



INSIGHT

## EUROPEAN CITIZENS' INITIATIVES, GREEK DEBT AND COURT OF JUSTICE: THE FINAL CHAPTER

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ABSTRACT: For the first time the Court of Justice – in its Grand Chamber composition – has ruled upon the registration phase of a European Citizens' Initiative (ECI) and, consequently, on the framework of the Commission's powers in this respect. The ECI entitled "One Million Signatures for a Europe of Solidarity" – aimed at introducing in the EU economic and monetary policy the principle of the state of necessity in order to allow a State not to repay its debt – has been the object of the *Anagnostakis I* (General Court, judgment of 30 September 2015, case T-450/12, *Alexios Anagnostakis v. Commission*) and *Anagnostakis II* (Court of Justice, judgment of 12 September 2017, case C-589/15 P, *Alexios Anagnostakis v. Commission* [GC]) cases. Against this background, this *Insight* will be structured as follows. Firstly, it will offer an overview of both cases analysing, in turn, the objectives of the ECI at stake as well as the judgment of the General Court (*Anagnostakis I*). Secondly, it will delve into the opinion of AG Mengozzi and the judgment of the Court of Justice (*Anagnostakis II*) which upheld the decision of the General Court. Thirdly, and in conclusion, it will link the Court of Justice judgment to the current debate on ECIs' developments and the recast of Regulation 211/2011 arguing that, despite some setbacks, ECIs might now be ready to deploy their full potentials, namely, empowering citizens to influence the Commission's legislative agenda.

KEYWORDS: European Citizens' Initiative – Greek debt – *Anagnostakis I* and *II* – state of necessity and EU economic and monetary policy – Regulation 211/2011 – duty to state reasons.

### I. INTRODUCTION

The Greek crisis has been – and still is – the epicenter of a legal, economic, political and social debate involving, amongst others, international actors, the EU, academics<sup>1</sup> and

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<sup>1</sup> As a non-exhaustive and short list, see F. AMTENBRIK, *Europe in Times of Economic Crisis: Bringing Europe's Citizens Closer to One Another?*, in M. DOUGAN, N. NIC SHUIBHNE, E. SPAVENTA (eds), *Empowerment and Disempowerment of the European Citizen*, Portland: Hart, 2012, p. 171 *et seq.*; I. BANTEKAS, R. VIVIEN, *On the Odiousness of Greek Debt*, in *European Law Journal*, 2016, p. 539 *et seq.*; K. CHRISONOGOS, T. ZOLOTAS, A. PAVLOPOULOS, *Excessive Public Debt and Social Rights in the Eurozone Periphery. The Greek*

civil society. Many different solutions have been tabled to alleviate the pressure of the Greek debt. In particular, a European Citizens' Initiative (ECI) entitled "One Million of Signatures for a Europe of Solidarity" (the ECI at stake) was proposed. It was aimed at introducing the doctrine of the state of necessity in the EU legal order to allow Greece not to repay a part of its debt. The Commission's refusal to register the ECI at stake originated two judgments, *Anagnostakis I*<sup>2</sup> and *Anagnostakis II*,<sup>3</sup> respectively decided by the General Court and the Court of Justice.

As it is well known, an ECI has been introduced by the Treaty of Lisbon to foster citizens' participation as a means to influence the institutions' legislative agenda. Indeed, Art. 11 TEU provides that "not less than one million citizens [...] may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties".

This norm is complemented by Art. 24 TFEU which, in turn, has constituted the legal basis for the enactment of Regulation 211/2011<sup>4</sup> (hereinafter: ECI Regulation) that laid down substantive and procedural rules.<sup>5</sup>

An ECI's lifecycle can be split in three intertwined segments. At the very beginning (phase 1),<sup>6</sup> an organising committee<sup>7</sup> must be constituted by at least seven persons who are residents of at least seven different Member States.<sup>8</sup> Then, an organising committee will apply for the registration of an ECI before the Commission. Consequently, the Commission performs a prior assessment of a proposed ECI to verify whether its subject matter falls within the framework of the Commission's powers. Should this prior assessment be positive, the Commission registers an ECI: since that very day, an organ-

*Case*, in *Maastricht Journal of European and Comparative Law*, 2015, p. 592 *et seq.*; H. HOFMEISTER, *To Bail Out or not to Bail Out? – Legal Aspects of the Greek Crisis*, in *Cambridge Yearbook of European Legal Studies*, 2011, p. 113 *et seq.*; A. POTTAKIS, *Departing from the Ordinary: The Executive Prerogative in a State of Emergency*, in *European Public Law*, 2014, p. 181 *et seq.*; M. RUFFERT, *The European Debt Crisis and European Union law*, in *Common Market Law Review*, 2011, p. 1777 *et seq.*

<sup>2</sup> General Court, judgment of 30 September 2015, case T-450/12, *Alexios Anagnostakis v. Commission* (hereinafter *Anagnostakis I*).

<sup>3</sup> Court of Justice, judgment of 12 September 2017, case C-589/15 P, *Alexios Anagnostakis v. Commission* (hereinafter *Anagnostakis II*).

<sup>4</sup> Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative.

<sup>5</sup> A. DAMATO, *Profili critici e istanze di revisione del diritto di iniziativa dei cittadini europei*, in *Il Diritto dell'Unione europea*, 2017, p. 39 *et seq.*; J. ORGAN, *Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-making on the Legal Admissibility of European Citizens' Initiative Proposal*, in *European Constitutional Law Review*, 2014, p. 422 *et seq.*

<sup>6</sup> A. KARATZIA, *The European Citizens' Initiative in Practice: Legal Admissibility Concerns*, in *European Law Review*, 2015, p. 509 *et seq.*

<sup>7</sup> Art. 2, para. 3, of the ECI Regulation, cit.: "organisers' means natural persons forming a citizens' committee responsible for the preparation of a citizens' initiative and its submission to the Commission".

<sup>8</sup> Art. 3, para. 2, of the ECI Regulation, cit.

ising committee can start collecting statements of support for twelve months (phase 2).<sup>9</sup> Should a million statements of support be successfully collected, the Commission will hence be required to enact a communication stating whether it intends – or not – take actions to follow up an ECI (phase 3).<sup>10</sup>

Against this background, this *Insight* will be structured as follows. First, it will provide a robust overview of the facts, of the objectives and of the contents of the ECI at stake which originated the dispute between Mr. Anagnostakis and the Commission, due to the refusal of the latter to register it. In doing so, appropriate references will be made to *Anagnostakis I*. Second, it will examine the opinion of AG Mengozzi<sup>11</sup> and *Anagnostakis II* to the extent that – it can be anticipated – the Court of Justice upheld the judgment of the General Court. Thirdly, and in conclusion, this *Insight* will link *Anagnostakis II* to the current trends in ECIs, the democratic participation of citizens to the rulemaking of the EU and the proposed recast of the ECI Regulation.<sup>12</sup>

This *Insight* will not specifically deal with phases 2 and 3 of an ECI, nor will it analyse this instrument as a whole.<sup>13</sup> Of course, references will be made to it when necessary to corroborate our findings. Furthermore, the Greek debt crisis as well as the economic governance of the EU will be solely incidentally referred to. Also the doctrine of state of necessity under international law will be touched upon to the extent strictly necessary for the purposes of the present writing.<sup>14</sup>

<sup>9</sup> Art. 5, para. 5, of the ECI Regulation, cit.

<sup>10</sup> Art. 10 of the ECI Regulation, cit. A. KARATZIA, *The European Citizens' Initiative and the EU Institutional Balance: on Realism and the Possibilities of Affecting EU Lawmaking*, in *Common Market Law Review*, 2017, p. 177 *et seq.*; R. PALLADINO, *Iniziativa legislativa dei cittadini dell'Unione europea e democrazia partecipativa: a proposito dell'iniziativa Right2Water*, in *Il Diritto dell'Unione Europea*, 2014, p. 493 *et seq.*

<sup>11</sup> Opinion of AG Mengozzi delivered on 7 March 2017, case C-589/15 P, *Alexios Anagnostakis v. Commission*.

<sup>12</sup> Commission Proposal for a Regulation of the European Parliament and of the Council on the citizens' initiative, COM(2017) 482 final.

<sup>13</sup> In general terms, M. DOUGAN, *What Are We to Make of the Citizens' Initiative?*, in *Common Market Law Review*, 2011, p. 1842 *et seq.*; N. LEVRAT, *L'iniziativa citoyenne européenne: une réponse au déficit démocratique?*, in *Cahiers de Droit Européen*, 2011, p. 56 *et seq.*; G. SMITH, *The European Citizens' Initiative: a New Institution for Empowering European Citizens?*, in M. DOUGAN, N. NIC SHUIBHNE, E. SPAVENTA (eds), *Empowerment and Disempowerment*, cit., p. 277 *et seq.*

<sup>14</sup> Art. 25, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts of 3 August 2001, UN Doc. A/56/10. It is interesting to note that Draft Art. 25, para. 2, let. b) excludes the application of the state of necessity if "the State has contributed to the situation of necessity", an aspect extremely troublesome when dealing with the Greek debt crisis. In general, see also A.K. KENT, A.R. HARRINGTON, *A State of Necessity: International Legal Obligations in Times of Crisis*, in *Canadian Review of American Studies*, p. 65 *et seq.*; A.H. QURESHI, *A Necessity Paradigm of 'Necessity' in International Economic Law*, in F. DEKKER, E. HEY (eds), *Netherlands Yearbook of International Law*, The Hague: TMC Asser Press, 2010, p. 99 *et seq.*; C. RYNGAERT, *State Responsibility, Necessity and Human Rights*, in F. DEKKER, E. HEY (eds), *Netherlands Yearbook*, cit., p. 79 *et seq.*

## II. THE GENERAL COURT JUDGMENT (*ANAGNOSTAKIS I*) AND THE EUROPEAN CITIZENS' INITIATIVE'S OBJECTIVE

The analysis of the two judgments of the CJEU requires a previous evaluation of the objectives and purposes of the ECI at stake. This is an uneasy task since it vaguely refers to “establish[ing] the principle of the ‘state of necessity’. When the financial and the political existence of a State is in danger because of the serving of the abhorrent debt the refusal of its payment is necessary and justifiable”.<sup>15</sup> Generically too, the Commission decision refusing the registration of the ECI at stake simply affirms that it falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the EU for the purposes of implementing the Treaties.<sup>16</sup> Therefore, recourse must be had to the documents and arguments submitted by Mr. Anagnostakis both before the General Court and the Court of Justice.

Apart from the plea regarding a violation of the duty to state reasons, Mr. Anagnostakis claimed that the Commission erred in law in interpreting Art. 122, paras 1 and 2, as well as Art. 136, para. 1, let. b), TFEU. In his view, those provisions should be considered as the legal bases to ground the legal act proposed in the ECI at stake to introduce in the EU legal order the doctrine of the state of necessity. Therefore, he claimed that the state of necessity could fall within the remit of Art. 122, para. 1, TFEU to the extent that that provision provides for the establishment of “measures appropriate to the economic situation”<sup>17</sup> and not being related solely to the supply of energy product. The Commission beforehand and then the General Court dismissed this argument recalling the *Pringle* case,<sup>18</sup> to the extent that that norm cannot be used for any form of EU financial assistance. In a similar vein, the General Court interprets Art. 122, para. 2, TFEU holding that – if used to insert the doctrine of state of necessity in EU law – it would introduce a general and permanent mechanism allowing Member States not to repay their debts. Again, the General Court adds that this cannot be considered a form of financial assistance in the sense wished by the ECI at stake.<sup>19</sup>

Regarding Art. 136, para. 1, let. b), TFEU, the applicant maintains that the principle of the state of necessity would well fit within the notion of “budgetary discipline”<sup>20</sup> since it contributes to the coordination and harmonisation of the economic policies of Member States. The General Court limits its reply to that plea stating that the applicant failed

<sup>15</sup> Available at [ec.europa.eu](http://ec.europa.eu).

<sup>16</sup> Commission Decision C(2012) 6289 final of 6 September 2012 rejecting the application for registration of the European citizens’ initiative “One million signatures for a Europe of solidarity”.

<sup>17</sup> *Anagnostakis I*, cit., paras 36-37.

<sup>18</sup> Court of Justice, judgment of 27 November 2012, case C-370/12, *Thomas Pringle v. Government of Ireland and others*. See also G. BECK, *The Court of Justice, Legal Reasoning and the Pringle Case – Law as the Continuation of Politics by Other Means*, in *European Law Review*, 2014, p. 234 *et seq.*

<sup>19</sup> *Anagnostakis I*, cit., paras 49-50.

<sup>20</sup> *Ibid.*, para. 51.

to demonstrate how and, eventually, to what extent the state of necessity would fall within a notion of budgetary discipline. Indeed, that would “in fact replace the free will of contracting parties with a legislative mechanism for the unilateral writing-off of sovereign debt, which is something that the provision clearly does not authorise”.<sup>21</sup>

As for the argument related to the state of necessity in international law, the General Court plainly finds that even if it exists in the form of allowing a State not to repay its debt, that does not entail that it can be transplanted into EU law,<sup>22</sup> since there is no, in this respect, conferral of powers from Member States to the EU. In essence, the General Court dismissed the action brought by Mr. Anagnostakis in its entirety.

The General Court judgment offers several hints to understand properly the content of the ECI at stake. Firstly, the doctrine of the state of necessity should have been introduced into EU law as part of the economic and monetary policy for those Member States whose currency is the Euro. Nonetheless, no clarifications are given regarding the nature of the legal act sought by the ECI at stake. Secondly, the doctrine of the state of necessity would have allowed those Member States under extreme financial hardship not to repay their debts, irrespective of the owner thereof (banks, other Member States, the EU, international institutions etc.), an aspect starkly criticised by the General Court. Thirdly, such a mechanism based on the doctrine of the state of necessity would have covered only the “abhorrent”<sup>23</sup> part of a State’s sovereign debt. Unfortunately, neither the ECI at stake nor the information submitted by Mr. Anagnostakis before the General Court supplied any criteria on how to severe – or, even, how to distinguish – the abhorrent from the non-abhorrent part of a debt. Fourthly (see *infra*) it remains unclear whether such a mechanism would be permanent or temporary and whether it would envisage the intervention of EU institutions. These aspects will constitute the bulk of AG Mengozzi’s opinion.

### III. THE COURT OF JUSTICE JUDGMENT (*ANAGNOSTAKIS II*)

AG Mengozzi’s opinion explicitly hits the ground criticising the lack of clarity of the ECI at stake.<sup>24</sup> AG Mengozzi explains that the non-repayment mechanism would be triggered

<sup>21</sup> *Ibid.*, para. 58.

<sup>22</sup> F. CASOLARI, *Giving Indirect Effect to International Law within the EU Legal Order: the Doctrine of Consistent Interpretation*, in E. CANNIZZARO, P. PALCHETTI, R.A. WESSEL (eds), *International Law as Law of the European Union*, Leiden-Boston: Martinus Nijhoff Publishers, 2012, p. 395 *et seq.*; A. GIANELLI, *Customary International Law in the European Union*, in E. CANNIZZARO, P. PALCHETTI, R.A. WESSEL (eds), *International Law*, cit., p. 93 *et seq.*

<sup>23</sup> *Anagnostakis I*, cit., paras 3 and 8.

<sup>24</sup> Opinion of AG Mengozzi, *Alexios Anagnostakis v. Commission*, cit., para. 7: “it must be stated in this regard that the present appeal perhaps does not offer all the necessary qualities to allow the Court to give the expected clarifications with a view to a better definition of the legal regime for the ECI since, after reading all the document in the case, it is still difficult to establish a precise idea of what exactly the appellant expected from the European action which he wished to be initiated”. Footnote 13 of AG Mengozzi opinion recalls that even the allegations submitted before the General Court were extremely scarce.

through a prior agreement amongst Member States solely to the extent that a debt threatens the political survival of one of them. This prior agreement – whose form and procedures to be reached are not spelt out – would then give a sort of green light to unilateral actions to be taken by the indebted Member State. Those unilateral actions, in turn, must be in compliance with some non-better specified conditions dictated by the Commission. As a last step, the EU would then be tasked to approve the unilateral actions undertaken by the indebted Member State. No further specifications have been added, especially regarding the Commission's role. Be that as it may, at the end of this procedure, the indebted Member State would be finally allowed to suspend the repayment of its debt. However, those unilateral actions would cover only debts contracted vis-à-vis the EU, thereby not affecting other international obligations.

Those are, in essence, the elements the organising committee wished to introduce in the EU legal order through the ECI at stake. The fact that all these elements have been belatedly clarified during the appeal phase is strikingly at odds with an ECI's purposes. Indeed, considering that "every citizen is to have the right to participate in the democratic life of the Union"<sup>25</sup> the lack of clarity of the ECI at stake would prevent a meaningful citizens' participation during the campaign aimed at collecting statements of support. Indeed, this lack of intelligibility jeopardises ECIs' goals, that is, influencing the EU legislature through the democratic involvement of EU citizens. As a side note, the aforementioned lack of clarity even affected the chance of success of the appeal brought before the Court of Justice.

The Grand Chamber judgment essentially upholds the findings of the General Court and endorses AG Mengozzi's opinion. The legal reasoning can be summarised as follows.

Mr. Anagnostakis claims that the Court of Justice should set aside the General Court judgment, annul the decision that denied the registration of the ECI at stake and order the Commission to register it. To do so, he alleges an error in law regarding the duty to state reasons and a misinterpretation of Art. 122, paras 1 and 2 as well as Art. 136 TFEU.

Regarding the first plea, he maintains that the General Court did not explain in detail the reasons according to which the Commission was right in considering the ECI at stake outside the framework of its powers, thereby not registering it. The Court of Justice responds arguing that the duty to state reasons as per Art. 296 TFEU has a specific expression in Art. 4, para. 3, of the ECI Regulation, therefore it must be assessed in light of the circumstances of the case at hand. However, the content and purposes of the ECI at stake were so confused as to prevent the Commission to engage in a (overly) detailed reasoning, a task complementarily performed by the General Court in its judgment.<sup>26</sup> This, in turn, shows that the reasons stated in the Commission decision were sufficiently detailed to enable the General Court to review its legality; therefore, the General Court did not err

<sup>25</sup> Recital 1 of the ECI Regulation, cit.

<sup>26</sup> *Anagnostakis II*, cit., paras 36-37.

in law. Regarding an alleged lack of motivation, it is important to stress at this stage that the Court of Justice blamed the appellant for not having provided enough explanations to the General Court adding new elements regarding the object and the content of the ECI at stake solely during the appeal hearings. Therefore, the Court of Justice did not consider them since this would constitute a broadening of the object of the appeal.

The second group of pleas put forward by the appellant concerns an alleged error in law in the interpretation of Art. 122, paras 1 and 2 as well as Art. 136 TFEU. In particular, according to Mr. Anagnostakis, Art. 122 TFEU as a whole embodies the principle of solidarity;<sup>27</sup> therefore the state of necessity squarely fits in it and would thus be an appropriate measure to counter severe economic difficulties. Furthermore, he claims that there are no similarities between the European Stability Mechanism<sup>28</sup> and the mechanism to be introduced through the ECI at stake. Upholding the reasoning of the General Court, the Court of Justice stipulates that "Article 122 (1) TFEU does not constitute an appropriate legal basis for possible financial assistance from the Union to Member States who are experiencing [...] severe financing issues".<sup>29</sup> The Court of Justice goes on specifying that only during the appeal stage Mr. Anagnostakis explained in full the mechanism he wished to introduce through the ECI at stake, in particular entrusting the Commission to impose detailed conditions on the indebted Member State. However, those specifications are now worthless since they were not raised before the General Court. Moreover, Art. 122, para. 2, TFEU cannot be interpreted – and has not been so by the General Court – so as to allow the introduction of such a mechanism which, in turn, would be "general and permanent".<sup>30</sup> In addition, remarking again the poor judicial strategy of the appellant, the Court of Justice stresses that he has never affirmed that it would be limited to debts *vis-à-vis* the EU and then rectified his statement mentioning Member States. It goes without saying that also the fact that the Commission would control the application of such a mechanism is counterproductive since this argument was raised solely before the Court of Justice. In other words, after two judgments it is still unclear which debts would be covered by the state of necessity doctrine and whether EU institutions would have a role to play.

For what concerns Art. 136 TFEU, the appellant claims that the introduction of the state of necessity would contribute to the "proper functioning of the economic and

<sup>27</sup> V. BORGER, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, in *European Constitutional Law Review*, 2013, p. 7 *et seq.*; P. HILPOLD, *Understanding Solidarity within EU law: an Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union*, in *Yearbook of European Law*, 2015, p. 257 *et seq.*

<sup>28</sup> A. DE GREGORIO MERINO, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: the Mechanisms of Financial Assistance*, in *Common Market Law Review*, 2012, p. 1613 *et seq.*

<sup>29</sup> *Anagnostakis II*, cit., para. 69.

<sup>30</sup> *Ibid.*, para. 75.

monetary union".<sup>31</sup> The Court of Justice, in this respect, essentially reiterates the findings of the General Court to the extent that the introduction of the state of necessity is "far from constituting 'economic policy guidance'".<sup>32</sup> In conclusion, the General Court did not err in law in stating that the Commission has no powers according to Art. 136 TFEU to introduce the mechanism sought by the ECI at stake. Nor arguing that Art. 352 TFEU would have led to a different conclusion is relevant since that provision was not invoked before the General Court. Therefore, the Court of Justice dismisses also this argument.

Finally, the Court of Justice held that even if the principle of state of necessity is present in international law that does not entail that it should have a space into the EU legal order<sup>33</sup> since the EU is based on the principle of conferral and no conferral has been given in that regard.

In conclusion, the Court of Justice dismisses all the arguments raised by Mr. Anagnostakis and upholds the judgment of the General Court.

To sum it up, *Anagnostakis I* and *II* were essentially driven by the lack of clarity of the ECI at stake. Indeed, both the General Court and the Court of Justice stressed that the ECI at stake and the documents submitted were so poorly drafted that envisaging a different outcome or hoping for the annulment of the Commission decision was fairly impossible. That, in turn, poses a remarkable burden on an organising committee. Indeed, as the CJEU has pointed out, it is not sufficient to cherry-picking some hypothetical legal bases vaguely related to an ECI's goal but, on the contrary, an organising committee has to thoroughly carry out this assessment. This is despite the fact that the Commission's practice has showed the willingness to analyse all the available legal bases.<sup>34</sup>

#### IV. CONCLUDING REMARKS

*Anagnostakis I* and *II* bear several implications for the constitutional aspects of the EU economic and monetary governance<sup>35</sup> as well as regarding the recast the ECI Regula-

<sup>31</sup> *Ibid.*, para. 82.

<sup>32</sup> *Ibid.*, para. 91.

<sup>33</sup> P. KOUTRAKOS, *The Notion of Necessity in the Law of the European Union*, in F. DEKKER, E. HEY (eds), *Netherlands Yearbook*, cit., p. 193 *et seq.*

<sup>34</sup> Cf. Commission Decision C(2013) 4975 final of 25 July 2013; Commission Decision C(2013) 7612 final of 5 November 2013; Commission Decision C(2014) 6501 final of 10 September 2014; Commission Decision C(2017) 2200 final of 29 March 2017.

<sup>35</sup> C. CARUSO, M. MORVILLO, *Economic Governance and Budgetary Rules in the European Context: a Call for a New European Constitutionalism*, in *Il Diritto dell'Unione Europea*, 2017, p. 699 *et seq.*; B. DE WITTE, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?*, in *European Constitutional Law Review*, 2015, p. 434 *et seq.*; A. HINAREJOS, *Fiscal Federalism in the European Union: Evolution and Future Choices for EMU*, in *Common Market Law Review*, 2013, p. 1621 *et seq.*; M. IOANNIDIS, *Europe's New Transformation: how the EU Economic Constitution Changed During the Eurozone Crisis*, in *Common Market Law Review*, 2016, p. 1237 *et seq.*; L.S. ROSSI, *Economic and Monetary*

tion. For space constraints, the analysis will be focused on the latter, whereas, regarding the former, we limit ourselves to consider that scholars already highlighted the need to foster democracy,<sup>36</sup> transparency<sup>37</sup> and the review of legal acts<sup>38</sup> adopted in this field.

First and almost intuitively, ECIs are still a novelty as showed by the fact that, to date, only four completed a whole lifecycle.<sup>39</sup> Furthermore, the very fact that after five years since its entry force the ECI Regulation needs to be reformed is a valid indicator that the previous system was not, or, at least, was not perceived as being adequate to foster citizens' democratic participation.<sup>40</sup>

Second, the current case law of the CJEU on ECIs is undergoing a major change. While at the beginning the General Court was more inclined to review the procedural aspects of phase 1,<sup>41</sup> delivering an orthodox interpretation of Art. 4, para. 2, let. b) of the ECI Regulation, since *Efler*<sup>42</sup> it seems that the judicial approach is more lenient, likely to make ECIs

*Policies as Essential Elements of the EU Constitutional Mandate*, in L. DANIELE, P. SIMONE, R. CISOTTA (eds), *Democracy in the EMU in the Aftermath of the Crisis*, Dordrecht: Springer, 2017, p. 405 *et seq.*; J. SNELL, *The Trilemma of European Economic and Monetary Integration and its Consequences*, in *European Law Journal*, 2016, p. 157 *et seq.*

<sup>36</sup> For a general overview, cf. L. DANIELE, P. SIMONE, R. CISOTTA (eds), *Democracy in the EMU in the Aftermath of the Crisis*, cit.

<sup>37</sup> Decision of the European Ombudsman of 15 March 2016 in case 2049/2014/NF on the European Council's refusal to grant access to documents concerning the 2010 Economic Task Force.

<sup>38</sup> C. KILPATRICK, B. DE WITTE (eds), *Social Rights in Times of Crisis in the Eurozone: the Role of Fundamental Rights Challenges*, in *EUI Working Papers*, no. 5, 2014; C. KILPATRICK, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU law?*, in *European Constitutional Law Review*, 2014, p. 393 *et seq.*; R. REPASI, *A Court of Justice Judicial Protection Against Austerity Measures in the Euro Area: Ledra and Mallis*, in *Common Market Law Review*, p. 1123 *et seq.*

<sup>39</sup> *Water and sanitation are a human right! Water is a public good, not a commodity!*, Commission registration number: ECI(2012)000003 of 10 May 2012; *Stop vivisection*, Commission registration number: ECI(2012)000007 of 22 June 2012; *One of us*, Commission registration number: ECI(2012)000005 of 11 May 2012; *Ban glyphosate and protect people and the environment from toxic pesticides*, Commission registration number: ECI(2017)000002 of 25 January 2017. The Commission is expected to adopt a communication on Ban glyphosate by 8 January 2018.

<sup>40</sup> Cf. European Commission, *Factual Summary of the Contributions Received in the Context of the Open Public Consultation on the Revision of Regulation (EU) No 211/2011 on the European Citizens' Initiative*, ec.europa.eu, as well as Decision of the European Ombudsman of 4 March 2015 closing her own-initiative inquiry OI/9/2013/TN concerning the European Commission. See also Communication COM(2015) 145 final of 31 March 2015 from the Commission to the European Parliament and the Council, *Report on the application of Regulation (EU) No 211/2011 on the citizens' initiative*.

<sup>41</sup> *Anagnostakis I*, cit.; General Court: judgment of 19 April 2016, case T-44/14, *Bruno Costantini v. Commission*, judgment of 10 May 2016, case T-529/13, *Balázs-Árpád Izsák, Attila Dabis v. Commission*, judgment of 5 April 2017, case T-361/14, *HB. v. Commission*.

<sup>42</sup> General Court, judgment of 10 May 2017, case T-754/14, *Efler et al. v. Commission*. See M. INGLESSE, *Positioning Efler in the Current Narrative of European Citizens' Initiatives*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 749 *et seq.*; J. ORGAN, *EU Citizen Participation, Openness and the European Citizens' Initiative: the TTIP Legacy*, in *Common Market Law Review*, 2017, p. 1713 *et seq.*

more citizen-friendly, as the European Ombudsman suggested too.<sup>43</sup> Nonetheless, it remains to be seen how the CJEU will respond in the much awaited *One of us* case, where the General Court has been asked to annul the Commission communication in phase 3.<sup>44</sup>

Third, in so far as an organising committee is not composed by EU law specialists, how can it autonomously evaluate the chance for an ECI to be registered? *Anagnostakis* // brought clarification to this point, to the extent that from now on organising committees are fully aware of the conditions to be respected, with a particular emphasis on the clarity of the subject matter, the intelligibility of the legal act wished as well as the identification of suitable legal bases. Therefore, the correct identification of these elements would have the effect of reducing the Commission's discretion in phase 1 and perhaps positively influence the outcome in phase 3.<sup>45</sup>

The aforementioned considerations are linked to the proposed recast of the ECI Regulation. To start with, it is interesting to note that a new Art. 6, para. 3, let. c) specifies that "the Commission shall register the initiative if [...] *none of the parts* of the initiative falls outside the framework of the Commission's powers [...]".<sup>46</sup> This change seems to contradict the reasoning put forward by the General Court in *Minority SafePack*<sup>47</sup> to the extent that an ECI's content could be severed in independent segments according to the information provided in the various annexes during phase 1. It may hence be plausible that some parts fall within the framework of the Commission powers whereas others do not, thereby creating an asymmetry in an ECI's contents, objectives and purposes. In addition, Art. 6, para. 4, of the recast ECI Regulation establishes the possibility of an ECI partial registration in so far as Art. 6, para. 3, let. c) requirements are not met. In this case, the Commission must inform an organising committee stating the reasons for this assessment. An organising committee, in turn, may decide to amend, maintain or withdraw an ECI, although, as it has been recently noted, "it is not very clear why organisers might want to maintain a rejected proposal, which in all likelihood will simply be rejected again by the Commission".<sup>48</sup> It remains to be seen how the Parliament and the Council will react to the novelties proposed in the recast of the ECI Regulation. However, it seems safe to conclude that nothing really changes for an organising committee given that it will always be charged with the burden to prove that an ECI falls – albeit partially – within the framework of the Commission's powers.

<sup>43</sup> Decision of the European Ombudsman, case OI/09/2013/TN, cit.

<sup>44</sup> Action brought on 25 July 2014, case T-561/14, *One of Us and Others v. Parlement and Others*.

<sup>45</sup> N. VOGIATZIS, *Between Discretion and Control: Reflections on the Institutional Position of the Commission within the European Citizen's Initiative Process*, in *European Law Journal*, 2017, p. 250 *et seq.*

<sup>46</sup> Emphasis added.

<sup>47</sup> General Court, judgment of 3 February 2017, case T-646/13, *Bürgerausschuss für die Bürgerinitiative Minority SafePack – one million signatures for diversity in Europe v. Commission*.

<sup>48</sup> A. KARATZIA, *The European Citizens' Initiative & Greek debt: An Unlikely Combination*, in *EU Law Analysis*, 30 November 2017, eulawanalysis.blogspot.ch.

EU institutions as well as civil society are devoting greater attention to ECIs. On the one hand, the recast of the ECI Regulation – despite the aforementioned criticisms – responds to the needs of making ECIs, or, better, their functioning, more accessible and “bring the EU closer to its citizens”.<sup>49</sup> On the other, organising committees are proposing – and the Commission is registering – more and more new ECIs,<sup>50</sup> thereby showing an increased awareness of the possibilities offered by the EU. Despite this new interest, it remains that the Commission, to date, never proposed a legislative act based on an ECI's output: looking ahead this is the real challenge to be overcome.

<sup>49</sup> Proposal for a Regulation COM(2017) 482, cit., p. 3.

<sup>50</sup> Amongst the newest and most interesting, cf. *Stop Extremism*, Commission registration number: ECI(2017)000007 of 12 June 2017, deadline: 12 June 2018; *Let us reduce the wage and economic differences that tear the EU apart!*, Commission registration number: ECI(2017)000006 of 22 May 2017, deadline: 22 May 2018; *Retaining European Citizenship*, Commission registration number: ECI(2017)000005 of 2 May 2017, deadline: 2 May 2018; *EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis*, Commission registration number: ECI(2017)000003 of 27 March 2017, deadline: 27 March 2018, *European Free Movement Instrument*, Commission registration number: ECI(2017)000001 of 11 January 2017, deadline: 11 January 2018. See European Commission, *The European Citizens' Initiative, Official Register, Open Initiatives*, ec.europa.eu, last accessed 4 December 2017.

