon them. Indeed, the Regulation specifically underscores their personal liability for any damage they cause in organising a citizens’ initiative, which will discourage the formation of citizens’ committees and therefore reduce the potential promise of the ECI.⁷⁸

No meaningful consideration was given to public funding towards the costs of preparing an initiative and sustaining the signature gathering campaign. The Parliament’s resolution was silent and the Green Paper asserted that no specific public funding was foreseen and that this was ‘in the interest of preserving the independence and citizen-driven nature of initiatives.’ The ECI Regulation thus offers no public funding for organisers. Indeed, it provides for the Commission to maintain an online register with proposed citizens’ initiatives, and stipulates that organisers can provide the initiative in other official EU languages for this register and that such translation shall be their responsibility.⁷⁹ It is especially striking that no translation support was provided given the translating resources at the EU’s disposal and how obviously critical this would be to gathering signatures in a transnational union with 24 official languages. Public funding for agenda initiatives is relatively rare, but even within the EU Spain provides this.⁸⁰ This offered a valuable comparative lesson for the EU to secure a more hospitable environment for launching its new instrument of direct democracy.

A final crucial design choice concerned the obligations that flow from an initiative meeting the relevant thresholds. The legislative proposal required the Commission to examine the initiative within a set time frame and to set out its conclusions in a communication including what, if any, actions it would take and the reasons. This in itself is more than is formally required by, for example, the Italian agenda initiative.⁸¹ Two crucial obligations were added during the legislative process. Firstly, that the Commission receive the organisers at an appropriate level so that they can explain the matters raised by the initiative and, secondly, that the organisers be given the opportunity to present their initiative at a public hearing at the European Parliament with the Commission present and other EU institutions and bodies that

⁷⁷ See Opinion of the EDPS [2010] OJ C323/1. See Art 5(3) and Annex III.

⁷⁸ Art 13. Art 14 is on penalties.

⁷⁹ Art 4(1).

⁸⁰ See for Spain, Cuesta-López, note 73 above, p 208.

⁸¹ See PV Uleri, ‘Institutions of Citizens’ Political Participation in Italy: Crooked Forms, Hindered Institutionalization’ in M Setälä and T Schiller (eds) *Citizens’ Initiatives in Europe* (Palgrave Macmillan, 2012), p 75.

Table 4. ECI outcomes (April 2012 – April 2017).

Status	Number	%
Refused registration	20	32
Registered	43	68
<i>Total</i>	<i>63</i>	<i>100</i>
Registered initiatives		
Met 1 million threshold	3	7
Collection ongoing	6	14
Insufficient support	18	42
Withdrawn	14	32
Collection closed	2	5
<i>Total registered</i>	<i>43</i>	<i>100</i>

wish to participate (Articles 10 & 11). These valuable additions enhance the democratic promise for the ECI and generate a greater incentive to pursue initiatives as there is a tangible outcome flowing from meeting the required thresholds.

C. Assessing outcomes

Table 4 illustrates ECI activity levels over the first five years. This section is divided into two sections exploring respectively the outcomes in relation to registration refusals and registered initiatives.⁸²

1. Registration refusals

Table 4 reflects the 20 listed registration refusals in the online register through to April 2017. This constitutes just under one-third of the initiatives to date (comparatively fewer registration refusals than was recently the case via the Spanish national and regional agenda initiatives).⁸³ The high water mark of registration refusals existed throughout 2014 when there was roughly a 60/40 split between the registered initiatives and registration refusals through to that date. This led to frequent criticism of the Commission for allegedly taking an overly restrictive approach that stifled initiatives and the transnational debate the ECI was intended to create. Indeed the 40% figure was often quoted, and continues to be despite growth in registered initiatives, as if this alone demonstrated that the registration test was being inappropriately applied.⁸⁴ Actual analysis of the registration refusals has been rare, though it is common knowledge that they were all on Article 4(2)(b) grounds,

⁸² All initiatives, and registration refusals, mentioned in this section can be found on the online register: <http://ec.europa.eu/citizens-initiative/public/welcome>

⁸³ See Cuesta-López, note 73 above, p 208.

⁸⁴ For a recent example see the EESC opinion on the ECI [2016] OJ C389/35, para 3.10.2. Note also C Berg and P Glogowski, 'Heavy Stones in the Road: The ECI in Practice' in M Conrad et al (eds) *Bridging the Gap? Opportunities & Constraints of the European Citizens' Initiative* (Nomos, 2016), p 213, stating, while relying on data through to 2014, that '[n]early half of the proposed ECIs have been declared "legally inadmissible"'.

namely falling manifestly outside the framework of the Commission's power to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.⁸⁵

Far less common knowledge is what the rejected initiatives actually proposed, and it is submitted that the vast majority were obviously non-starters. In several cases this was even apparent from their titles and the clear absence of a legal base that would allow such action. This includes proposing: abolishing the European Parliament; stopping Brexit; creating a European Public Bank focused on social, ecological and solidarity development; singing the European anthem in Esperanto; EU referendums (twice). These are obvious non-starters if one accepts that initiatives cannot be used to propose treaty revision. The FAQ section of the Commission maintained official register states that citizens cannot request treaty revision. The first registration refusal to expressly state this was the response in January 2013 to a proposed initiative entitled 'Enforcing Selfdetermination Human Right in the EU' that aimed 'to accommodate within the EU's legal framework the selfdetermination human rights' and which itself invoked Article 48(2) TEU. Registration refusals accordingly confirm the exclusion of treaty revision proposals, though this could still be subject to judicial challenge.

Another unsurprising refusal concerned 'My Voice Against Nuclear Power'. This sought phase-out plans for nuclear power plants which the Commission underscored fell within Euratom Treaty competence on which a citizens' initiative could not be based and that it was in any event 'manifestly contrary to the objectives of the Euratom Treaty, as stated in its preamble and its Article 1, namely the establishment and growth of the nuclear industries'. A proposed initiative seeking to guarantee the retention of EU citizenship to citizens from a new State that resulted from secession of a part of an EU Member State was rightly rejected on the basis that there was no legal basis for secondary legislation to deal with such an issue, and that Article 20 TFEU provides that only those holding the nationality of a Member State are EU citizens. Another predictable rejection concerned a proposed initiative to ban the legalisation of prostitution, with the Commission underscoring that prostitution in and of itself was a Member State competence and that Article 84 TFEU excluded any harmonisation of Member State laws and regulations.

Four more unsurprising rejections all concerned animal welfare. In one case the title alone, 'Abolition of Bullfighting and the Use of Bulls in Festivals Involving Cruelty and Torture for Entertainment in Europe', is arguably testament to the forthcoming registration refusal. Any such legislative action would be in direct tension with Article 13 TFEU which in the animal welfare context requires the Union to respect 'the legislative or administrative provisions and customs of the Member

⁸⁵ For rare analysis of registration refusals, see J Organ, 'Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals' (2014) 10(3) *European Constitutional Law Review* 422. A study critical of registration refusals asserted that '[a]round one quarter of the initiatives refused registration' fall into the category of 'Initiatives that were (possibly or probably) within the EU's competence' but in fact only mentions two examples and only one comes with anything by way of explanation: see *The European Citizens' Initiative Registration: Falling at the First Hurdle?* (ECAS, 2015), pp 14–15.

States relating in particular to ... cultural traditions and regional heritage.’ The Commission therefore emphasised that it was ‘required to recognize bullfighting and the use of bulls in festivals as a cultural tradition and part of the regional heritage of some Member States’. The other three animal welfare initiatives have similar reasoning employed in the registration refusals. They underscore the *Jippes* ruling that ensuring animal welfare was not an objective of the Treaties and which remains valid under the current Treaties, that existing Union legislation on animal welfare has been adopted on common agricultural policy, internal market and environmental legal bases but that the proposed initiatives would not contribute to any of the objectives of those policies as set out in the Treaties.⁸⁶

Another three refusals were less immediately obvious non-starters, however the decisions were all upheld before the General Court.⁸⁷ So far we have briefly accounted for 17 of the 20 registration refusals. On this basis alone one could contest the notion that there has been something fundamentally amiss with the application of the registration test. Furthermore, two of the remaining three resulted in amended initiatives that were duly registered.⁸⁸ However, the remaining rejection stood out as one of two clearly contestable refusals. The first – ‘Minority SafePack’ – is not actually included under refused registrations in Table 4 because it was registered following a legal challenge and removed from the register of refused requests (an outcome which may yet apply to the second contestable refusal – ‘STOP TTIP’ – considered further below). The ‘Minority SafePack’ initiative proposed legal acts ‘to improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union.’⁸⁹ Although the Commission considered that some of the acts requested might individually fall within its powers to submit a proposal, it concluded that the ECI Regulation ‘does not provide for the registration of part or parts of a proposed initiative’ and that accordingly it fell foul of Article 4(2)(b). It is true that the Regulation does not provide for this, but nor patently does it stipulate the contrary, and the more citizen-friendly reading would be to register those parts which are considered to fall within the Commission’s powers. This was part of the basis for a legal challenge which the General Court did not deal with because it found in favour of the organisers on a different plea concerning the Commission failing to state reasons by not indicating which of the 11 proposed measures did not fall within its competence, nor the reasons supporting that conclusion.⁹⁰ The initiative was particularly detailed as considerable additional information was included in an annex as the ECI

⁸⁶ *Jippes*, C-189/01, ECLI:EU:C:2001:420. The most recent refusal concerned the protection of stray animals and was unsuccessfully challenged before the General Court: *HB v Commission*, T-361/14, ECLI:EU:T:2017:252.

⁸⁷ See respectively, *Anagnostakis v Commission*, T-450/12, ECLI:EU:T:2015:739 (on appeal C-589/15 P); *Constantini v Commission*, T-44/14, ECLI:EU:T:2016:223; *Izsák and Dabis*, T-529/13, ECLI:EU:T:2016:282 (on appeal C-420/16 P).

⁸⁸ ‘Unconditional Basic Income’ and ‘Vite l’Europe Sociale’.

⁸⁹ C(2013) 5969 final, 13 September 2013.

⁹⁰ *Minority SafePack v Commission*, T-646/13, ECLI:EU:T:2017:59.

Regulation permits. And the registration refusal was strikingly curt as only five short paragraphs dealt with the specificity of the *Minority SafePack* initiative, the rest being the standard text used in nearly every other registration refusal. For the General Court, without a complete statement of reasons the possibility of introducing a new proposed ECI that took into account the Commission's objections would be seriously compromised as would be the objectives referred to in the ECI Regulation of encouraging participation by citizens in the democratic life of the Union.

The *Minority SafePack* ruling should discourage perfunctory registration refusals and in turn make it easier for organisers to successfully resubmit refused proposals. The ruling certainly did not require the Commission to register any part of the initiative. Nonetheless the Commission responded by registering it with the exception of two proposed acts that were not considered to fall within its powers.⁹¹ That the Commission was able to conclude that fully 9 of the 11 proposed acts were within its powers makes it even more striking that it refused to register those parts in the first place. In any event, an extremely important consequence of the *Minority SafePack* ruling, though not required by it, is the Commission reconsidering its initial reading of the ECI Regulation as precluding the registration of parts of an initiative.⁹² This should obviously lead to increased registrations.

This brings us to our outstanding registration refusal. 'STOP TTIP' proposed repealing the negotiating mandate for the Transatlantic Trade and Investment Partnership (TTIP) and not concluding the Comprehensive Economic and Trade Agreement (CETA). The Commission's response in relation to TTIP was that Council decisions authorising the opening of negotiations are preparatory acts and deploy legal effects only between the institutions concerned and, in relation to both TTIP and CETA, that inviting the Commission not to propose a legal act is not admissible under the ECI and likewise in relation to proposing a decision not to adopt a legal act, since such a decision would not deploy autonomous legal effects. In effect, the Commission proposed a distinction between types of 'legal acts' that cannot be found in either the implementing Regulation or the treaty-enshrined ECI text, nor for that matter any other EU treaty text. This registration refusal therefore appeared particularly suspect and it was unsurprising that the legal challenge brought by the organisers succeeded before the General Court.⁹³ Indeed for the Court 'the principle of democracy' required an interpretation of the concept of legal acts that covered such acts. A number of arguments from the Commission were rejected including the striking proposition that the proposed acts 'would lead to an inadmissible interference in an ongoing legislative procedure', the Court underscoring that to the contrary it constituted 'an expression of the effective participation of citizens of the European Union in the democratic life thereof'.

It remains to be seen whether the *STOP TTIP* ruling is appealed or whether the Commission simply proceeds to register the initiative. The registration refusal did recognise that initiatives could be used to request the signature and conclusion of

⁹¹ COM(2017)2200 final, 29 March 2017.

⁹² The Commission may have been preempting a future ruling that would require it.

⁹³ *Efter v Commission*, T-754/14, ECLI:EU:T:2017:323.

international agreements. This is relatively unsurprising given that the EU's agenda initiative, unlike in some constitutional systems, contains no international agreement subject matter exclusion.⁹⁴ Precisely the absence of this subject matter exclusion made defending this registration refusal a difficult task. The ramifications of the General Court's ruling are considerable and likely to be viewed by the Commission, and the Council, as posing a considerable peril to the EU's future trade relations in particular. But what from one perspective can be viewed as peril for the EU, can from the angle of the citizens be viewed as promise as it can contribute to increased policy responsiveness in the field of the EU's international relations.

That the 'STOP TTIP' registration refusal appeared markedly suspect, as did the initial unwillingness to partially register the 'Minority SafePack' initiative, should not lead us to accept the harshest criticism of the Commission. Those two refusals raise key issues but only account for one of the currently listed registration refusals or two out of the 21 that have ever taken place. Even if both had initially been registered it would still have been possible to accurately assert in 2014 that nearly 40% of proposed initiatives had been rejected. Put simply, the criticism has been exaggerated as the vast majority of proposed initiatives have been obvious non-starters. This has nonetheless become one of the perils of the ECI because a damaging narrative has emerged of Brussels bureaucrats inappropriately standing in the way of meaningful citizen involvement.

2. *Registered initiatives*

The tally of registered initiatives through to April 2017 is at 43.⁹⁵ The range of policy areas has included amongst others social policy, environmental policy, animal welfare, and education. So far three have met the signature thresholds. The insufficient support category is at 18. Two are closed for which no signature data is available on the official register as well as six for which the collection is on-going. Of particular interest in the on-going collection category is the 'Stop Glyphosate' initiative concerned with banning a pesticide and reforming pesticide approval procedure. It was registered in January 2017 and, according to the organisers, had obtained over 1 million signatures by May 2017 and was due to be submitted to the Commission in July 2017. It has received more funding (€240,000) than any that met the signature thresholds. But sizable funding has been no guarantee of meeting these thresholds. The prime example is 'Fair Transport Europe' which concerned fair competition and equal treatment of workers in transport sectors and which received €322,000 from the European Transport Workers Federation. That such a (comparatively) well-funded initiative backed by trade unions throughout Europe has been unable to collect the necessary support is testament to the enormity of the challenge. If getting a citizens initiative registered is likely to be beyond the realistic capacities of the 'ordinary' EU citizen, then meeting the signature thresholds is

⁹⁴ See eg Art 87.3 Spanish Constitution (1978).

⁹⁵ This included two initiatives that were initially refused registration, see note 88 above. The withdrawal category includes four that were resubmitted and registered: 'Single Communications Tariff Act'; 'Let Me vote'; 'End Ecocide in Europe'; 'Media Pluralism'.

particularly unlikely in the absence of considerable backing from civil society organisations.

The three initiatives that met the signature thresholds were all backed by civil society organisations. All three were registered between May and June 2012. The first, the 'Right2Water' initiative, was essentially about preventing the privatisation of water services and received 1.6 million signatures. It was launched and backed by the European Federation of Public Services Union from which it received €140,000. The second, the 'One of Us' initiative, proposed an EU-wide ban and termination of financing of activities which presuppose the destruction of human embryos and received 1.7 million signatures. It was initiated by catholic organisations and right to life associations and declared funding of €159,219. The third, 'Stop Vivisection', proposed the repeal of Directive 2010/63 on the protection of animals used for scientific purposes in order to phase out the practice of animal experimentation and received 1.17 million signatures. It was initiated by volunteers from the animal welfare sector and declared funding of €23,651 primarily from animal rights organisations.

The organisers of these three initiatives were all received by the Commission to explain their initiatives, prior to having public hearings organised at the European Parliament with representatives from both the Parliament and Commission, and followed by Commission communications explaining the action, if any, that it intended to take.⁹⁶ We will briefly take each Communication in turn, but the general take home point has focused on none having proposed legislative action. Much of the 13 page 'Right2Water' Communication had a self congratulatory feel to it in relation to EU action on access to water and sanitation. Although there was a seven bullet point summary of proposed action identified as directly relevant to the initiative and its goals, it was not clear whether these were a direct response to the initiative or part of a pre-existing agenda. Only one bullet point, a proposal to launch an EU-wide public consultation on the Drinking Water Directive, looked directly related to potential legislative action. The Commission emphasised that its earlier proposal to exclude drinking water and certain waste water treatment from the EU's new rules on concession contracts was a response to concerns raised by the Right2Water initiative.⁹⁷ Accordingly, where initiatives are receiving substantial popular support and tap into concerns with on-going legislative action, they are even capable of having legislative impact during the signature gathering stage.

Nonetheless, the Commission's response to the Right2Water initiative has been criticised, most notably in a European Parliament resolution on the follow-up to the initiative.⁹⁸ This 17 page resolution found the Commission response 'insufficient' and called for it 'to come forward with legislative proposals' while underscoring 'that if the Commission neglects successful and widely supported ECIs ... the EU as such will lose credibility in the eyes of citizens'. The Parliament is expressing the

⁹⁶ Respectively COM(2014)177 (Right2Water); COM(2014)355 (One of Us); C(2015)3773 (Stop Vivisection).

⁹⁷ See Directive (EU) No 2014/23 [2014] OJ L94/1.

⁹⁸ P8_TA(2015)0294. Similarly, see EESC Opinion [2015] OJ C12/5.

growing concern that the absence of legislative action for ECIs meeting the signature thresholds can damage support for the EU. An eight page Commission response repeatedly underscored that it had ‘responded positively to the requests of the initiative’ and also that it was ‘not obliged to follow all the specific requests contained in a successful ECI’ (it is actually not obliged to follow any).⁹⁹ The first initiative to meet the signature thresholds is already testament to an important potential dynamic that Dougan foresaw, namely, that representative democracy could be used to inflate the political value of a citizens’ initiative.¹⁰⁰ In fact, the Commission’s first published work programme since its response to that European Parliament resolution states that it will revise the Drinking Water Directive as a follow-up to the ‘Right2Water’ initiative (and a Regulatory Fitness and Performance Programme Evaluation).¹⁰¹

The Commission’s response to the ‘One of Us’ initiative rejected the proposed legislative changes and emphasised that the Horizon 2020 provisions on human embryonic stem cell research had only very recently been agreed in a democratic process by the EU co-legislator (European Parliament and Council).¹⁰² Given the recently adopted Horizon 2020 Regulation, it is unsurprising that the Parliament has not responded with a resolution directly chastising the Commission’s absence of follow-up as it had with the ‘Right2Water’ initiative. Surprisingly, the One of Us organisers brought a legal challenge on the basis that the Commission response was unsatisfactory and violated the democratic process as legal reasons were not provided for the refusal to transmit the proposal to the Parliament, and the Commission maintained a monopoly of the legislative process.¹⁰³ These arguments have no realistic chance of success because they are in direct tension with the ECI Regulation specifically requiring the Commission to set out ‘the action it intends to take, if any’ (Article 10(1)(c)). Their additional plea that this provision of the Regulation should be annulled for breaching the Treaties is also far-fetched given the language in Article 11(4) TEU of ‘inviting the Commission’ which protects the Commission’s treaty-enshrined right of legislative initiative.¹⁰⁴ Thus, given the treaty and legislative text, judicial challenges to Commission Communications responding to initiatives that meet the signature thresholds are unlikely to yield gains for citizens.

Finally, the Commission response to the ‘Stop Vivisection’ initiative proposed a range of actions to accelerate the development and uptake of non-animal approaches in research and testing, but none involved legislative action. The Commission underscored that it shared their conviction that animal testing should be phased out,

⁹⁹ Follow up to the European Parliament resolution on the European Citizens’ Initiative (2 February 2016).

¹⁰⁰ Dougan note 69 above, pp 1843–1844 (specifically referring to the possibility of the Parliament or Council calling for legislative action under respectively Arts 225 and 241 TFEU but the general insight is of broader application).

¹⁰¹ COM(2016)710 final.

¹⁰² Regulation (EU) No 1291/2013 [2013] OJ L347/104.

¹⁰³ T-561/14 *One of Us v Commission*.

¹⁰⁴ Art 17(2) TEU; Art 289 TFEU.

while emphasising that Directive 2010/63 is an indispensable tool to protect animals and also ‘the catalyst for the development and uptake of alternative approaches, which is in line with the request of this Initiative.’ The organisers brought a complaint to the Ombudsman which concluded that the Commission had ‘complied with its duty to explain, in a clear, comprehensible and detailed manner, its position and political choices’.¹⁰⁵

To conclude, the absence of legislative proposals has generated considerable consternation with the Commission and the ECI more generally. This is so despite the fact that agenda initiatives by their very nature are premised on requests and invitations to legislative action and in comparative terms rarely lead to concrete legislative output. However, in the EU set-up where democratic discontent has become increasingly profound, the absence or perceived absence of adequate follow-up to such initiatives is one of the perils of the ECI for the EU.

D. The future of the ECI

Calls for ECI reform rapidly emerged and were effectively encouraged by Article 22 of the Regulation, entitled ‘Review’, which required the Commission to present a report on the operation of the Regulation to the European Parliament and the Council within three years.¹⁰⁶ But no revision proposals were forthcoming in the eagerly anticipated review.¹⁰⁷ The calls thus became louder and more critical, most significantly via a Parliamentary resolution in 2015.¹⁰⁸ The punch-line of the Commission’s detailed response was that it was ‘too early to launch a legislative revision’.¹⁰⁹ Finally, in April 2017 the Commission announced plans to revise the ECI to make it more accessible and citizen friendly with proposals expected in late 2017.¹¹⁰

Many of the long-circulating proposals have much to commend them.¹¹¹ Chief among these include: increasing the period of time for collecting signatures, whether that be to 18 or 24 months, given that we have seen that reaching the signature thresholds in 12 months is no small feat; reducing the age for signing initiatives to 16, as is currently the case in Austria, thus encouraging greater youth involvement with the EU and facilitating meeting signature thresholds; harmonising and reducing personal data requirements which deter citizens from signing initiatives; providing financial support for registered initiatives, and greater translation support, given the

¹⁰⁵ Case 1609/2016/JAS.

¹⁰⁶ See C Berg and J Thomson (eds), *An ECI that works! Learning from the first two years of the European Citizens’ Initiative* (The ECI Campaign, 2014).

¹⁰⁷ COM(2015)145 final.

¹⁰⁸ P8_TA(2015)0382. Critical opinions also emerged from the Committee of the Regions [2015] OJ C423/1 and the EESC [2016] OJ C389/35.

¹⁰⁹ SP(2016)67 available at: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2014/2257\(INI\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2014/2257(INI))

¹¹⁰ See Commission press release at: http://europa.eu/rapid/press-release_MEX-17-950_en.htm

¹¹¹ For a particularly detailed range of proposals, see M Ballesteros and S Fiorentini, *Towards a Revision of the European Citizens’ Initiative* (European Parliament, 2015).

considerable expenditure involved and with a view to making the ECI more accessible;¹¹² stipulating that the personal liability of organisers is not unlimited as the current phrasing in the Regulation discourages committee formation.

Considerably more problematic are proposals for including treaty revision within the ECI's remit or placing more duties on the Commission with respect to follow-up of initiatives.¹¹³ Amending the ECI Regulation to include treaty revision would, for reasons suggested above, be in tension with the Treaty text. But even if it were possible, it could have negative unforeseen consequences. Launching the treaty revision process has become a treacherous endeavour, not least because of Member State referendums. To expand the ECI to this terrain would generate unrealistic expectations as to its viability as a route to treaty change. If achieving legislative change is a perceived measure of success and has proved both elusive thus far and a cause for discontent with the ECI, for its scope to be expanded to treaty revision creates the potential for more frustration and discontent. An alternative proposal to help manage expectations would be to expressly rule out treaty revision in the ECI Regulation itself. In relation to imposing obligations upon the Commission to actually produce legislative proposals, this would be in clear tension with the Commission's right of legislative initiative. The limited experience from the mere three to meet the signature thresholds provides insufficient basis for reconsidering the obligations on the Commission.

It is inevitable that, with a novel and complex instrument, there would be teething problems and scope for improvement. But we should not accept the increasingly standard line that portrays the first years of the ECI in a negative light with the Commission as the villain of the piece. There is an alternative more optimistic reading that is also more realistic in so far as it is shaped by awareness of agenda initiatives comparatively. The ECI is a wholly novel transnational instrument that has generated considerable activity in its first five years with over 60 proposed initiatives. This has created interactions between EU citizens in diverse Member States who have formed citizens committees, and others who may have tried unsuccessfully to do so. Registration refusals have been frequent, but this is not comparatively anomalous and was to be expected given the great complexity of the EU's system of competences. Two significant exceptions aside – 'Minority SafePack' and 'STOP TTIP' – they have been unsurprising rejections and at least two were subsequently registered. From those registered, signed statements have exceeded seven million (if one includes the 'Stop Glyphosate' initiative) which strengthens awareness of the ECI.

The negative narrative flows partially from an impoverished definition of a 'successful initiative' as either being confined to those meeting the signature thresholds, in line with the Commission's own unfortunate labeling in the official register, or, worse still, those which have resulted in legislative action which would

¹¹² The EESC has offered free translation of the 800 characters since October 2014, see *Your Guide to the European Citizens' Initiative*, 3rd ed (EESC, 2015), p 11. However, the Minority SafePack initiative came with a 14 page annex.

¹¹³ See eg the Committee of the Regions Opinion, note 108 above.

mean that none have been successful. It is too simplistic to see achieving the signature threshold as the measure of success; this is a tall order even with the backing of civil society organisations. Even those not meeting the signature threshold can be part of the promise of the ECI in that they foster its cross-national deliberative and participatory aspirations. Bouza Garcia and Greenwood have rightly emphasised the ECI's value in generating proposals from activists well outside the 'Brussels bubble' and contributing to creating new pan-European networks and even new organisations.¹¹⁴ The European Ombudsman has also emphasised that a legislative proposal should not be seen as the only measure of success and that the process itself is of major significance.¹¹⁵ Indeed the importance of views being aired in the arena of the European Parliament, even absent legislative initiatives, should not be downplayed, and even initiatives not meeting the signature thresholds can be examined by the Parliament's petitions committee if it considers follow-up to be appropriate.¹¹⁶

Ultimately, five years is very early days in the life of the first EU level direct democracy instrument. We can expect the revision process to result in an even more fit for purpose agenda initiative for the EU. But the ECI is in any event likely to become a powerful agenda initiative because of the political setting in which it is located. The EU's political malaise and democratic disconnect vis-à-vis its citizens is such that there is enormous pressure to exploit all opportunities to combat this disconnect. And in an era where major treaty revision is no longer the order of the day, the existing treaty-enshrined instrument that is the ECI can make at least a modest contribution to addressing this disconnect. This promise of the ECI is dependent on political practice. If one type of political practice is seen to jeopardise the promise of the ECI, Commission reluctance to follow-up initiatives, there is scope for another type to contribute to that promise, namely, Parliament adding its weight, as it did with the 'Right2Water' initiative, to calls for action and if necessary backing initiatives via its own right to call for a legislative proposal.¹¹⁷ In conclusion, the future of the ECI thus looks bright.

IV. CONCLUSION

This concluding section begins by first focusing on the referendum device before moving on to the ECI. Throughout this paper we have flagged conditions under which the current practice of referendums on EU matters can be either perilous or promising for the EU. The fact that a referendum rejects a carefully negotiated treaty package is certainly not in and of itself a sufficient reason for denouncing the referendum device. After all, referendum outcomes are by their very nature uncertain

¹¹⁴ L Bouza Garcia and J Greenwood, 'Bridging the Gap? Opportunities and Constraints of the European Citizens' Initiative', in M Conrad et al (eds) see note 84 above.

¹¹⁵ See Decision of the European Ombudsman closing own-initiative inquiry OI/9/2013/TN.

¹¹⁶ The rules of procedure were amended in 2012, Rule 203a, to expressly stipulate this. The organisers of the 'End Ecocide' initiative were received in a Petitions Committee hearing at the European Parliament on 26 February 2015.

¹¹⁷ The Parliament has recently underscored this possibility, note 108 above, para 32.

in democratic regimes, a stark contrast to the staging of referendums in authoritarian regimes.¹¹⁸ This line of argumentation against referendums – that the ‘people’ are not competent to understand the intricacies of contemporary policymaking – acquires an even greater resonance in the EU context in view of the latter’s byzantine procedures and the sheer distance between ordinary citizens and Brussels. The competence justification is the classic argument against direct democracy and it appears in many guises in relation to referendums on EU matters.¹¹⁹ To our mind this is a misplaced critique against popular participation since, taken to its logical conclusion, a justification that is predicated on the faulty knowledge of citizens is an argument against democracy itself, including its representative variant. As Grynawski has argued, empirical research over the past decades has, if anything, consistently revealed that voters are rather ignorant about the issues, candidate positions and party programmes associated with elections.¹²⁰ Yet no one seriously advocates dispensing with elections because of faulty voter knowledge. From a voter competence perspective, in many respects the binary aspect of a referendum is easier to deal with than the multi-dimensional nature of an election. In short, opposition to direct democracy needs to draw its intellectual sustenance from arguments other than voter competence.

No doubt in recognition of the need to go beyond simplistic voter competence critiques, one important line of research on EU referendums does not reject direct democracy outright but rather the dysfunctional way in which it is practiced in the EU context. Most commentary has focused on treaty revision referendums. There are two main sources to the dysfunctional critique: (1) the extra-territorial spillover effects of referendums such as the treaty revision variant; and (2) the discretionary way in which the referendum is deployed by political elites, often for gaining partisan advantage. To neutralise these problems, scholars have advocated the introduction of pan-EU referendums as a means to not only overcome the current pitfalls of EU referendums but more importantly to unleash the promise of direct democracy. The more promising variant seeks to overcome the unanimity hurdle so that the EU could no longer be held to ransom by the popular veto of a single Member State, nor be subjected to the partisan deployment of a referendum for strategic domestic political concerns. While we are sympathetic to the introduction of an appropriately configured pan-EU referendum under some variant of a double majority system, we do not see this as politically feasible any time soon.

In highlighting the promise and peril of referendums it is necessary to take account of the type of referendum in question. The most straightforward source of peril for

¹¹⁸ On referendums in authoritarian regimes see J Wheatley, ‘The Disruptive Potential of Direct Democracy in Deeply Divided Societies’ in W Marxer (ed), *Direct Democracy and Minorities* (Springer, 2012).

¹¹⁹ For examples of this line of argumentation in relation to voters’ competence and EU referendums, see R Dehousse, ‘The Unmaking of a Constitution: Lessons from the European Referenda’ (2006) 13 *Constellations* 151; A Moravcsik, ‘The European constitutional settlement’ (2008) 31(1) *The World Economy* 158.

¹²⁰ J Grynawski, ‘Reflections of a Party Scholar on Direct Democracy and the Direct Democracy Literature’ (2015) 38 *Electoral Studies* 238.

the EU are those referendums that have a direct extraterritorial spillover – most of which are treaty revision referendums. Nonetheless, treaty revision referendums can certainly have redeeming features at the domestic level, especially when they are constitutionally mandatory rather than discretionary devices. However, from the EU level perspective they are mostly a perilous device. Of all types, the membership referendum is the least perilous for the EU. This rather bold statement needs some further explication. Given the implications of joining the EU, a referendum can provide the highest degree of democratic legitimacy for acceding to the EU. Logically, the same argument can be run in reverse. Given the existence of an exit clause in the treaties, the referendum is an appropriate device for deciding on such a highly salient issue. Note that either decision (joining or leaving) could also be decided by holding a general election on the particular issue, with parties taking pro and contra positions. But then that election would be the functional equivalent of a referendum. The membership referendum is therefore not *prima facie* perilous for the EU. On the contrary, for deciding on the issues it touches upon the referendum is arguably the most appropriate device. This applies even to withdrawal referendums since the latter is one of two main mechanisms – the other being a general election on the specific issue – that can provide a constitutionally legitimate route to withdrawal. Evidently, if a major EU Member State or group of States deployed the withdrawal referendum this can be perilous for the EU and ultimately even lead to its unravelling. Yet, in any such instance the referendum is at best a symptom of the problem rather than its cause. The unraveling of the EU in the more extreme hypothetical scenario would not be caused by the existence of the referendum device although it can be delivered by it. Instead, any putative unraveling would be caused by a much deeper, and structural political malaise of the EU. A very different argument relates to the peril associated with the discretionary deployment of the referendum. The literature has, rightly, been very critical of discretionary referendums that are called for purely partisan motives referring to these as plebiscites or as power-reinforcing and pro-hegemonic devices.¹²¹ A discretionary referendum can obviously be deployed on issues other than membership. However, the Brexit referendum provides a textbook example of such peril: an unnecessary referendum that was called mostly to resolve an internal party dispute. Thus our main problem with the Brexit referendum is not the referendum instrument *per se*, but rather the strategic deployment of the device for partisan motives.

In the case of the two remaining types, we have shown conditions under which they are perilous for the EU independently of how they are called. The most controversial aspect of the EU's direct democratic landscape was traditionally the treaty revision referendum. Its peril was always obvious given the unanimous ratification hurdle for a treaty to enter into force. Indeed, recourse to second referendums was required to allow three (Maastricht, Nice and Lisbon) of the last five major treaty revisions to enter into force. The existence of the popular veto point has been a key driver of calls for replacing the unanimous ratification hurdle, a view that was bolstered when the UK introduced 'referendum locks' on future

¹²¹ See eg D Altman, *Direct Democracy Worldwide* (Cambridge University Press, 2011).

treaty revisions.¹²² With the UK's departure following a withdrawal referendum, a type of referendum whose peril for the EU is now all too painfully apparent, this lock on future treaty revision will be no more. However, other Member States could mimic the UK locks and additional avenues for treaty revision referendums present themselves, notably the new Dutch citizen-initiated referendum. The treaty revision referendum will thus continue to make its presence felt, not necessarily because it will be activated but because its obvious peril for successful treaty revision discourages recourse to that route to constitutional adaptation. This in turn might lead to other EU related referendums, which brings us neatly to the policy referendum type. If, for example, 'extra-EU treaties' are used for constitutional adaptation they may find themselves subject to Member State referendums, as was the case with the Fiscal Compact in Ireland. Since such treaties need not be wedded to unanimous ratification, the peril of a negative referendum vote could be contained. States can thus retain the legitimacy gains they reap from having such a referendum, but without the same ability to externalise the consequences of a negative vote.

The policy referendums category includes popular votes that cannot so easily be contained and we have highlighted the disconcerting development of referendums by Member States on future enlargements. The new Dutch citizen-initiated referendum may be activated to this end and has already been applied to another facet of the EU's international relations: the ratification of an EU Agreement with a third State. All is not bleak with regard to the policy referendum however. Some policy referendums can deliver a high degree of legitimacy and offer a promising route to the taking of salient political decisions related to EU matters, such as the decision to join the Euro. Crucially, such decisions primarily affect the Member State rather than the rest of the Union.

In weaving together these various threads related to contemporary EU referendum practice we highlight two dimensions to the problematique. The first concerns the type of referendum, and in particular the degree of extraterritorial spillover generated by a given referendum. This varies from membership referendums, which of course have significant consequences for the rest of the EU but where the primary effect can be said to be located in the state holding the referendum, to the treaty revision referendum and certain types of policy referendum where the primary effect impacts on the rest of the Member States by either permitting or precluding them from proceeding. The second dimension relates to the discretion involved in calling for referendums in the first place. This continuum varies from constitutionally mandatory cases where political discretion is largely absent, those cases where referendums are politically obligatory though not necessarily constitutionally mandatory on issues of high salience, such as joining the EU or adopting the Euro, through to the unnecessary referendum called to resolve internal party disputes or to enhance the

¹²² For further details see Mendez and Mendez, note 2 above. 'Referendum locks' were created by the European Union Act 2011 and may partially explain Prime Minister Cameron's decision to veto a proposed treaty change in 2011: see D Hodson and I Maher, 'British Brinkmanship and Gaelic Games: EU Treaty Ratification in the UK and Ireland From a Two Level Game Perspective' (2014) 16(4) *British Journal of Politics and International Relations* 645.

profile of a party leader or President. The latter type is the most suspect in terms of democratic legitimacy, as long pointed out in the literature.¹²³ These two dimensions can interact in myriad ways. A discretionary referendum need not be perilous for the EU (as in the case when this has been the motive behind calling for an accession referendum). On the other hand, a democratically valid citizens' initiative triggering a referendum (eg the Dutch Ukraine Agreement vote) or a court ruling to that effect (the Irish SEA referendum) can certainly be perilous for the EU.

On balance, the referendum is largely a perilous enterprise for the EU. To be fair, numerically speaking most EU referendums have actually been promising, since accession referendums – which we believe are the most democratically apt devices for endorsing membership of the EU – account for the majority of referendum activity, while the perilous variant of the policy referendum is rather rare.¹²⁴ Thus, although historically EU referendums may have on balance been mostly promising, the current trajectory – which includes the potential expansion of popular vetoes – points in the direction of peril. A rather different picture crystallises in relation to the ECI, which has revealed a fundamental dualism in relation to the impact of direct democracy instruments on EU affairs. On balance, the picture is promising for the ECI – which unlike the referendum is the only direct democratic instrument that is institutionalised at the EU level. Partly because it does exist at EU level, the dysfunctionality associated with the national referendums on EU matters has been overcome. There are a number of apparent perils with this instrument of direct democracy, concerns that upon closer inspection are mostly misguided.

First, the democratic expectations regarding this instrument of direct democracy need to be re-calibrated to avoid disappointment. The ECI is an agenda initiative, which represents a careful balance between elements of direct democracy and representative democracy. Thus, the bold democratic rhetoric that has often accompanied the ECI needs to be managed. As powerful as the ECI could become by virtue of both design alterations and political practice, as long as it remains a species of agenda initiative, one of the weakest of direct democratic instruments, it will be beset by the agenda initiative's inherent limitations. Crucially, this includes the fact that launching an initiative, as contrasted with simply supporting an existing initiative, is rarely likely to be within the reach of the 'ordinary' citizen; a problem accentuated in the EU set-up because the choice was legitimately made to impose a transnational prerequisite to launching an initiative, namely, a citizens' committee composed of at least seven EU citizens resident in at least seven different Member States. The ECI should be evaluated according to the appropriate benchmark, that is, as an instrument whose effects are largely mediated as opposed to the direct effect of a citizens' initiated referendum on a policy topic, which if approved, leads to direct policy change. A connected peril is that the instrument's potential is stifled because of choices in the implementing Regulation and the application of the admissibility

¹²³ G Smith, 'The Functional Properties of the Referendum'. (1976) 4 *European Journal of Political Research* 31.

¹²⁴ The three instances are the 1972 French enlargement referendum, the 2016 Dutch Ukraine Association Agreement referendum and the 2016 Hungarian refugee quota referendum.

test by the Commission. There have certainly been ‘teething problems’, but reform is rightly on the agenda. However, we have found the pessimistic narrative of existing outcomes under the ECI to be largely unsubstantiated and wedded to a reductionist (mis)understanding of success.

A second potential peril of the ECI is that the ECI is used to block integrationist policy. Certain aspects of the EU’s future international relations not only now appear bound to be affected by Member State level direct democracy, but also by its own direct democracy instrument. We have seen the Commission conclude in its ‘STOP TTIP’ registration refusal that the ECI can be used to call for the conclusion of international agreements. The General Court’s *STOP TTIP* ruling held that it can also be used to call for negotiating mandates to be repealed and agreements not to be concluded, which has enormous ramifications for potential involvement of citizens in the EU’s international relations. This is especially so if, as we suggest, the ECI becomes a powerful agenda initiative because of the considerable political pressure to exploit its promise. But what some of the political institutions, notably the Commission and the Council, might see as peril can, from the perspective of the citizenry more generally, be seen as democratic promise. The ECI was introduced to open up new channels of political participation. To that end, it is likely to lead to policy proposals that both promote and oppose integrationist policy. This is a necessary attribute of a well-functioning democracy: to provide channels in which citizens can contest the direction of policy.

Clarifying what type of institution the ECI is represents a necessary first step to assessing its functioning and potential promise. Despite its institutional limitations, a well-functioning agenda initiative can have significant indirect consequences in terms of putting issues on the policy agenda and in the EU case, mobilising citizenry and stimulating transnational debate. In rarer cases, an agenda initiative can also have a direct or partial policy impact on legislation. In its short history, the ECI has already proved itself to be a valuable addition for the EU to engage with its citizens and for them to engage with each other, even if it has not (yet) led to a concrete legislative output. The ECI’s promise far outweighs the peril associated with the implementation of the agenda initiative in the EU policy context.