# The Commission's 'Communication' on a Successful European Citizens' Initiative before the Court of Justice

## ECJ (Grand Chamber) 19 December 2019, Case C-418/18 P, *Puppinck and Others* v *European Commission*

Nikos Vogiatzis*

### Introduction

On 19 December 2019, the Grand Chamber of the Court of Justice delivered its judgment in *Puppinck and Others* v *Commission*.[1] The Court of Justice, largely in agreement with the General Court and the Opinion of Advocate General Bobek, effectively found that the Commission's 'communication' on a successful European citizens' initiative may be subject to judicial review, yet the Commission is not obliged to accept the content of a successful initiative and start the legislative process. The Commission has a near-monopoly on the initiation of legislation, and this monopoly is not affected by the citizens' initiative, according to the Court of Justice. The judgment of the Court of Justice, as well as that of the General Court and the Opinion of the Advocate General, also include important statements about the European citizens' initiative as a means of facilitating citizens' participation in the EU.

This was the first case before the Court concerning the Commission's 'communication' after a successful citizens' initiative, namely a proposal which, after passing the registration stage, manages to secure the required number of signatures (one million, from at least seven member states). This case note argues that

*Senior Lecturer in Law, University of Essex. I am grateful to the Editorial Board for comments and suggestions on an earlier version. The usual disclaimer applies. This note considers developments up to the end of August 2020.

[1]Case C-418/18 P, *Puppinck and Others* v *European Commission*, EU:C:2019:1113 (hereinafter '*Puppinck and Others*').

*European Constitutional Law Review, 16: 691–712, 2020*

doi:10.1017/S1574019620000292

the Court of Justice delivered a balanced judgment, which should be welcomed. The confirmation of the General Court's finding that the 'communication' is subject to judicial review by the Court of Justice is a noteworthy development. On the other hand, the existing legal framework (and most notably the treaty text itself) probably would not permit an interpretation to the effect that a successful citizens' initiative *obliges* the Commission to accept the proposal. More generally, whether the success of the European citizens' initiative as an instrument of citizens' participation will be assessed with reference to the possibility of debates that may be generated and the engagement of civil society, as opposed to leading to concrete action by the Commission in *certain* proposals, is a matter on which differing views exist. This case note also briefly comments on the new Regulation on the European citizens' initiative,[2] which applies from 1 January 2020 (that is, after the present judgment was delivered).

The note proceeds as follows. The next section discusses the legal framework concerning the citizens' initiative – including examination of the initial Regulation,[3] applicable at the time – and the factual background of the case. Following this, the judgment of the General Court, the Opinion of Advocate General Bobek and the judgment of the Court of Justice are briefly presented in chronological order. Next, the comment section focuses on a number of areas: the reviewability of the Commission's communication; whether the Commission is under an obligation to accept the content of the proposal, and its reason-giving requirements; the relationship between the citizens' initiative and the right to petition the European Parliament; and the EU judiciary's understanding of the European citizens' initiative as a tool of citizens' participation. Comments on the new Regulation, with a particular focus on changes introduced to the step when the Commission receives and considers the successful initiative, are offered in places. The final section provides some concluding remarks, and a brief comment on the state of democracy in the EU.

## The legal framework and the factual background of the case

The citizens' initiative was introduced in the EU by the Lisbon Treaty, although discussions about this instrument preceded Lisbon.[4] It is mentioned in Article

[2]Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative, OJ L 130/55 (hereinafter 'new ECI Regulation'). The acronym 'ECI' is avoided in the main text.

[3]Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65/1 (hereinafter 'initial ECI Regulation').

[4]*See*, for example, A. Auer, 'European Citizens' Initiative: Article I-46.4 Draft Convention', 1 *EuConst* (2005) p. 79.

11(4) TEU and Article 24 TFEU – the latter being part of the provisions on Union citizenship. But it was effectively the initial Regulation that crystallised the instrument and the conditions under which it would operate. That Regulation specified, among other things, that a 'successful initiative' would consist of at least one million signatures from at least one quarter of member states;[5] in that case, the Commission would consider the proposal. This threshold was decided after much consultation and debate, following the Commission's initial Green Paper on the European citizens' initiative.[6]

In the 'life' of a citizens' initiative, at least in this author's view,[7] the Commission has to make two important decisions: the first is whether or not the initiative should be *registered*, after which point the collection of signatures of support may begin; the second is how to proceed with a successful initiative, namely one that has managed to collect the required level of support. This is often described as the *'follow-up' process*. Crucially, and despite some improvements concerning the registration stage and the degree of flexibility that the Commission can demonstrate at this initial step, the new Regulation does not affect the centrality of the aforementioned two decisions in the process. The Commission remains, of course, the institution making both of these decisions. Since the case under review concerns the Commission's follow-up decision, the focus of the piece is not be on the registration stage, which has already led to significant case law[8] and to scholarly commentary.[9]

On the follow-up step, it should be noted that the European citizens' initiative was not designed as a typical 'popular legislative initiative' (that could oblige the Commission to forward the proposal to the co-legislators) and even less so as a 'popular initiative' (which would lead to the initiation of a referendum).[10] Indeed, as

[5]Art. 2(1) of initial ECI Regulation.

[6]European Commission, 'Green Paper on a European Citizens' Initiative', COM/2009/0622 final.

[7]This position is further explained in N. Vogiatzis, 'Between Discretion and Control: Reflections on the Institutional Position of the Commission within the European Citizens' Initiative Process', 23 *European Law Journal* (2017) p. 250.

[8]Such case law has been illuminating, particularly with regard to Art. 4(2)(b) of the initial ECI Regulation, stating that the Commission should not register the initiative if it 'manifestly fall[s] 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'. *See*, among others, General Court 30 September 2015, Case T-450/12, *Anagnostakis* v *Commission*, EU:T:2015:739; General Court 10 May 2017, Case T-754/14, *Efler* v *Commission*, EU:T:2017:323; General Court 3 February 2017, Case T-646/13, *Minority SafePack* v *Commission*, EU:T:2017:59.

[9]*See*, among others, A. Karatzia, 'Revisiting the Registration of European Citizens' Initiatives: The Evolution of the Legal Admissibility Test', 20 *Cambridge Yearbook of European Legal Studies* (2018) p. 147; J. Organ, 'Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals', 10 *EuConst* (2014) p. 422.

[10]M. Sousa Ferro, 'Popular Legislative Initiative in the EU: *Alea Iacta Est*', 26 *Yearbook of European Law* (2007) p. 355 at p. 357 ff.

Article 10(1)(c) of the initial Regulation specified, upon receipt of a successful initiative, the Commission within three months should 'set out in a *communication* its *legal and political conclusions* on the citizens' initiative, the action it intends to take, *if any*, and its reasons for taking or not taking that action'.[11] It was precisely one such 'communication' that was at the centre of the dispute in the present case. The wording of Article 10(1)(c) of the initial Regulation echoed Article 11(4) TEU, which states that the Commission is merely *invited* to act.[12]

A summary of the factual background is appropriate at this point, on the basis of the useful exposition by the General Court.[13] The applicants were the organisers of the second (in the history of this instrument) successful European citizens' initiative, entitled 'One of Us'. The proposal claimed that the EU should 'ban and end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health'. The organisers presented their proposal to the Commission, a public hearing at the European Parliament was organised and, on 25 May 2014, the Commission adopted its communication,[14] namely its legal and political conclusions on the initiative. In brief, the Commission via a thorough response decided not to accept any of the requests for legislative amendment submitted by the organisers, while underlining, *inter alia*, that EU primary law 'explicitly enshrines human dignity, the right to life, and the right to the integrity of the person'.[15] The applicants at first instance sought the annulment of the above communication.[16]

## The judgment of the General Court, the Opinion of Advocate General Bobek and the judgment of the Court of Justice

### *Judgment of the General Court*

The Commission argued before the General Court that the 'communication' did not produce binding effects, 'let alone binding legal effects capable of affecting the interests of the applicants by bringing about a distinct change in their legal position', according to established case law, with the consequence that the

[11]Emphasis added.

[12]Auer, *supra* n. 4, p. 83.

[13]*See* General Court 23 April 2018, Case T-561/14, *One of Us* v *Commission*, EU:T:2018:210, paras. 1-30 (the content of the Commission's communication is also described therein).

[14]Communication from the Commission on the European citizens' initiative 'One of Us', COM (2014) 355 final.

[15]Ibid., point 4.1.

[16]They also sought the annulment of Art. 10(1)(c) of the initial ECI Regulation; however, that part of the action was found inadmissible by Order of the First Chamber of the General Court, as the time limit under Art. 263 TFEU had expired; that Order has not been published but is referenced in the judgment of the General Court (para. 40) and the Opinion of AG Bobek (para. 20).

communication could not be subject to judicial review in accordance with Article 263 TFEU.[17] The Commission further argued that the communication 'is an act of the Commission which reflects the latter's *intention* of following a particular line of conduct'.[18] The General Court held otherwise: the communication *is* a challengeable act which affects the interests of the applicants. The following considerations weighed in favour of this position: the communication concludes the European citizens' initiative process while representing the Commission's 'final position', and the Commission clearly has an obligation to present such communication;[19] in addition, and regarding the applicants' position, 'that communication constitutes the completion of the specific procedure initiated and conducted by the applicants on the basis of Regulation No 211/2011';[20] moreover, the right to support an initiative enhances citizens' participation, reinforces Union citizenship and, therefore:

> 'The non-submission of the Commission's refusal to submit to the EU legislature a proposal for a legal act ... to judicial review would compromise the realisation of that objective, in so far as the arbitrary risk on the part of the Commission would deter all recourse to the [European citizens' initiative] mechanism, regard being had also to the stringent procedures and conditions to which that mechanism is subject.'[21]

Having found that the communication is subject to judicial review, the General Court examined and then rejected the applicants' grounds for annulment. With reference to the very wording of Article 10(1)(c) of the initial Regulation, as well as the Commission's 'near-monopoly' on legislative initiative on the basis of its role to act independently with a view to promoting the EU's general interest,[22] the argument that the Commission's right to take no action should be interpreted restrictively, and its discretion should correspondingly be reduced, was rejected.[23] The General Court also held that the Commission is not obliged to set out *separately* its legal and political conclusions on the initiative.[24] As to the Commission's obligation to state reasons, which is mentioned in the Regulation but also follows from Article 296 TFEU, the General Court referenced settled case law on the adequacy of reasons and found the Commission's explanations sufficient as they enabled the applicants to determine whether the Commission's decision was well-founded and the EU judiciary to review its lawfulness.[25] Lastly, on

[17] *One of Us*, *supra* n. 13, para. 69.
[18] Ibid (emphasis added).
[19] Ibid., paras. 76-77.
[20] Ibid., para. 77.
[21] Ibid., para. 93.
[22] *See* Art. 17(1) TEU.
[23] *One of Us*, *supra* n. 13, paras. 103-118.
[24] Ibid., paras. 126-132.
[25] Ibid., in particular paras. 150-158.

the merits of the reasons and the act's substantive legality, the applicants claimed that the Commission committed errors of assessment, which led the General Court to define the standard of review that should be applied with regard to this 'communication'. The General Court, in light of the Commission's broad discretion, held that review should be limited to 'manifest errors of assessment': no such errors were committed in that case.[26]

*Opinion of Advocate General Bobek*

The action was dismissed by the General Court, and an appeal was submitted before the Court of Justice. Advocate General Bobek delivered an elaborate and clearly-argued Opinion, in which the appellants' grounds of appeal were rejected.[27] To begin with, the wording of the European citizens' initiative provisions, as well as preparatory work concerning the instrument, indicate that the latter was not designed to impose an obligation upon the Commission to accept the proposal.[28] Similarly, 'systemic arguments' support this conclusion: the design of the Regulation follows a distinction between registration (under Article 4) and follow-up process:

> 'if a successful [European citizens' initiative] had a binding character, it is questionable whether the legislature would have been so open in terms of the conditions of registration that currently feature in Article 4(2) of the [European citizens' initiative] Regulation. That article imposes on the Commission an obligation to register an [initiative] unless there are "manifest" grounds for not doing so'.[29]

More generally, and considering the 'institutional context' of the European citizens' initiative, if the Commission were bound to accept the views of quite a limited number of citizens, that could undermine its mandate under Article 17 TEU (to act independently and impartially, in accordance with the EU general interest, etc).[30] Interestingly, the Advocate General also stated that the initiative is not the only instrument mentioned in Article 11 TEU: if so, it should not be granted exclusivity, in terms of influence in the decision-making process.[31] Moreover, a

[26]Ibid., paras. 159-183.

[27]Opinion of AG Bobek 29 July 2019, Case C-418/18 P, *Puppinck and Others* v *Commission*, EU:C:2019:640 (hereinafter 'Opinion of AG Bobek').

[28]Ibid., paras. 33-42.

[29]Ibid., para. 44.

[30]Ibid., paras. 50-51.

[31]Ibid., para. 52. Art. 11(1) TEU states that the 'institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action'; Art. 11(2) TEU that the 'institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society'; and Art. 11(3) TEU that the 'European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent'. As noted above, Art. 11(4) TEU refers to the ECI.

different interpretation would mean that the citizens' initiative would not be placed on an equal footing with the European Parliament (Article 225 TFEU) and the Council (Article 241 TFEU), in terms of their power to request the Commission to submit a proposal.[32] An analysis of the aims and purpose of the European citizens' initiative followed, a matter returned to below. The Advocate General confirmed that the Commission is not obliged to separate its legal and political conclusions in the communication.[33] Turning to the degree of scrutiny of the communication, it was initially observed that the fact that the communication is subject to judicial review 'strengthen[s] considerably the position of the [European citizens' initiative]. It provides for a judicial guarantee of adequate consideration by the Commission of a successful [initiative]'.[34] Moreover, and approvingly, it was underlined that 'both the *adequacy of the statement of reasons* in the Communication and the *assessment* that forms the basis of its substantive content' were found to be reviewable by the General Court.[35] In this context, the General Court did not err in confining the standard of review to manifest errors of assessment, in light of established case law pointing to the depth of discretion in situations involving choices of a political nature or complex assessments.[36]

### *Judgment of the Court of Justice*

As already noted, the Grand Chamber of the Court of Justice dismissed the appeal. It was confirmed that the wording of Article 11(4) TEU and the initial Regulation indicate that the Commission is not obliged to submit a proposal.[37] The European citizens' initiative right is comparable to the rights granted to the European Parliament and the Council under Articles 225 and 241 TFEU, respectively.[38] The Union is founded on representative democracy (Article 10(1) TEU), complemented (after the Lisbon Treaty) with instruments of participatory democracy (like the citizens' initiative), which cannot, however, infringe the Commission's prerogatives under Article 17 TEU.[39] In addition, the word

[32]Ibid., paras. 55-56.

[33]Ibid., paras. 87-107. The Advocate General opined that the reasoning of the General Court regarding the role of preambles in the interpretation of legal acts (here recital 20 and Art. 10(1)(c) of the initial ECI Regulation) was vitiated by an error of law, but that did not have an impact on the operative part of the judgment.

[34]Ibid., para. 115.

[35]Ibid., para. 116 (emphasis in the original).

[36]Ibid., paras. 123-127.

[37]*Puppinck and Others*, *supra* n. 1, para. 57.

[38]Ibid., para. 61.

[39]Ibid., paras. 64-65.

https://doi.org/10.1017/S1574019620000292 Published online by Cambridge University Press

'separately' in recital 20 of the initial Regulation 'must be understood as meaning that *both* the legal conclusions and the political conclusions of the Commission must appear in the communication' and not as imposing an obligation on the Commission to separate the two; failure to do so could not lead to the annulment of the communication.[40] The Court of Justice then went on to confirm that the Commission's broad discretion entails that the communication should be subject to limited judicial review; yet the communication also differs from the examination of a petition by the European Parliament (this matter is returned to below).[41] The remaining grounds of appeal were also rejected, and the appellants were ordered to pay their own costs and those of the Commission.[42]

## Comment

Taken together, the judgments of the General Court and the Court of Justice, as well as the Opinion of Advocate General Bobek, demonstrate remarkable consistency in their reasoning and findings. This note submits that there is not much to criticise in the approach taken by the EU judiciary in this case. This concerns the reviewability of the communication, the standard of review, as well as the question of whether the Commission is legally obliged to forward the proposal to the EU legislature. In that sense, the comment section will elaborate on a number of issues emerging (directly or indirectly) from this judgment.

### *The communication is subject to judicial review*

The finding of the General Court that the Commission's communication is subject to judicial review is arguably one of the most important developments in this case. In the author's view, it is also a positive development which – as the Advocate General pointed out – was clearly not a given prior to the proceedings. The uncertainty did not originate in the fact that communications are not mentioned in Article 288 TFEU (since it is the *content*, not the form, of the act that matters),[43] but rather in whether this is a binding act producing legal effects. The Commission argued that it is not: the act reflected the Commission's 'intention of following a particular line of conduct'.[44] The EU judiciary was not convinced by this line of argumentation. And indeed the communication, presenting

[40]Ibid., paras. 79-80 (emphasis added).
[41]Ibid., paras. 87-97.
[42]Ibid., para. 133.
[43]*See further* K. Lenaerts et al., *EU Procedural Law* (Oxford University Press 2015) p. 263 ff and case law cited therein.
[44]*One of Us*, *supra* n. 13, para. 69.

https://doi.org/10.1017/S1574019620000292 Published online by Cambridge University Press

the Commission's final position on the European citizens' initiative process, could not easily be viewed as constituting 'internal guidelines'[45] or as being 'interpretative' in nature,[46] contrary to the Commission's argument.

With a view to identifying the impact of the act on the applicants' interests and establishing that a 'distinct change' in their legal position did take place,[47] the General Court pointed out that the applicants were the organisers of the initiative, while the latter is a complex and burdensome procedure. The crucial consideration, however, appears to have been more straightforward: the European citizens' initiative as a means of citizens' participation would be undermined if the Commission's follow-up decision escaped any judicial scrutiny. It was therefore necessary to strengthen the citizens' initiative with an additional judicial guarantee (to use the wording of the Advocate General) that would prevent the Commission from paying little or no attention to a successful initiative.

The intensity of review that was applied was less surprising. The EU judiciary opted for 'marginal' review,[48] taking into account the undeniable discretion that the Commission enjoys, as a matter of law, under the treaties. In *Rica Foods*, Advocate General Léger attempted, on the basis of existing case law, a justification of the 'political' and 'technical' discretion that is granted to EU institutions – with the consequence that the intensity of judicial review will be limited.[49] As Craig explains, the term 'manifest error' indicates 'review that will only be used as a longstop to catch extreme and obvious forms of substantive error'.[50] Like elsewhere, perhaps,[51] the distinction between the examination of the sufficiency of reasons and errors of assessment may be less straightforward when it comes to the review of the Commission's communication. However, on the basis of the available evidence after the first successful European citizens' initiatives, it can

[45]Within the meaning of the case law of the Court: *see* ECJ 6 April 2000, Case C-443/97, *Spain* v *Commission*, EU:C:2000:190 (cited by the Commission).

[46]General Court 20 May 2010, Case T-258/06, *Germany* v *Commission*, EU:T:2010:214 (also cited by the Commission).

[47]*See*, among others, ECJ 26 January 2010, Case C-362/08 P, *Internationaler Hilfsfonds eV* v *Commission*, EU:C:2010:40, para. 51; ECJ 12 September 2006, Case C-131/03 P, *Reynolds Tobacco and Others* v *Commission*, EU:C:2006:541, para. 54.

[48]*See*, for example, A. Türk, 'Oversight of Administrative Rulemaking: Judicial Review', 19 *European Law Journal* (2013) p. 126 at p. 136 ff.

[49]Opinion of AG Léger of 17 February 2005, in Case C-41/03 P, *Rica Foods* v *Commission*, EU:C:2005:93, paras. 45-49; while adding (at para. 49) that, in his view, judicial review is even 'less exhaustive' when the discretion is of a political nature. For further discussion of the 'manifest error of assessment' in complex economic appraisals in EU competition enforcement *see* A. Kalintiri, 'What's in a Name? The Marginal Standard of Review of "Complex Economic Assessments" in EU Competition Enforcement', 53 *Common Market Law Review* (2016) p. 1283.

[50]P. Craig, *EU Administrative Law* (Oxford University Press 2018) p. 480.

[51]Ibid, p. 481.

be anticipated that the Commission will continue to provide thorough reasoning in its communications,[52] as was also the case in *One of Us*. The Commission is probably aware that the stakes are high[53] – even more so now that it has been established that the communication is subject to judicial review. Thus, the probability of an annulment of a communication on this basis is rather low.

More generally, the uncertainty about the reviewability of the communication also stemmed from the text of the initial Regulation, and the distinction it made between the admissibility decision – which would be subject to judicial and extrajudicial review[54] (i.e. review by the European Ombudsman) – and its silence on whether the communication would be reviewable, albeit mentioning that the Commission should provide reasons. The admissibility step, therefore, would clearly be a *legal* one.[55] There was no doubt that the General Court would be called upon to review admissibility decisions – as it did. Now that it has been confirmed that the communication is also subject to judicial review (within the aforementioned limitations, of course), another crucial implication is that this communication should also be reviewable by the European Ombudsman. With regard to the European Ombudsman's mandate, any doubts surrounding her competence to review this communication stemmed from the Ombudsman's well-established position that political matters cannot be supervised by the office.[56] However, in 2017 the European Ombudsman did examine the Commission's communication with regard to the 'Stop Vivisection' European citizens' initiative, as the organisers were not satisfied with the Commission's response.[57] No maladministration was found in that case, as the Commission's duties under Article 10(1)(c) of the initial Regulation were complied with, according to the Ombudsman. Further to the long-held position that maladministration is broader than illegality,[58] *Puppinck* can now serve as authority that the

[52]*See* Vogiatzis, *supra* n. 7, p. 267.

[53]The stakes would be high anyway, since this was only the second successful ECI in the history of the instrument, and the first time the EU courts had the opportunity to assess the follow-up stage (the 'communication'). But this remark also pertains to the criticism that the ECI has received, from various standpoints: the procedural and technical hurdles, the lack of clarity regarding various steps, the Commission's admissibility decisions and of course the follow-up stage. In this context, it is unsurprising that the Commission has generally provided thorough justifications behind its actions and inactions under former Art. 10(1)(c) of the initial ECI Regulation.

[54]*See* Art. 4(3) of the initial ECI Regulation: 'Where it refuses to register a proposed citizens' initiative, the Commission shall inform the organisers of the reasons for such refusal and of all possible judicial and extrajudicial remedies available to them'.

[55]*See*, for example, M. Dougan, 'What Are We to Make of the Citizens' Initiative?', 48 *Common Market Law Review* (2011) p. 1807 at p. 1838; *see also* Karatzia, *supra* n. 9.

[56]*See further* Vogiatzis, *supra* n. 7, p. 263-265.

[57]European Ombudsman Case 1609/2016/JAS (all European Ombudsman cases referred to in this case note can be accessed at ⟨www.ombudsman.europa.eu⟩, visited 11 November 2020).

https://doi.org/10.1017/S1574019620000292 Published online by Cambridge University Press

Commission's communication is also reviewable by the European Ombudsman – if, of course, the extra-judicial avenue is the one which unsatisfied (with the Commission's response) organisers elect to pursue.

Another interesting question is how the present judgment on the reviewability of the Commission's communication following a successful initiative could be contrasted/related to the ECJ case law on the non-reviewability of preparatory acts in the EU legislative process.[59] Certainly, the non-reviewability of preparatory acts is not confined to the legislative process. In *IBM*, a competition case, the Court explained that the reviewability of such an act 'might make it necessary for the Court to arrive at a decision on questions on which the Commission has not yet had an opportunity to state its position … It would thus be incompatible with the system of the division of powers between the Commission and the Court'.[60] In this respect, the finding of the General Court that the communication represents the Commission's *final position* is of relevance. Likewise, in the context of the legislative process the European Court of Justice has clarified that a proposal from the Commission to the Council is not reviewable, as it:

> 'is part of a legislative process involving several stages, it is only an intermediate measure intended solely to pave the way for a final measure, namely a Council regulation, without definitively determining the position that the Council will adopt. Consequently such a proposal for a regulation cannot be regarded as producing binding legal effects within the meaning of the case-law'.[61]

From the perspective of the jurisprudence of the Luxembourg Court, the answer that could be provided is that, technically, the European citizens' initiative does not start the legislative process – and therefore the initiative is distinguishable, in this respect, from the aforementioned case law. In fact, it may even be argued that the Court's subsequent finding that the Commission is not obliged to submit a legislative proposal (thereby starting the legislative process) confirms as much. In terms of *reviewability of EU acts*, therefore, the EU judiciary appears to separate

[58]*See further* N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union* (Palgrave Macmillan 2018) p. 16-26, 33-52 and 93-96.

[59]The Commission's decision to withdraw a proposal in the context of the legislative process is, however, reviewable: *see* ECJ 14 April 2015, Case C-409/13, *Council* v *Commission*, EU:C:2015:217, para. 77: 'a decision to withdraw a proposal … constitutes an act against which an action for annulment may be brought given that, by bringing the legislative procedure initiated by the submission of the Commission's proposal to an end, such a decision prevents the Parliament and the Council from exercising, as they would have intended, their legislative functions under Articles 14(1) TEU and 16(1) TEU'.

[60]ECJ 11 November 1981, Case 60/81, *IBM* v *Commission*, EU:C:1981:264, para. 20. For further discussion *see* A. Türk, *Judicial Review in EU Law* (Edward Elgar 2010) p. 17-23.

[61]15 May 1997, Case T-175/96, *Berthu* v *Commission*, EU:T:1997:72, para. 21.

the citizens' initiative process from the legislative process – despite the obvious connection between the two. This matter is further discussed in the next section.

### *The Commission is not obliged to submit a proposal*

The finding of the Court that the Commission is under no obligation to submit a proposal is not surprising: it is legally understandable, and the Court of Justice relied on the text of the EU treaties, which indicates that the Commission enjoys broad discretion in the initiation of legislation, this being an expression of institutional balance.[62] In addition, neither the European Parliament nor the Council are granted a right to *initiate the legislative process themselves* under Articles 225 and 241 TFEU, respectively. The Court considered that a different treatment of the European citizens' initiative would upset the existing institutional equilibrium. An argument was submitted by the applicants that the case law on the Commission's power to withdraw a proposal (notably *Council* v *Commission*)[63] should be understood as implying that 'a failure to launch a legislative proposal after a successful [European citizens' initiative] can only be justified by *cogent evidence or arguments, which are not contrary to the objective of the [initiative]*'.[64] This argument was dismissed by the Advocate General and the Court of Justice. As the Advocate General explained, the communication on the initiative precedes the 'beginning of the legislative process', as opposed to the withdrawal of a proposal, where that process has already been initiated and the 'decision-making in other institutions' has been 'triggered'.[65] The remarks in the earlier section are of relevance.

In addition, commentators observed that the proposal under scrutiny in the present case (*One of Us*) was met with 'intense debate' and 'concerns' at the public hearing at the European Parliament, and the Commission was clearly aware that the specific legislative proposals would not find support among the co-legislators – which influenced the content and tone of the communication.[66] Thus, this

[62]On this point *see also* A. Karatzia, 'The European Citizens' Initiative and the EU Institutional Balance: On Realism and the Possibilities of Affecting Lawmaking', 54 *Common Market Law Review* (2017) p. 177.

[63]ECJ 14 April 2015, Case C-409/13, *Council* v *Commission*, EU:C:2015:217, where the Court stated, *inter alia*, that: 'The power of withdrawal [of the Commission] cannot, however, confer upon that institution a right of veto in the conduct of the legislative process, a right which would be contrary to the principles of conferral of powers and institutional balance' (para. 75); 'Consequently, if the Commission, after submitting a proposal under the ordinary legislative procedure, decides to withdraw that proposal, it must state to the Parliament and the Council the grounds for the withdrawal, which, in the event of challenge, have to be supported by *cogent evidence or arguments*' (para. 76, emphasis added).

[64]Opinion of AG Bobek, *supra* n. 27, para. 59 (emphasis in the original).

[65]Ibid., para. 61.

[66]Karatzia, *supra* n. 62, p. 192-201.

particular citizens' initiative could not be forwarded to the European Parliament and the Council – they would not support it anyway. Moreover, it goes beyond the purposes of the present note to comment on the suitability or otherwise of the remaining citizens' initiatives which have managed, to date, to receive the required level of support.[67]

These disclaimers aside, some critical observations about the general practice of the Commission are warranted.[68] These are not directed against the Court (subsequent paragraphs will elaborate on whether the Court could have been more 'activist' in this respect), and do not concern the initiative 'One of Us'. To date, the Commission has not decided to forward *as such* any of the successful initiatives to the co-legislators.[69] Moreover, and given that this piece does not comment on the existing successful initiatives, there have been no signs to suggest that the Commission has undertaken a commitment to do so in the future. If that existing practice solidified, in an era when the legitimacy of the EU is increasingly being debated (as the EU institutions also acknowledge), the intergovernmental institutions have assumed a prominent role in decision-making, and citizens find it challenging to have a meaningful voice in the EU's decision-making world (see also the discussion below), it would probably be an unsurprising yet simultaneously rather disappointing development: it would demonstrate that the Commission had chosen the European citizens' initiative as the area where it would exert itself to maintain its role as the initiator of legislation and the promoter of the EU general interest. To give but an example of influence, research suggests that the Commission is heavily influenced by the intergovernmental institutions in its decisions to initiate legislation.[70] This author maintains that ultimately, the European citizens' initiative will be a more successful instrument of participation if appropriate proposals (which could include proposals that would find the support of the European Parliament and the Council[71]) were forwarded *as such* to the co-legislators. There would no doubt be scrutiny, possibly amendments or even outright rejection by the two institutions. But that is rather

[67]*See further* details at ⟨europa.eu/citizens-initiative/_en⟩, visited 11 November 2020.

[68]This paragraph is based on critical remarks made in Vogiatzis, *supra* n. 7.

[69]The extent of the Commission's engagement with the proposals has varied, however. Perhaps noteworthy, in this respect, is the Commission's very belated response to the 'Right to water' ECI which, according to the organisers, partly addressed their objectives, by proposing a revised Directive on the quality of water intended for human consumption; *see further* ⟨www.right2water.eu⟩, visited 11 November 2020.

[70]P. Ponzano et al., 'The Power of Initiative of the European Commission: A Progressive Erosion?' (Notre Europe 2012).

[71]In an important own-initiative inquiry, which is also discussed below, the European Ombudsman invited the Commission, among others, to 'carry out preliminary consultations with the Council and Parliament with a view to determining whether there is political support for the ECI'; *see* European Ombudsman own-initiative inquiry OI/9/2013/TN, point 17.

different from the present situation, where the Commission in most cases proposes 'some actions' to successful organisers of citizens' initiatives, when clearly this is not what is pursued by the initiatives. Although legally the Commission is not obliged to follow this course of action, politically it could be convinced that, *where appropriate*, it should do so.[72] It appears, however, that the Commission is not prepared to take this step; that is, the voluntary 'sacrifice' of the prerogative to initiate the legislative process on the basis of an appropriate successful initiative.

One could perhaps object that, if these propositions were taken forward, it would then be difficult to establish which proposals were 'appropriate' to be forwarded to the EU legislature. Without any intention to prescribe solutions in a very delicate (for the Commission) area, while also acknowledging that it falls within the Commission's remit to make such decisions, appropriate proposals might include those that could be supported by the legislature (as the European Ombudsman suggested); others that would defend or advance the interests of EU citizens or the EU interest more generally, in light of the Commission's institutional position; or others that would squarely fall within the Commission's agenda and programme. The crucial question remains unchanged: is the Commission open to considering forwarding suitable proposals to the legislature? And, of course, the earlier reference to 'sacrificing' the prerogative to initiate legislation does not mean that it would not be *the Commission itself* that would forward the proposal (which might also require appropriate re-drafting, as organisers and citizens need not be legal experts to be involved in the European citizens' initiative process), as it might also be the case with parliamentary and Council requests; perhaps that would not be an unprecedented 'sacrifice', after all.

Let us now turn to the role of the Court. To be clear, the author submits that the Court achieved an appropriate balance by holding, on the one hand, that the communication is subject to judicial review, and on the other that the Commission is not obliged to forward the proposal to the EU legislature. In this respect, it is noted that the Advocate General openly admitted that the positive elements of the citizens' initiative mechanism highlighted in the Opinion 'certainly [did] not suggest that the [European citizens' initiative] is a perfect mechanism that provides a miraculous solution to the alleged or real shortcomings of the European Union in terms of democratic legitimacy'; yet it is for the legislature, not the judiciary, to decide any further amendments to the institutional design of the initiative, including on the role of the Commission at the follow-up stage.[73]

Not everyone will share the viewpoint expressed in this case note (and in the judgment of the Court). There may be those who believe that the Court

[72]On this point *see* L. Bouza García, 'How Could the New Article 11 TEU Contribute to Reduce the EU's Democratic Malaise?', in M. Dougan et al. (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012) p. 253 at p. 274-275.

[73]Opinion of AG Bobek, *supra* n. 27, paras. 84-85.

https://doi.org/10.1017/S1574019620000292 Published online by Cambridge University Press

should have held that the communication is non-reviewable in the first place. The reviewability of the communication was addressed in earlier sections. And there may be others who would perhaps welcome a more 'activist' stance on the part of the Court, with a view to strengthening the EU's democratic credentials: in light of the democratic principle, the Court could essentially go against the letter of the Regulation and find that the Commission is obliged, in the case of successful European citizens' initiatives, to forward the proposal. This note will now turn to this line of argumentation.

The basis for such an argument would be the EU's undeniable democratic challenges. At a more general level, clearly the citizens' initiative brings to the fore the ongoing debate about the EU's legitimacy and the limited role of citizens in EU decision-making. Claims about the 'democratic deficit'[74] will be familiar to readers of *EuConst*, as well as the – quite noticeable – prominence of intergovernmentalism[75] or the reliance on non-majoritarian institutions (such as the European Central Bank), particularly since the emergence of the Euro-crisis.[76] The 2017 white paper amply acknowledged the legitimacy problem that the EU has been facing: 'many Europeans', said the Commission,

> 'consider the Union as either too distant or too interfering in their day-to-day lives. Others question its added-value and ask how Europe improves their standard of living. And for too many, the EU fell short of their expectations as it struggled with its worst financial, economic and social crisis in post-war history'.[77]

It is, therefore, understandable that strengthening the role of citizens in the EU democratic process should be a priority for the Union. It has been claimed, for example, that 'the Union must urgently embrace, possibly under the current Treaties, a new *systemic* approach to the EU democratic reform agenda, aimed at empowering citizens to both set and monitor agendas on a permanent basis'.[78]

[74]A. Follesdal and S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', 44 *Journal of Common Market Studies* (2006) p. 533; *see also* V. Schmidt, 'Democracy and Legitimacy in the European Union', in E Jones et al. (eds.), *The Oxford Handbook of the European Union* (Oxford University Press 2012) p. 661.

[75]C. Bickerton et al., 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', 53 *Journal of Common Market Studies* (2015) p. 703.

[76]N. Scicluna and S. Auer, 'From the Rule of Law to the Rule of Rules: Technocracy and the Crisis of EU Governance', 42 *West European Politics* (2019) p. 1420; P. Kratochvíl and Z. Sychra, 'The End of Democracy in the EU? The Eurozone Crisis and the EU's Democratic Deficit', 41 *Journal of European Integration* (2019) p. 169 – among others.

[77]European Commission 'White Paper on the Future of Europe' (2017) p. 6.

[78]A. Alemanno and J. Organ, 'The Case for Citizen Participation in the European Union: A Theoretical Perspective on EU Participatory Democracy', (2020) available at SSRN: ⟨https://ssrn.com/abstract=3627195⟩, visited 11 November 2020.

The above observations, to which this author subscribes, bring another dilemma to the fore: to what extent is it for the Court to address the EU's democratic problems? The appellants argued, for example, that the approach of the General Court '[failed] to address the democratic deficit of the European Union'. The Court can certainly contribute to the strengthening of democracy in the EU (and the reviewability decision is a manifestation of this) but there are certain limitations on what the Court can do, not least those deriving from the judicial function itself. That being said, in the TTIP judgment (which, however, concerned the Commission's *admissibility decision*) the General Court did rely on the democratic principle:

> 'the principle of democracy, which, as it is stated in particular in the preamble to the EU Treaty, in Article 2 TEU and in the preamble to the Charter of Fundamental Rights of the European Union, is one of the fundamental values of the European Union, as is the objective specifically pursued by the [European citizens' initiative] mechanism, which consists in improving the democratic functioning of the European Union by granting every citizen a general right to participate in democratic life ... requires an interpretation of the concept of legal act which covers legal acts such as a decision to open negotiations with a view to concluding an international agreement, which manifestly seeks to modify the legal order of the European Union'.[79]

In this context, it has been observed that were the Commission compelled to take action, that would 'infringe the Commission's institutional prerogative of legislative initiative, as well as the fundamental principle that the Commission takes instruction from no body or entity, but rather acts with complete independence and in the general interest'.[80] Of course, empirical evidence suggests that the Commission is far from completely independent when presenting proposals (see the discussion above); yet there is no doubt that Dougan is right when he refers to the institutional position of the Commission *from a legal point of view.* These considerations informed the approach of the EU judiciary as well. In addition, as the Advocate General observed, the Commission's near-monopoly on initiative 'marks an important difference between the EU legislative process and that of national States, [and] is rooted in the specificity of the institutional architecture of the European Union as a compound of States and peoples'.[81] He also carefully observed that:

> '[w]ithout wishing to enter into any evaluation of the (continuing) appropriateness or otherwise of such reasons [for the Commission's near-monopoly], what matters *in*

[79] *Efler* v *Commission*, *supra* n. 8, para. 37.
[80] Dougan, *supra* n. 55, p. 1842.
[81] Opinion of AG Bobek, *supra* n. 27, para. 46.

> *my (legal) view* is the fact that, *in terms of positive law*, it is clear that the Commission has been vested, with some exceptions, with the power of initiative'.[82]

As such, while comparisons with similar national schemes[83] are valuable and should inform the practice of the EU institutions involved in the process (and most notably the Commission), when it comes to the legal interpretation of the prerogatives of the institutions involved, the institutional balance in the EU legislative process suggests that divergences might be inevitable.

Although the point that the Court classifies the European citizens' initiative as an instrument of participatory democracy is discussed below, an additional observation might be submitted – not without some degree of speculation. It is not impossible to think that any potentially activist (for some) judgments have been primarily devoted to strengthening representative, rather than participatory, democracy. To be sure, the EU is primarily founded on representative, rather than participatory democracy: Article 10(1) TEU confirms as much. Representative democracy is then 'complemented and enhanced'[84] by instruments of participatory and deliberative democracy. To take one example, although this author does not find anything particularly activist in that judgment, *Delvigne* could be understood by some to impermissibly stretch the jurisdiction of the Court regarding the right to vote in the European elections for static EU citizens, that is, those who have not exercised free movement rights.[85] For the Court, this was a natural reading of Article 14(3) TEU,[86] taken together with Article 39(2) of the Charter.[87]

Lastly, as already noted, the judgment was decided under the former legal framework, namely the initial Regulation. The new Regulation on the European citizens' initiative, which applies from 1 January 2020, contains significant improvements to the admissibility stage.[88] Regarding the follow-up stage, which is the focus of the present case note, the Regulation contains certain amendments which are briefly mentioned in a subsequent section. The key point remains, however, that the

[82]Ibid., para. 47 (emphasis added).

[83]For a comparative overview in Europe *see*, for example, M. Qvortrup, 'The Legislative Initiative: A Comparative Analysis of the Domestic Experiences in EU Countries', in Dougan et al., *supra* n. 72, p. 291.

[84]Opinion of AG Bobek, *supra* n. 27, para. 69.

[85]ECJ 6 October 2015, Case C-650/13, *Delvigne*, EU:C:2015:648.

[86]It reads: 'The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot'.

[87]On the same day that *Puppinck* was delivered, the Court of Justice elsewhere (in the widely-discussed Junqueras case on immunities of Members of the European Parliament) stressed the principle of representative democracy: *see* Case C-502/19, *Oriol Junqueras Vies*, EU:C:2019:1115, paras. 63, 83.

[88]A brief overview of these changes can be found at ⟨europa.eu/citizens-initiative/how-it-works/history_en⟩, visited 11 November 2020.

Commission's discretion at the follow-up stage essentially remains unaffected.[89] Consequently, the new Regulation does not touch upon the Commission's prerogative. In that sense, *Puppinck* remains good law and fully applicable as the European citizens' initiative enters its second stage of development, with the adoption of the new Regulation.

To conclude this section, and leaving the specific details of the case aside, not everyone will agree with the balance that the Court achieved here: 'yes' to the reviewability of the communication; 'no' to obliging the Commission to forward the proposal. The stakes were simply too high and therefore the Court could not produce a judgment that would satisfy everyone.

### *The European citizens' initiative differs from the right to petition the European Parliament*

A thorough examination of the right to petition the European Parliament, or even a comparison of that right and the European citizens' initiative, cannot be undertaken here. By way of brief introduction, Article 227 TFEU states that:

> '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly'.[90]

The Committee on Petitions of the European Parliament deals with petitions and produces an annual report of activities. In the present case, the Commission attempted to argue for the application, by analogy, of the *Schönberger* judgment, where the Court held that when Parliament takes the view that a petition meets the requirements under Article 227 TFEU, a decision regarding the action to be taken from that point onwards is *not* subject to judicial review, because Parliament has 'a broad discretion, of a political nature, as regards how that petition should be dealt with'.[91] The Commission's communication and, by extension, the citizens' initiative process more generally, differs 'in various respects' from the petition, according to the Court of Justice. First, unlike the petition, the admissibility step in the European citizens' initiative is subject to 'strict conditions and to specific

[89] *See* Art. 15(2) of the new ECI Regulation.

[90] The right to petition the European Parliament is also mentioned in Art. 24 TFEU (i.e. among the provisions on Union citizenship) and Art. 44 of the EU Charter of Fundamental Rights.

[91] ECJ 9 December 2014, Case C-261/13 P, *Schönberger* v *European Parliament*, EU:C:2014:2423, para. 24.

procedural safeguards'.[92] The Court of Justice also pointed out that the initial Regulation spelled out in greater detail what the Commission should do at the follow-up process, namely to set out 'its conclusions, both legal and political, on the [European citizens' initiative] concerned, the action it intends to take, if any, and its reasons for taking or not taking that action'; the intention of this provision is not only to inform the organisers, but also to enable the EU courts to review the communication under the said provision.[93] The General Court also highlighted the various procedural guarantees prescribed to the organisers:[94] in essence, the EU judiciary held that the citizens' initiative process is much more burdensome and complex, and the Regulation sets out the Commission's obligations in further detail. The Commission also argued, before the General Court, that the European citizens' initiative right is not mentioned in the Charter and therefore is not a fundamental right – which means that the initiative cannot benefit from a higher standard of protection than the petition right. That argument was dismissed by the General Court, as follows:

> 'although the right to the [European citizens' initiative] is not included in the Charter ... the fact remains that that right is provided for under the primary law of the Union, namely in Article 11(4) TEU. It is therefore enshrined in an instrument that has the same legal value as that conferred on the Charter'.[95]

### *The European citizens' initiative is an instrument of participatory democracy*

The above discussion on how the EU judiciary dealt with the question as to whether the Commission is obliged to forward the proposal already indicates that, for the EU judiciary, the citizens' initiative is an instrument of participatory – not direct – democracy. On this point, it is not necessary to remind ourselves that the role of the Court is to state the law as it is and not as it should be. But this was also underlined by the Advocate General, who used a metaphor in his Opinion to address the applicants' argument that the interpretation of the General Court would mean that the initiative would be deprived of any *effet utile*.[96] The position that the European citizens' initiative is an instrument of participatory democracy entails, *inter alia*, that how the Commission will react is not, in and of itself, the key added value of the mechanism; by contrast, that value mainly resides in the possibilities for democratic debate that will emerge (on this point, the Advocate General

[92] *Puppinck and Others*, *supra* n. 1, para. 91.
[93] Ibid., paras. 91-92.
[94] *One of Us*, *supra* n. 13, paras. 97-98.
[95] Ibid, para. 99.
[96] Opinion of AG Bobek, *supra* n. 27, para. 64.

https://doi.org/10.1017/S1574019620000292 Published online by Cambridge University Press

cited approvingly the European Ombudsman's own-initiative inquiry).[97] It is also a view that situates the initiative in the content of Article 11 TEU[98] and the right to participate in the democratic life of the Union under Article 10(3) TEU. Accordingly, the interplay between the registration (Article 4(2) of the initial Regulation) and the follow-up of the citizens' initiative is of relevance: the Advocate General duly noted the broad approach to admissibility that has been adopted by the EU judiciary, which verified the non-binding (on the Commission) character of the initiative at the follow-up stage.[99] For example, in *Anagnostakis*, the Court of Justice held that in light of the objectives of the European citizens' initiative which:

> '[consist], *inter alia*, in encouraging citizen participation and making the Union more accessible, the registration condition provided for in Article 4(2)(b) ... must be interpreted and applied by the Commission, when it receives a proposal for [a European citizens' initiative], in such a way as to ensure easy accessibility to the [European citizens' initiative]'.[100]

In this context, an argument that could be made is that if the citizens' initiative should enable debates and generate interest among citizens, the Commission should relax its approach at the first stage (the registration/admissibility); yet its broad discretion at the follow-up stage should entail limited judicial review. And indeed it is possible to understand the European citizens' initiative process as implying some kind of trade-off between the first and the second stage, in the sense that the Commission cannot be expected to have limited control over both the registration and the follow-up steps.

This author recognises, of course, the potential of debates and awareness-raising. Yet it should not be forgotten that repeated refusals by the Commission to forward the proposal(s) in all cases may lead to fatigue and disappointment, thereby undermining the overall prospects of the instrument. In addition, it is always useful to remind ourselves that, should the Commission decide one day to forward the proposal(s) to the co-legislators, this does not mean that the proposal will automatically become law: it will be up to the European Parliament and the Council – if the ordinary legislative procedure applies – to decide what happens next.[101] Moreover, the

[97]Ibid., para. 78, with reference to European Ombudsman own-initiative inquiry OI/9/2013/TNT, point 20. This was a rare (and welcome) citation of a European Ombudsman inquiry by the EU judiciary. That paragraph from the AG's Opinion was also cited in the judgment of the Court of Justice.

[98]Although, admittedly, the remaining provisions in Art. 11 TEU (on dialogue, consultation etc.) are significantly less regulated than the ECI.

[99]Opinion of AG Bobek, *supra* n. 27, para. 44.

[100]ECJ 12 September 2017, Case C-589/15 P, *Anagnostakis* v *Commission*, EU:C:2017:663, para. 49.

[101]Vogiatzis, *supra* n. 7, p. 268.

citizens' initiative may indeed be characterised as an 'institutional vehicle'[102] enabling citizens to raise issues and concerns with the EU institutions; yet it is not the only channel (institutionalised or otherwise) of influence in the EU decision-making world, within and outside the so-called Brussels bubble.[103]

In terms of the amendments to the follow-up step under the new Regulation, Article 15 is the key provision. The timeframe for the Commission to publish its communication is extended from three to six months; but *if* the Commission indeed decides to take action, 'including, where appropriate, the adoption of one or more proposals for a legal act of the Union, the communication shall also set out the envisaged timeline for these actions'.[104] This is a development from the previous legal framework. In addition, the communication, which should be made public (also under the initial Regulation) should now be notified to the European Economic and Social Committee and the Committee of the Regions – a 'gesture of kindness', perhaps, towards these two EU advisory bodies for their contributions to the European citizens' initiative debate. Lastly, the Commission undertakes to update its website and the register on the various actions and activities that will be pursued in response to the successful initiatives (which may not, of course, include proposals for a legal act). These developments (eg a more visible and interactive website or a more regular contribution to the debate by the two Committees) have the potential to generate further debates, in line with the participatory credentials of the instrument.

## Concluding remarks

*Puppinck* established that the Commission's communication, after a successful European citizens' initiative, is subject to judicial review, which is a noteworthy development; yet the intensity of review should be limited, due to the discretion granted to the Commission under its institutional role. Simultaneously, the Commission is not obliged to forward the European citizens' initiative proposal to the EU legislature. The citizens' initiative has been designed as an instrument of participatory democracy, and its value also resides in the debates that can be generated at the EU level (and notably in the public hearing at the European Parliament).

The EU judiciary, particularly with its decision that the communication is reviewable, sought to strengthen the importance of the European citizens' initiative mechanism. Beyond the aforementioned level of scrutiny, it was felt that, legally,

[102]Opinion of AG Bobek, *supra* n. 27, para. 80. The point was made to substantiate the claim that 'the ECI is much more than a mere symbolic nod toward participative democracy'.

[103]*See*, for example, J. Greenwood, *Interest Representation in the European Union* (Palgrave Macmillan 2017); D. Coen and J. Richardson (eds.), *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford University Press 2009).

[104]Art. 15(2) of the new ECI Regulation.

whether and how the Commission might take successful initiatives further is a matter that could not be addressed by the Court. This brings the Commission back into the spotlight. As to the role of the legislature, which was invited by the Advocate General to take steps if/when it feels that the citizens' initiative process could be further improved, a particularly interesting question is whether room for manoeuvre in the follow-up stage actually exists, in light of the wording of Article 11(4) TEU and the Court's established views on the institutional balance. For now, in the recent review of the Regulation on the European citizens' initiative, the legislature decided that the Commission's discretion at the follow-up stage – which is clearly the most pressing issue for the Commission – should effectively remain untouched. Any assessment of the aforementioned minor changes depends on how one views the follow-up stage: one might be more inclined to be sceptical if, like this author, one believes that ultimately the European citizens' initiative would be more successful if the Commission on a suitable occasion decided to 'sacrifice' its prerogative to initiate the legislative process. Obviously, other commentators might take a different view.

More generally, the present state of democracy in the EU suggests that a limited role is reserved for citizens who wish to participate in decision-making. Among other contributions, this journal as well has underlined the 'systemic dominance of the European Council', which 'suggests that the present stage of European integration in democratic terms reflects a predominant legitimacy of member state polities in the governmental system'.[105] Simultaneously, the current President of the European Commission, Ursula von der Leyen, has published an agenda for a 'new push for European democracy', which will involve a conference on the future of Europe.[106] The results of this process remain to be seen and assessed in due course. A desirable topic for debate, and a crucial question to be addressed in these discussions, is whether the Commission would be prepared to loosen its grip on its prerogative to initiate the legislative process, in favour of a suitable European citizens' initiative proposal. This has always been the most delicate aspect of the European citizens' initiative process and – in the opinion of this author, at least – the key element to measure its success.

[105]Editorial, 'Spitzenkandidaten and the European Union's System of Government', 15 *EuConst* (2019) p. 609 at p. 609, 618.

[106]*See* European Commission, 'Communication from the Commission to the European Parliament and the Council: Shaping the conference on the future of Europe', COM(2020) 27 final.