

# **THE EUROPEAN CITIZENS' INITIATIVE (ART 11.4 TEU)**

## **IMPULSES AND SUGGESTIONS OF THE**

### ***EUROPEAN CITIZENS' INITIATIVE OFFICE (ECIO)***

#### ***1. Introduction: our pro-active premises regarding the new "initiative legislation"***

With Art 11.4, the European Union for the first time is formally given a legislative means of right of proposal for citizens.

The European Citizens' Initiative (ECI) offers a unique win-win opportunity for European democracy, the strengthening of European citizenship, the legitimizing and anchoring of the EU as well as the unique chance for the EU Commission of a new beginning in the difficult relationship until now with EU citizens.

We consider the European Citizens' Initiative a first step towards a representational transnational democracy in Europe. By way of creating an initial element of direct democracy [PAI], people power can be positioned at a transnational level and the existent representative democracy can be made more representative.

Further reflection on the integration of more powerful instruments of direct democracy, like a European constitutional referendum [LOR] could be the fruit of positive experiences with the citizens' initiative. Both of these would be extraordinarily helpful for democracy as well as for Europe.

The European Citizens' Initiative is potentially a suitable instrument for use in countering the frequently heard complaint that European democracy is not sufficiently legitimized and much too estranged from the Union citizen. Whether this potential can be perceived and put to use will be dependent on whether the implementation legislation is designed so that the instrument is indeed used by Union citizens and thus perceived as their instrument. Only EU democracy which is used and experienced enables the effective identification of citizenry with the EU and can only in this way contribute to EU integration.

Only a truly useful and utilized and thus a vital law for the European Citizens' Initiative will develop a European force which builds the identity of citizens.

This kind of European Citizens' Initiative, however, implies that no overregulation and no unnecessary hurdles will be created and simultaneously, that initiative-promoting structures will be further developed which can prevent the freedom to use this citizen right from becoming a privilege of only a few organizations that possess the necessary resources.

Of course, the allowance for the European legal principle of commensurability in view of implementation of the European initiative, which as we know is only an indirect, merely agenda-setting initiative legislation, signifies that the necessary effort for this must be kept within limits.

At the same time, the European Citizens' Initiative (ECI) offers the unique chance until now for Europe to write world constitutional history and take up a leading position with the first, transnational, direct-democratic right. However, in order for this pioneer accomplishment to truly be able to be used and claimed by all committed Europeans, it should not be dependent on pre-requisites which are unachievable for normal Europeans.

Should the success of the ECI be possible in the end, thanks to a careful, supportive implementation of it, then immeasurable advantages for European integration will have been created. We wish at this point to stress the following advantages which the EU needs more than ever today:

- *a strengthened European integration process,*
- *a more discourse-friendly European public sphere*
- *a more experiential European identity development*
- *a massive increase of transnational legitimacy*

## ***2. Regarding an effective European Citizens' Initiative Legislation and the related tendencies suggested in the Commission's Green Paper***

### Positive Tendencies

In late 2009 the European Commission launched a Green Paper on the ECI regulation and conducted a brief public consultation. Hundreds of organizations, authorities and individual citizens participated in this important process, which was followed-up by a hearing in Brussels on February 22, 2010. The new European Citizens' Initiative Office with Headquarters in Salzburg/Austria participated in pro-actively in this process and provided its recommendations to the Commission both during the consultation period and at the Brussels hearing. This article summarized the background for the recommendations as well as the proposals of the European Citizens' Initiative Office as such.

We considered the consultation paper (GP) of the Commission presented in late 2009 to be a highly promising basis for discussion. Even though the Commission in the GP shows itself to be flexible in form and discursive and represents several possible directive approaches, still the GP is unmistakably moving in a carefully considered direction which we appreciate and support. The Commission has generally recognized what there is to do in order to develop a pan-European instrument, transcending as well as integrating the Member States, which links the European citizens directly with the EU and is able to induce pan-European thought and pan-European learning processes - which is what Europe has perhaps the most need of today.

It could, of course, be that governments which view this development with skepticism might try to enter in as "middlemen" between citizens and the Commission by way of involvement in the process. This would be successful for States to the degree that it should not be successful to create a pan-European process for the collection of signatures, in which the roll of the Member States is limited to the certification of the signatures.

Clearly positive in our evaluation is the position suggested by the GP related to the legitimacy of initiatives: this should be cautiously formulated so that no unnecessary hurdles are created and the inherent dignity of the initiative concern can flow into the Commission's treatment after successful submission of signatures.

Such an approach makes sense. A comprehensive examination of legitimacy extending further than an examination of competence would have to be linked with a direct right of access to a decision of the European Court of Justice (EuCJ) because of the appeal requirement - with uncertain outcome and the danger that the fronts have already hardened before an initiative was able to be truly launched. Legitimacy hurdles which are too early and too high would call the entire process into question as well as the integrity of the EU Commission, or, as the case may be, the citizens' initiative, itself.

Thus it is to be recommended that the formal access to the European citizens' initiative right be left as wide open as possible and to signal to the initiative committee at best that an implementation of a concern might however be called into question on grounds of violation of human rights.

It should be possible within the framework of freedom of religion and conscience, the freedom of expression and the freedom of assembly for an initiative to present its concern to a European public and convince it thereof. Thus the EU would be given the singular chance even in a marginal case to demonstrate to this very same public the pan-European canon of legal values and principles upon which it rests itself. The Commission cannot ask for a better possibility than to present itself in marginal cases with regards to content to a pan-European public which has become very observant. It can only be in the interest of the EU Commission for it to present itself openly and with conviction in its organizational political responsibility.

### Critical Tendencies

There are parts, however, in the consultation paper which could turn the young instrument from the offset into an ineffectual and above all, untrustworthy medium. Should the Commission have already determined by way of the GP that there should be no pro-active support, financing and mentoring of European citizens' initiatives, then their own ambitions in favor of a more democratic European democracy would immediately be called into question - and the commitment to a citizen-friendly implementation of the ECI article degenerate into a lip service.

The danger looms then that the same situation will arise which has already taken place like with the seemingly admirable phrase of equality BEFORE the law in other areas, like in equality of gender. Only through a civil empowerment by way of a factual establishment of equality THROUGH legislation will it be possible to hinder the forward projection of inequality, in this case, the political speechlessness and helplessness of many EU citizens. Only the one who disposes over all resources can hinder that this legislation becomes a privilege of organizations which already have the necessary

resources at their disposal. That is what we mean when we say: neither may democracy be allowed to become the privilege of a few if it does not want to lose its character.

That is why it is so important to help bring about authenticity in the new legislation by affirmative actions - in other words, through pro-active support measures. This can take place by way of financial backing and/or the creation of practical support mechanisms.

### ***-3. Fundamental considerations and suggestions regarding execution legislation for Art 11.4 EUT***

#### For creating an open, pro-active climate of cooperation

The EU Commission now has the singular chance at its disposal to enter for the first time into a direct relationship with the citizens of Europe. The European citizenry is able for the first time to enter in directly at the "Brussels door" by way of the new initiative right. This decision of the "Lisbon Treaty" can be seen and affirmed as a quiet revolution.

One should therefore avoid any systematic regression to a collaboration with the States in this new direct channel. Alert and active citizens are the salt of Europe. Actors who utilize a parliamentary means always demonstrate a formative power in a vital democracy - and should thus be given a warm welcome - supported, yes, even enlivened and encouraged. They are able to endow the EU with a new inner political strength on a whole which is greater than the direct legitimacy given to the EU.

#### Discovery of that which is political in the EU through a more conscious political awareness of the citizenry.

Virtues like a sense of citizenry, vigilance and an active participation are being claimed in a louder and strong way on the level of Member States as well as on the sub national level. And there is much about the "Europe of the Citizen" being talked about also at the transnational European level. However, a true change of attitude regarding the possibilities of decision-making participation "from below" was not obvious for a long time. This led among other things to the strengthening of forces which demanded a re-nationalization of European politics. This is because, as long as democracy is almost solely an option for the States, nationalists always have a trump card at their disposal.

The new citizens' initiative brings with it however the possibility of an authentic and effective Europe political awareness and transnational democratization. That means, democracy no longer remains restricted to the State but can also develop along the supranational level. Instead of describing the future use of the citizens' initiative right first of all as the collating of particular interests, the "political awareness" of the EU as well as the search for a "European common interest", which it makes possible should be at the center of this reform - something which has become urgent in light of the development toward transnational political community (policies) and the required democratic form (polity).

With a hopefully large number of initiatives, a deliberate process can begin at European level in which Europeans are drawn into a politically RIGHT participatory and creative way of acting and draw their own experiences and conclusions from it. When it is possible for us citizens to experience our creative powers in a RIGHT way then we will

also award the EU with the legitimacy which the Union is still lacking. Many people will also begin to identify themselves with the EU in this way.

Awaken awareness that now, for the first time, a formal constitutional tool for citizen empowerment exists.

The current, modest agreement known as the "Lisbon Treaty" should not in any way be called a "constitution" after the first (failed) constitutional round; this is why the originally planned legal protection of symbols like flag and hymn is waived in the treaty. However, the treaty has an inherent potential to make citizens aware of their "constitution" if it is possible to bring awareness to us citizens that we, for the first time, have obtained a little piece of constitutional power, institutional power. That means: with the positioning of the initiative at European level, we obtain new motivation for political action because, from this moment on, in this respect, we are on equal footing with the European Parliament and the European Council.

The legitimate, long-standing complaint was that there was no existing European public. Now, however, in the words of Habermas, finally this means has been constituted by which the constituted subject can create itself. "Europe of the Citizens" until now was more of an appeal than description of a reality. Now, with a vital, true democracy, this gulf between expectation and reality can be closed, step-by-step. It is now decisive how wide open the doors are to this constitutional means, in quantity and quality, in order for as many EU citizens as possible to be able to use it in reality, constructively and successfully.

Do not allow the implementation right ever to be devalued by fraudulent fantasies

The cardinal error of so many legislators is that they are not directed by the positive goals, the formative goals, in regulating the issue but that they waste the energy in contemplating how potential misuse could be hindered. This may not be permitted to happen in the case of the new EU initiative right!

Upon repeated reference to the democratic-political dimension of Art 11.4 EUT, that is why the principle of proportion should be particularly considered. In view of the ECI's modest weight, legally considered, potential minor cases of misuse may not be used as reference to justify reducing the overall potential.

However, it should be awareness and control that that no grave mass attacks and the implicit numbers fraud is allowed to happen. This type of risk cannot be totally ruled out with online processes. But in result, this kind of risk is easily apparent with the technology made available today and in the future; in addition, the interest of criminal circles seems to be small for the manipulation of a process which has no overall financial profit schemes. Having said this, the limited practical experience with e-collecting of signatures will create the need of proper and innovative procedures, developed on step-by-step basis. This is especially important, as a careless rush into going online even with the e-collecting part would offer an easy way for skeptical voices to discredit the whole process as such.

Regarding the verification of signatures, it should suffice that the Commission provides those States from which the signatures come with a particular key for sample control-

like examination. In order to reduce the potential error quota here, the number of submitted signatures should be reduced.

#### Keeping an eye on the dimension of the instrument

We recommend to the EU Commission that they not lose sight of essentials in the preparation on regulating the European Citizens' Initiative: the new public right according to Art 11.4 EUT is an agenda initiative and cannot trigger a popular vote on a substantive issue. The instrument is closer to a petition, in legal terms, than to a popular initiative like the ones in many German states or at the national level in Switzerland. Thus a sense of proportion should be kept regarding the requirements and everything aimed at winning over the citizens in the first place for this new possibility of becoming EU-initiating and in this way enabling them to transcend their distance to Brussels.

#### Simple structures suffice

The process of collecting signatures - crucial for the qualitative as well as the quantitative success - should be carried out in as much of an uncomplicated and integrative way as possible. That means: unnecessary hurdles - like official registration or the notarization of signatures - must be prevented. Simultaneously, the possibilities for signing must be extensive. Along with a carefully conducted and introduced e-collecting process, there should thus also be the option to give one's signature to paper on the street or send it in by letter.

As the European Citizens' Initiative Office is designed to unite scientific competence with practical experience as well as political commitment, extensive comprehension of Europe as well as enthusiasm - we wish to contribute our knowledge and our deep pro-European conviction in order to make the new constitutional means as attractive as possible. Our experience in founding and operating European initiatives could help the Commission to not have to walk down the crooked paths and detours again which we already have left behind us. So it is critical not to overlook that if the new instrument of direct democracy has once been disappointing, it will be difficult then to reanimate it. This democratic start-up must become a success; otherwise Brussels will be barraged by guffaws of laughter from the tabloids with their malicious tendencies regarding the EU.

#### How many votes at what age and with which country spread? Peripheral question. Create a sliding scale system!

The provision of legitimacy about the instrument of the European Citizens' Initiative will be dependent on how wide the pan-European spread and by how many citizens' initiatives are supported. An aspect of the principles of observance of direct democratic manifestations worldwide is that certain minimum participatory quotas must be met.

Hardly one of the systems known to us however would put up with such an incredibly limited "quorum" like Art 11.4 EUT has. Of course, those popular rights strapped with higher hurdles for the triggering of popular votes are of another binding character and caliber of power. The Art 11.4 EUT instrument is - contrary to local opinion until now - not able to force any binding legislative action in the initiators' interest from the Commission.

That is why it is the task here as well is to think innovatively about how the integration-fostering and deliberative aspects of future initiative processes could be most cleverly promoted. Thus we recommend to the Commission to look for an open system, a

sliding scale system in which initiatives may be accepted even when they do not fulfill the spread criteria in one point but more than fulfill the criteria catalogue in other points.

One example as an illustration: say an initiative in Malta and in Cyprus and in Luxembourg actually fails to fulfill the distribution key of eg 0,2% per counted member state but instead however brings, say, 1.5 million votes together and this from ten or more States and this in addition perhaps even achieving a representative spread of States between Poland and Portugal, then an initiative of this sort should be able to qualify as well. Consequently, a "double" tallying could be considered which weighs the initiatives similarly along the lines of the EU politically real system of qualified majority in regards to the weight of their representativeness.

In sum, we recommend to the Commission not to lock any doors and to open up a maximum of flexibility - also as evidence of the flexibility of the Commission itself.

#### The discourse process of EU citizens and the EU Commission

Some think the goals of the instrument of Art 11.4 EUT have been reached when an initiative succeeds in becoming part of the Commission's agenda.

We see reaching the goal completely differently. Not whether the Commission has set the one or the other initiative on its agenda and then nicely communicates that they have extensively mulled over the concern of this or that initiative, is the essential point. We consider it more important that the Commission discloses what deliberate effort the Commission is willing to actually undertake, above and beyond the legal question of whether it has (or doesn't have) to bring an initiative of how much quality and quantity onto the agenda. And whether it is prepared to explain to initiatives in a partially and fully open manner what there is about the initiative concerns and why the Commission finds it worth following through on, or which deliberations and upon what grounds the Commission must regret not (or not yet) following through on an initiative.

It will depend on the political acumen of the EU Commission and not on the legal construction as to how it handles initiatives materially. It will depend on the political acumen of European initiatives as to how it handles the EU Commission in order to present their concerns besides the mere completion of formal criteria in a constructive discourse with Brussels and beyond Brussels.

#### The relationship of Art 11.4 to the petition right directed to the EU Parliament

We haven't missed the fact that the EU Parliament has contrived up a new controlling instrument in the framework of the discussion about the potential non-eligibility of certain initiatives, so-called constitutional initiatives - and sees itself here as controller. This type of function for Parliament would undermine the division of power anchored in the Lisbon Treaty which guarantees the citizens an equal access in regards to the initiative right.

Competition may generally energize commerce, but in constitutional questions, care must to be taken concerning type cleanness and a mesh of petition and initiative rights must thus be categorically rejected. An additional fact is that at EU level in contrast to Member States, several organs are appointed for legislation - although it is up to the Commission in the end to launch a formal legal initiative.

That is why the two initial tracts of citizens make thorough sense: with the petition right, the citizen directs him or herself to the EU Parliament, with the initiative right, to the EU Commission. This creates the pre-requisites for a system which is mutually active. Nothing hinders EU initiative committees namely from increasing awareness in Parliament for its concern along the petition right; in this case one would actually have arrived at a positive, substantial, political competition and then the institutions could show how much they competitively care about citizen concerns.

### Subsidies, Sponsorships, Counseling Assistance, Start-Up Aid

#### The "Ten Questions"

As already mentioned, a functional, trustworthy and a European Citizens' Initiative right which motivates the commitment of the citizens requires not only a regulatory but far more a supportive procedure legislation. This has, however, received almost no attention until now from the Commission. It is, in our opinion, perhaps the greatest omission of the Commission up to the present! We are hopeful that, with arguments, we will be able to convince the Commission to become correctively active here in the interest of democracy and Europe.

European Citizens' Initiatives are not to become an unordered extra-parliamentarian opposition of a few powerful opponents for lack of a systemic and systematic embedding; in that case, much power and a great promise for the positive formation of Europe would be senselessly lost.

Thus we draw attention here in broad strokes (and later in detail by addressing the single questions of the Green Paper) to the significance and elements of a supportive ECI infrastructure:

When someone - like the Commission and we, the European Citizen Initiative Office, suggests doing without the formal eligibility examination process, it still does not unbind him or her from being of service to potential initiators with a consulting agency in an early stage of the considerations.

This can take place initially in the form of an online HelpDesk. In a second step, it will be important to advise EU initiatives in a direct and decentralized way and pose the "first ten questions" to them on the success or failure of an initiative. At this point in a ECI process, every question should be raised which would otherwise be examined in an eligibility examination procedure, like compatibility with human rights, the central Union values as well as the unity of the matter, the clarity of the formulation and naturally, whether the cited initiative concern falls within the competence of the EU Commission.

Initiative committees which go through this type of counseling might be given a kind of "Green Card" which would give the European people a signal regarding the eligibility of an initiative without the Commission itself or a Court having to enter the game.

In view of the proposed timeframe limitations for the collecting phase of signatures - between 12 and 18 months - the pre-collecting phase will take on decisive importance for the success of a concern. Besides the potential completion of the quantitative requirements, the reason for this is found in the qualitative facilitating of a pan-European dialog on a particular pertinent question.

Initiative committees will thus need to invest strongly in the preparation of a transnational support network in the run-up to an initiative launching process and should thus be advised specifically by this time. In addition the ECI online platform which the EU Commission has envisaged should offer services but also those in the beginning phase of independent, non-governmental agencies-run support agency like, for example, our "European Citizen Initiative Office" (ECIO),

It would be feasible in this type of pre-procedure to recognize possible overlapping at an early stage and avoid unnecessary competitive initiatives. If it brings about parallel initiatives and duplication regardless, then this may not be allowed to become a hindrance. It is just as undesirable that an authority - as is the case in California - might be allowed to decide on the formulating of an initiative. Since it will depend on the EU Commission in the end how it deals with a successful initiative proposal, it is important that the greatest scope of freedom is ensured for the preparation and implementation of a European Citizens' Initiative.

### **Questions and Answers - concerning the Green Paper questions in detail**

#### 1. The requirement of initiative vote spread across a "significant number of Member States".

Many numbers have been dealt with since the announcement of this requirement. Even a minimum of four states was argued to be sufficiently representational and systemic. For instance, as in the first report draft of the EU Parliament (prepared by Sylvia Yvonne Kaufmann), where it was thought that according to Art 76 TFEU, orientation to an interest in a European commonwealth can already be implied with declarations by a fourth of the States. According to Art 76 TFEU, the right to submit a legislative proposal is given to a quarter of Member States - meaning 6 States. Thus the Parliament report draft concludes, an instrument which at its core is clearly only a summons to the Commission to submit a legislative proposal, may address an even lower quorum without contradiction - thus four.

Of course, a well-meaning low-lying number may possibly serve the legality determination but it will not be helpful for the political acknowledgement of legitimacy. Just think: individuals reach an agreement faster regionally than in a pan-European context. One example: an east-Mediterranean consensus which mobilizes a million people from Cyprus, Bulgaria, Greece and Malta or one from north-European with Latvia, Estonia, Lithuania and Finland would already meet the 4 State criteria.

Regardless of the preferential treatment of the European Citizens' Initiative Right we desire, a measurement set too low would be contra-productive. Since in this way, expectations would be nourished which could not then be met. The less an initiative is spread across Europe and as a result, only able to claim with difficulty that it is a reflection of a pan-European citizens' concern, the less the initiative may expect to have its concern taken seriously by the Commission.

Those who urge real assistance in favor of a prosperous European initiative form must take it when it comes from the other direction: we thus support the opinion of the Commission in the Green Paper regarding the thoughts on representation and with it, the recommended minimum number of nine qualified (cf. 2) Member States. This type of - admittedly - ambitious hurdle also makes it necessary simultaneously that the Commission also creates and provides pro-active support mechanisms.

## 2. Minimum Number of Signatories per Member State

We state first of all that we would also consider the requirement of 1 million as insufficient for a legitimate, as in popular vote-triggering, citizens' initiative right. Many States require considerably higher access percent number for good reasons. Thus in the EU constitutional convent discussions, at first higher qualification limits were named as well which were however then reduced to a million signatures in light of the mere agenda-setting and minimally binding character of the new instrument.

The Parliamentary report draft insufficiently interprets the representational criteria in our opinion if already a five-hundredth of citizens or, as the case may be, a four-hundredth of eligible voters is considered representative. We register herewith our doubt.

One should treat this new instrument not preferentially but as correctly as possible. It is what it is. And a million is still a million in a democracy based on counts. We don't discard barring clauses for the smallest of parties in parliamentary elections because in the meantime a few well-meaning folk could have joined together. It doesn't only have to do with finding out more about how the general public in Europe thinks but about how numerically important a political idea is or how a method of resolution stands compared to others. The finding and creating of political majorities, whether relative or absolute, belongs to the core business of democracy. The new European Citizens' Initiative right must be clearly differentiated not only from the petition right directed to the EU Parliament but also from the efforts of opinion surveys of opinion institutes and their momentary opinion polls.

The meeting of minimum conditions alone does not in our eyes create a positive point of departure. It would not be hard for the EU Commission in this case to counter the initiative that in this case 99.75% of European citizens do not share the concern of the initiative submitted - or even explicitly oppose it.

As part of the rebuttal of this type of argumentation, we suggest the following. It should be possible within the framework of the signature collecting to speak not only in favor of the initiative concern but also against. For this, however, it would have to be ensured that such negative signatures are not counted against it. Should the threshold of a million signatures in favor of the concern be reached (plus the required number of qualified Member States), then the initiative is achieved. The advantage of this type of option, with counter-signatures, is to be found in the resulting clearly expressed opinion of EU citizens. The EU Commission could use this as an important source for its political estimate of the further procedure. Once again it needs to be pointed out namely in this connection that the European Citizens' Initiative Right has to do on the one hand with an exclusively agenda-setting initiative right which, on the other hand, disposes of an indirect functionality as part of the EU-specific political system. In the end, it is the Commission itself which is responsible in instituting a formal initiative procedure.

Further, we consider the criteria of connecting Member States in Art 11.4 EUT from a primarily legal perspective as problematic if not false. This is because with European initiative right, we are dealing with a completely new instrument of a pan-European kind which does not have national citizenship as its basis but the Union citizenship. A membership state-like view of things is in fact unwanted in the case of the European Citizens' Initiative, since it, like the corresponding right of European Parliament and the European Council, deals with transnational, European initiatives. Logically that is why it

is sensible to make the point of contact the address or the particular residence. Consequently, other criteria could qualify for the establishment of a representative spread, for instance, a representative spread across municipalities or regions.

We admit, however, that upon legal-organizational grounds, the determination of representation by way of the States would be the organizationally simplest means. Then, however, those with the right of residence, not State citizens but EU Parliament election-eligible EU citizens are counted within the quorum of place of residence and not the State of their formal national citizenship.

We agree with the Commission in the appraisal made in the GP that a state-related minimum of signature number per State would be the most unsuitable means. At the same time, however, a fixed key of one-five-hundredth as sole criteria is not especially suitable since it does not do the preliminary work for the principle of a pan-European representation which we are aspiring to. To the contrary, the implementation right should not leave any measure untried which encourages participation with the broadest and widest spread across the Union.

As was already described in the initial section of this article, that is why the introduction of a flexible system, a sliding scale system, is to be the goal with view to the widest participation and spread throughout Europe. In this, the minimum provenance of signatures which as the Commission suggests can come from a third of Member States (each with at least 0.2% of the total population) may serve as a point of departure, whereby as presented above, the country of residence is to be applied. Due to exactly this fundamental idea of a European spread with the broadest and at best, fullest coverage, compensation should be made possible of a failed minimum in one of the States with voting in several other States as the third of the Länder minimum. Whether one could demand a higher total number than the million signatures in this case via the implementation right seems doubtful upon legal grounds. That is why we suggest that those signatures which come from States which exceed the minimum number of eight States should compensate to offset the requisite of meeting the 0.2% key.

Let us bring to mind the requirements once again of the framework right of Art 11.4 EUT. Here, the number of 1 million is chosen as a minimum fixed size and the requirement of spread from a significant number of States as the variable size. By conclusion, the implementation right must strictly persevere to meeting the attainment of the one million signatures but is free in the arranging of variable components. Simultaneously, however, the "implementation regulator" is obliged to avoid new hurdles.

There is thus no legal hindrance for our suggestion of a sliding scale system.

### 3. Minimum Age

The wish would be for the broadest possible participation in initiatives. That is why the EU Parliament Report - allegedly preferentially - also suggests a minimum age of 16 years. The arguments here taken on their own are praiseworthy: Art 11.4 speaks of Union citizens without qualifying clauses like fundamentally mature, mature enough to vote or similar things which would point to a wide group of participants. In addition, a possible restriction of democratic participation should align itself to the proportionality principle which suggests non-exclusive positioning with an initiative right which is

"weak" to begin with. And, finally, an age limit as low as possible is to be chosen - the report suggests 16 years - so that analysis contradictions could be avoided that could arise when in a State, Austria, the minimum age for the EP election was lower than participation set at an older age in a citizens' initiative.

We position ourselves thus along the lines of the suggestion made in the GP, which states regarding eligibility in an initiative that the voting right should be consulted, which is linked individually to the voting age of the National legal structures.

At the same time, it makes sense to amend this basic principle in the following way. Arising from the fundamental concept of Art 11.4 to provide the Commission with political impulses and summons for legislation by way of the initiative right, in order that the EU Commission for its part permits the will of the European citizen to flow into its law-making, there should also be the option for participation from those not (yet) eligible to vote - along the lines of a "shadow" signature collection. This type of signatures would of course not be decisive in determining the qualification. (As an virtual inspiration we refer to the initiative platform [www.we-change-europe.eu](http://www.we-change-europe.eu)) for testing and simulating these types of signature collection practices).

#### 4. Form and Wording of a Citizens' Initiative

The constitutional text (Art. 11.4) knows only one single requirement which an initiative must respect - that there must be an appropriate competence with the Commission for the initiative concern.

In the GP, however, the Commission now suddenly brings several possible additional requirements to the discussion, although these, happily, are not to be given a great deal of weight from the Commission's point of view. Should however such additional limitations find inclusion in the ordinance draft of the Commission, then the EuCJ will have to decide in the end on the constitutionality of it.

#### 5. Requirements for the Collection, Verification and Authentication of Signatures

The fact that only the respective election offices (officially designated centers) come into question for the certification of submitted signatures is beyond discussion of any kind. The broad-sweeping comments in the GP in regards to the cooperation of Member States seem to us in this context to be a sensible statement of respect acknowledging the sovereign rights of Member States.

Further, we welcome the main statement: "to set a number of basic provisions at EU level.. and obligations for Member States to facilitate the collection process and remove unduly restrictive requirements." In reality, there is namely cause to fear that the Member States might have tendencies to set additional hurdles in the way of their citizens at the European level - in particular within the context of how restrictive the discussion is held in some places today on the status of direct-democratic participatory rights in the representational system.

With this, two questions come into clear focus: how are signatures to be collected?  
And: what degree and scope is the control over these signatures to have?

Here we advise the EU Commission to adopt a relaxed and initiative-friendly attitude. Since, with the European Citizens' Initiative Right, we are dealing with a pan-European instrument and in addition, with a procedure which is aimed directly at the Commission.

It is thus the Commission decision alone as to how welcoming it wishes to lean towards the citizenry legally, then it alone will have to bear the blows of possible criticism and dissatisfaction of citizens and media.

This is why the online initiative platform as planned by the GP is a central element to enable a citizen-friendly and effective initiative practice. This should facilitate the signature collection itself as well as the official management of the initiative (pre-process, registration, submission).

All other familiar forms are to be considered as well in the collection process itself like the traditional collection in the street (especially attractive in terms of discourse), the submission of signatures by mail and fax as well as the submission via a free-of-charge telephone hotline where "signatures" can be deposited. In the end, even the official registry office signature collection as is common with initiatives in some Member States needs to be checked. It makes sense to establish contact with the committees of the regions regarding whether the existing Europe Offices in the regions might not serve as an actual contact point.

#### About Verification and Authentication of Signatures

As has been presented in the preliminary fundamental section, we are dealing with the core of a (direct) democratic autonomy which is to be newly obtained of the Union versus the Member States.

Since it has to do with an instrument according to 11.4 EUT which is a genuine Union instrument, the EU Commission should insist that it alone decides what it deems sufficient in the authentication of the signatures it receives.

Since this is not a popular vote or election process with the European Citizens' Initiatives in which a few or even only one voice decides about agreeing on a factual issue or the voting down of a fraction, we think that a random sample process is sufficient. In this case, there are already global (very good) practices which contribute even more by ensuring that the bureaucratic effort is reduced.

The EU-wide common procedure regulations for the verification (certification) and authentication of signatures can also take the form that the Commission directs arbitrarily-chosen "signature packets" for random sample control to Member States. Nothing more is needed. To the extent that there are a percentage of invalid signatures, then these are to be marked against an initiative in a key drawn up according to Länder.

In summary, the questions posed under point 5 can be answered as follows:

- *Signature collection should be made possible along all imaginable channels. In this respect, the kind of data of the signatory is to be provided which is necessary for the authentication which follows. The EU Commission must determine for each member country (or even sub-national jurisdiction) which information is required according to the particular vote register (registry for usages) so that a requested institution can undertake its task.*
- *Security measures are to be taken which correspond to the requirements of data protection laws on the one hand and which promote the hindrance of forgery corresponding to the standard in the IT security market and according to the E-voting principles of the Council of Europe. Additionally the new form of e-collecting*

*signatures in the framework of a legal right must create an innovative step-by-step process of introduction in order to safeguard the credibility of new democratic instrument.*

- *The verification must comply with the law at place of residence because the participation in a signature collection is not the product of citizenship law but of Union citizen law.*
- *Yes, there should be EU-wide common procedure rules because the instrument with which it deals is itself a Union instrument and thus there can only be one standardized verification procedure which is given to the authentication authorities. This is simply to be done in a way so that the designated authorities are able to conduct an efficient authentication according to their internal requirements.*
- *There is to be, however, no latitude for specific precautionary measures by Member States except for the above-mentioned residual latitude stating that an authentication has to be in compliance with the national authentication requirements. This, however, is not presentational latitude.*
- *Yes, the citizen should certainly have - along the lines even of first option - the possibilities of participating online. A pan-European initiative, with an objective glance at the literal requirements, will hardly be granted success without online methods. For this, online signatories must have the data at hand for those who need to be able to establish their voting legitimacy if subject to control. The protection of this data must correspond to the above-mentioned international principles and security standards. Should citizens not want to use this channel due to sensing lack of trust in data security with online signatures, then there must be other collection channels open to them. The question does not seem to us to be posed quite correctly also for another reason, since it will depend on the presentation of the implementation law as to how invitingly and with how many possibilities the EU will offer in the conducting of an initiative.*

## 6. Time Limit for the Collection of Signatures

It is hardly helpful or expedient to draw on the time framework of Member State initiative laws as reference values. This is because in spite of the desirable homogeneity of initiative requirements, there is still a list of additional barriers to be overcome, like first of all, language barriers or cultural disparities.

The grounds for setting of a time frame are chosen rightly. The suggested time limit of one year is chosen wrongly - particularly in the case where the Commission might not be willing to provide any additional support mechanisms in the context of something like a European citizens' initiative agency.

However, this time limit could be justified after all should the EU make use of our suggestions below:

One should think of having a pre-collection phase in which potential initiators can "simulate" the overall process and in this way already use the online tool provided by the Union - without however having to determine an official launching date for the initiative.

This procedure would offer several considerable advantages. European initiatives could already collect signatures with all the required information so that the signatories would participate later once again. Additionally, the EU Commission would have the opportunity to bring up its opinion informally regarding this initiative and should there be any cause for it, reduce potential later frustration with repercussions for Union consciousness.

This kind of pre-initiative phase could also be used further to better estimate the qualifications of an initiative in terms of subsidy eligibility. This is why we suggest that an initiative be considered qualified and thus worthy of support when it can account for 50,000 signatories.

### Registration of Proposed Initiatives

We note with concern that suddenly, behind this innocuous title, the talk is of a kind of admission examination, which the Commission itself also described plausibly as undesirable.

An admission examination is to be refused because of grounds named earlier because this deeply interferes with the fundamental right endowment to freedom of expression. It is up to the EU Commission anyway, once the criteria are met, to state its position on how it intends to handle the demands of an initiative – by handing out a “green” or a “yellow” card. The political uproar will not be any less because the EU Commission reaches its decision already at an early stage by way of an admission examination. To the contrary, the EU Commission will only earn the accusation of “being judge and judged” and it would then in any case have to make its inadmissibility verdict compliant and pave the way to the EuCJ.

Whether the issue and the instrument are better served by this is subject to doubt. No one can hinder the EU Commission from informing an initiative in the earliest phase that its concern will not be taken up on those grounds which must be used for the declaration of ineligibility. Thus, it would only create a hurdle which could upon some circumstances be overrun with help from the EuCJ via a formal ineligibility declaration law which feeds the fundamental doubt that the EU Commission is negatively positioned to the instrument and thus itself constructs this kind of outlet in order to throttle an unwanted initiative. It would too quickly be possible to bring down constitutional, in particular, constitutional-amending initiatives with a statement of ineligibility. It should merely be clarified that EU citizens’ initiatives cannot overrule the constitutionally guaranteed rights of Member States and as a consequence neither can it be expected by the EU Commission that it can.

It must suffice that the EU Commission may plead its own non-competence for a substantive issue at any point in time, even the earliest; initiatives should however remain at liberty to conduct their initiative on grounds of the basic provisions with freedom of opinion and freedom of expression. In the case of an initial “yellow” card, the EU Commission could refuse to give the support which we demand to an initiative which it has already informed that it considers its proposal to violate human rights or as contrary to the basic values in the EUT. However, it should be possible here on grounds of constitutional legality to claim the means of appealing to the EuCJ.

When the EU Commission, which is discernable, thinks of an initiative which makes demands on the Commission which cannot be fulfilled, then the Commission can, after

completion of an initiative always fall back on a series of tried and true objection figures for acute cases - like illegality or legal impossibility.

#### 8. Requirements for Organizers - Transparency and Funding

The implication at outset is absolutely right: European citizens' initiatives cannot be conducted without support. We refer to American legal history. The introduction of a public subsidy scheme is now being vehemently demanded there precisely because of the proven susceptibility of citizen referendums, to only be able to take off with outside help and because of the inherent dangers of concealed lobbying using citizen initiatives,

It is astonishing that in the GP, the EU Commission however offers exactly opposite arguments and quite paradoxically. It states in the GP that it does not foresee any public subsidy "in the interest of preserving the independence and citizen-driven nature of initiatives." How is it then that public subsidy is the standard in national and regional contexts, in parliamentary as well as extra-parliamentary channels? It is just the opposite reasoning: in order that citizens' initiatives do not have to submit themselves to necessary private financing of unknown origin, or, as the case may be, essential initiatives which are not allowed to come into existence because it is lacking.

Because the disclosure of private support for private initiative organizers cannot be insisted upon by any legal guidelines of Union law whatsoever. According to individual national state laws, this kind of allocation falls under the classical civil law purview to which the Union has no right of access. An analogy to the disclosures along considerations of party funding law does not fit either. Since only through the bestowal of a subsidy provided with EU funds would a contractually-determined disclosure obligation be supported by contract law.

The EU Commission loses itself in this point in the same argumentation labyrinth in which the EU Parliament already lost itself. It is the EU Commission which must bear the accusation by the EU that it was not yet able or willing to introduce a strict transparency principle for its own activity in order to disclose the influences which are or were tried out on commissioners by lobbyists. And yet the Commission wishes with this starting position to burden down pro-active citizens with obligations which it itself has successfully avoided so far? This will certainly lead to stormy debates among public opinion which will be picked up gladly by the media and prove to be inclement for the starting climate of the European initiative law.

We recommend thus at this point thoroughly reconsidering the position of non-subsidy.

In achieving a subsidy scheme, we consider the counter call for maximum disclosure to be legitimate. Only by fulfilling this requirement do we affirm the question about disclosure - and we also consider it lawful and enforceable only then if at all.

The sober reminder that organizers "should" comply with the data protection requirements along national law we consider to be rhetorical idling. They have to, anyway. And by the way, it has become tradition that the person who wants to be trustworthy will offer a data protection policy far more extensive than the requirements of the data protection laws and will additionally submit to scrutiny laws and additional certification requirements. By the way, it will be up to the context of the nature of fundamental commerce as to whether private persons will be proffered sensitive data. The EU Commission should by the way not overlook the fact that we stand at a societal crossroads in which more and more people practically beg for as many options of self-

disclosure as possible. It should thus be envisaged that supporters and promoters who wish self-disclosure can present themselves with the available Online Tool. A self-disclosure of this kind should be welcome in light of the desired transparency principle.

As a summary: freedom, in this case, freedom of expression may not be freedom for those who are privileged or substantiated from outside and supported from outside. It must be made possible for normal citizens to organize a pressing concern and negotiate a broad acceptance for their concern. That cannot be done without the pro-active help of the political community in whose context the initiative is undertaken (the provision of vouchers for online institutions, trips, meetings, publishing of printed material and much more). It should be the Union's intention to undertake everything so that initiatives can step forward with the highest qualification. The EU Commission must have the earnestness of the initiatives which it will be presented as its intention.

#### 9. Examination of Citizens' Initiatives by the Commission

A remark which can very much be welcomed is the one on how and whether the Commission should react to a successful initiative in a specific time frame.

First of all, we recall that we are among those who consider the obligation to react to be one of the elements which belongs to political responsibility. Thus the EU Commission could bind itself to this kind of obligation to react or even in limited form only in a kind of law of self-obligation. That must remain up to the EU Commission's deliberation as to what it finds politically advantageous.

From the approach we have of not being so much concerned about individual initiatives as much as for a switching of paradigms in the European Union's political communication along the tracks of direct democracy, we would recommend to the EU Commission - self-obligatorily hasty at best - to abandon speed in favor of effective communication. (The GP causes confusion with the chosen formulating of sub 9, saying that proposed term period in the best case could begin with "the formal submission of the initiative". The formal submission is foreseen before, at the start of the time limit for the beginning of an initiative. It can thus only be meant after completion of this deadline, however that is determined - 12 months?)

If an initiative is to have 12 months time, which we think, as already stated, is much too short if one does not make a pre-preparation phase possible in a legal structure, then not much would speak against giving the Commission the same time limit. The Commission should definitely take time first to carefully consider the consequences and then arrive at a politically reasonable procedure which is of course would be put to vote by the States, their parliaments, the Council and the EU Parliament. Only then should it enter into a formal reaction procedure and only then make known its own possible initiative readiness.

#### 10. Initiatives on One and the Same Issue

As already explained several times, the EU Commission should create advisory and supportive institutions and in undergirding them, though not politically, locate them in its near vicinity. This type of support structure would be created by a preliminary phase during which time information about initiatives, and also those which may be started parallel or even simultaneously, could become transparent.

However, at this point in the GP, the idea suddenly surfaces that a duplication or repeat of an initiative might "create undue burdens for the system" - and that thus an access limitation should be considered. Of which system? The idea of a system for promoting was (illogically) discarded in the GP until now. An online initiative platform can tolerate almost any kind of burden. The burden of a control system, which as we suggest is content with a statement-relevant sample, is within limits. So, once again, which system might be unnecessarily burdened? Instead, the mentioned point makes the purpose of what we suggest with an "early phase advisory system" much clearer which is conceived for taking up just these kinds of coordination tasks.

That is why there is full agreement when the EU Commission counters itself by stating that apparently identical themes might not be identical at all. The blocking of a subject with an initiative topic that was once submitted could even lead to highly undesirable processes. For instance, that a topic is seized in order to hinder that other initiators present it as well - and then perhaps not conducting it after all.

We can only caution discretion and recommend to the EU Commission that it respect European fundamental topics of freedom and citizen freedom.

Thus we caution urgently against any possible precautionary measures or hurdles.

#### ***V. Final Observations***

We arrive thus in conclusion at the central question, which the GP has omitted, on how the purposeful use of the instrument of the European initiative with its identity-promoting, integrative, legitimization-fostering effects can truly be supported.

The one who really wants the initiative (in both senses) of the European citizens - this being the measurement of credibility of every responsible politician, and the EU Commission at the fore - needs to do something pro-actively for the initiative, needs to encourage, needs to enable, needs to promote, needs to also provide financial support, needs to equip initiatives. Many States have developed admirable models of support strategies already.

At the core, there are two premises:

The first deals with the function of numerical mightiness. Initiatives just barely at the limit of the minimum will only be able to develop a weak political significance and not be able to advertise themselves with it due to democratic-political correctness. Thus, should the concern of an initiative be considered incorrect in light of the Union, then the EU Commission should undertake everything to see that this need for clarification is carried out, in particular to also make the possible rejection by European citizens plausible to the initiators. Only in this way is it possible to retain political rationality when initiators themselves must acknowledge that their ambition in an honest and fair undertaking is not democratically viable in the form of an initiative.

The second premise has to do fundamentally with legitimacy. Legitimacy is linked not with the fastidiousness of the constitutional procedure as is often thought, but with what citizens experience, feel, think, sense, hope. When citizens complain in resounding unison that the Union is undemocratic or not democratically legitimized then this is a legal-political approach which must be counteracted with every possible strength available; thus the initiative law must be carried out as invitingly and generously as possible. It is not what is but how it is experienced which namely brings about or blocks

legitimacy.

What was sorely lacking in the EU until now was the quietly implemented citizen conviction, a vague hope only, that in the unforeseen end, the EU might be accessible for the citizen. With Art 11.4, a spark of hope has been ignited which must be further fanned by the implementation law and by no means smothered. That is why the Commission should be very clearly advised to avoid any and everything which could be interpreted as secret reversals of the promises in the constitution. Not faintheartedness as to whether this instrument might become an additional problem factor: what's called for now is European courage!

Salzburg, January 31, 2010

Written and edited by the executive board of the European Citizens' Initiative Office

Johannes W. Pichler, Bruno Kaufmann, Andreas Gross, Anne-Marie Sigmund

*About us:*

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EUROPEAN CITIZEN INITIATIVE OFFICE

### Objectives

Noch in diesem Jahr erhalten eine halbe Milliarde Menschen das Recht, Gesetzesvorschläge auf der grenzüberschreitenden Ebene einzubringen. Dazu verhilft ihnen ein Artikel im neuen Grundgesetz der Europäischen Union (Vertrag von Lissbon), der Artikel 11.4 zur Europäischen Bürgerinitiative. Erstmals in der Weltgeschichte wird damit ein transnationales, direktdemokratisches Verfahren eingeführt – dass zu einer nachhaltigen Demokratisierung der oft für ihr Demokratiedefizit kritisierten Europäischen Union beitragen kann. Um wirksam werden zu können und nicht nur einfach den bereits mächtigen Organisationen ein zusätzliches Lobby-Instrument zur Verfügung zu stellen, benötigt das neue EU-Bürgerinitiativrecht eine umfassende Unterstützung. Das beginnt bei der Information über die Möglichkeiten und Grenzen des neuen Bürgerrechtes, über die Ausbildung der zuständigen Behörden und Beamten bis hin zur Begleitung von Initiativen in allen Phasen ihrer Arbeit.

### Mission Statement

Das neue Europäische Bürgerinitiativbüro, das zum Europatag 2010 in Salzburg eröffnet wird, will von Beginn weg aktiv dazu beitragen, dass die riesige Chance auf einer bürgerschaftlicheres Europa, die sich mit neuen, innovativen Initiativinstrument geschaffen wird, nicht verpasst wird:

- als **unabhängiger und unparteiischer Think-Tank**
- als **Kompetenzzentrum**, das über die Personen seiner Leitung wissenschaftlich und publizistisch bestens ausgewiesen ist
- als **Dokumentationszentrum**
- als **Treffpunkt der „Stakeholder“** des neuen Prozesses in Zivilgesellschaft, Wissenschaft, Medien, Politik, Verwaltung und Wirtschaft
- als **neutrale Beobachtungsstelle“ der Aktivitäten** rund um die neue, transnationalen, direktdemokratische Praxis
- als **Anlaufstelle für Bürgerinnen und Bürger** aus ganz Europa, die es sich überlegen, eine EU-Initiative zu starten
- als **Beratungsstelle für Initiativgruppen** in den Startlöchern bzw. im Durchführungsstadium

Das Europäische Bürgerinitiativbüro ist nur der Beginn einer umfassenden EU-weiten Demokratieinfrastruktur, die mittelfristig viele kleinere und grössere Hilfeleistungen anbieten wird und auch offizielle Unterstützungsmechanismen durch die EU selbst umfassen wird. Weil es aber einige Zeit in Anspruch nehmen wird, den Sinn einer solchen Infrastruktur

einzusehen und die entsprechenden Massnahmen zu treffen, macht das Europäische Bürgerinitiativbüro einen Anfang und sieht sich als Anregung und Impuls für den modernen Demokratiesupport im Europa des 21. Jahrhunderts.

#### **Arbeitsweise**

1. Der Verein „European Citizen´s Initiative Office“ mit Sitz in Salzburg betreibt ein derartige Einrichtung, kurz ECIO, in dem die oben beschriebenen Aufgaben wahrgenommen werden sollen.
2. Dieses Office wird unparteiisch und gemeinnützig betrieben und von zum Thema ausgewiesenen Personen geleitet.
3. Dem Office und seinen Mitarbeiterinnen und Mitarbeiter steht ein Beirat („Advisory Board“) zu Seite, der ausgewiesene Experten und Persönlichkeiten zum Thema versammelt und mit Repräsentanten von Institutionen, die mit der Abwicklung von Europäischen Initiativen befasst sind, von Repräsentanten von Förderern und von Repräsentanten der EU Kommission beschickt wird.
4. Das ECIO nimmt die oben beschriebenen Aufgaben wahr und versteht sich als transnationales Zentrum zum neuen EU-Bürgerrecht der Europäischen Bürgerinitiative gemäss Art. 11.4 EUVnF-VvLissabon.

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