OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 29 July 2019(1)

Case C-418/18 P

Puppinck and Others
v
European Commission

(Appeal — Institutional law — European Citizens' Initiative (ECI) — Article 11(4) TEU — EU financing of activities involving the destruction of human embryos — Research policy — Public health — Development cooperation — ECI having attained the required statements of support — Commission communication pursuant to Article 10(1)(c) of Regulation (EU) No 211/2011 — Obligations of the Commission with regard to a successful ECI — Standard of judicial review)

I. Introduction

1. Mr Patrick Grégor Puppinck and six other persons ('the Appellants') form the citizens' committee of the European Citizens' Initiative called 'Uno di noi' ('One of Us') ('the ECI'). The ECI was registered by the European Commission. It then obtained more than one million signatures. It thus attained the relevant threshold and was submitted to the Commission, which received the members of the citizens' committee of the ECI. A hearing at the European Parliament was organised to discuss the ECI. Finally, the Commission adopted a communication in which it explained that it had decided not to take any action in pursuance of the aims of the ECI.

2. The Appellants sought the annulment of that communication before the General Court. They were not successful. By the present appeal, they challenge the first-instance judgment of the General Court. (2)

3. The ECI is one of the innovations introduced by the Treaty of Lisbon to promote the participation of citizens in the democratic life of the European Union. Regulation (EU) No 211/2011 (3) establishes the legislative framework for the ECI. That instrument has already been the subject of several cases that have come before the EU Courts relating to decisions of the Commission rejecting the registration of ECIs. (4)

4. The novelty of the present case lies in the fact that it is the first case before this Court concerning the follow-up by the Commission in the case of a 'successful ECI' (in the sense of attaining the required threshold). Indeed, 'One of Us' is one of only four ECIs to date that have attained the required number of signatures. (5) This in turn brings to the fore two important questions of principle raised by the present case: first, is the Commission obliged to submit any concrete legislative proposals following a successful

ECI? Second, what standard of judicial review is to be applied when reviewing the position taken by the Commission following a successful ECI?

II. EU legal framework

5. According to recital 1 of the ECI Regulation, 'the [TEU] reinforces citizenship of the Union and enhances further the democratic functioning of the Union by providing, inter alia, that every citizen is to have the right to participate in the democratic life of the Union by way of a European citizens' initiative. That procedure affords citizens the possibility of directly approaching the Commission with a request inviting it to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties similar to the right conferred on the European Parliament under Article 225 [TFEU] and on the Council under Article 241 TFEU'.

6. Recital 20 of the ECI Regulation reads as follows: 'the Commission should examine a citizens' initiative and set out its legal and political conclusions separately. It should also set out the action it intends to take in response to it, within a period of 3 months. In order to demonstrate that a citizens' initiative supported by at least one million Union citizens and its possible follow-up are carefully examined, the Commission should explain in a clear, comprehensible and detailed manner the reasons for its intended action, and should likewise give its reasons if it does not intend to take any action. When the Commission has received a citizens' initiative supported by the requisite number of signatories which fulfils the other requirements of this Regulation, the organisers should be entitled to present that initiative at a public hearing at Union level.'

7. According to Article 2(1) of the ECI Regulation, 'citizens' initiative' means 'an initiative submitted to the Commission in accordance with this Regulation, inviting the 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, which has received the support of at least one million eligible signatories coming from at least one quarter of all Member States'.

8. Article 10 of the ECI Regulation establishes the procedure for the examination of a citizens' initiative by the Commission. According to that provision:

'1. Where the Commission receives a citizens' initiative in accordance with Article 9 it shall:

…

(c) within 3 months, set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action.

2. The communication referred to in paragraph 1(c) shall be notified to the organisers as well as to the European Parliament and the Council and shall be made public.'

9. According to Article 11 of the ECI Regulation, 'where the conditions of Article 10(1)(a) and (b) are fulfilled, and within the deadline laid down in Article 10(1)(c), the organisers shall be given the opportunity to present the citizens' initiative at a public hearing. The Commission and the European Parliament shall ensure that this hearing is organised at the European Parliament, if appropriate together with such other institutions and bodies of the Union as may wish to participate, and that the Commission is represented at an appropriate level'.

III. Factual background

10. On 11 May 2012, the ECI 'One of Us' was registered by the Commission pursuant to Article 4(2) of the ECI Regulation. (6) The subject matter of the ECI is described in the online register made available by the Commission as follows: 'the juridical protection of the dignity, the right to life and of the integrity

of every human being from conception in the areas of EU competence in which such protection is of particular importance'. The objectives of the ECI were described in the following terms: 'the human embryo deserves respect to its dignity and integrity. This is enounced by the [Court of Justice of the European Union] in the *Brüstle* case, which defines the human embryo as the beginning of the development of the human being. To ensure consistency in areas of its competence where the life of the human embryo is at stake, the [European Union] should establish a ban and end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health.'

11. The organisers identified the provisions of the Treaties that are relevant for the ECI as being Articles 2 and 17 TEU and Article 4(3) and (4), and Articles 168, 180, 182, 209, 210 and 322 TFEU.

12. An annex was attached to the ECI containing a draft legal act requesting, more specifically, three amendments to existing EU acts.

13. First, it was proposed that a new article be inserted into Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities. (7) According to the proposed provision: 'no European Union budget allocation will be made for the funding of activities that destroy human embryos, or that presume their destruction'.

14. Second, it was proposed that a new subparagraph be inserted into Article 16(3) of the Proposal for a Regulation of the European Parliament and of the Council establishing Horizon 2020 — The Framework Programme for Research and Innovation (2014-2020). (8) That new subparagraph would entail excluding from funding 'research activities that destroy human embryos, including those aimed at obtaining stem cells, and research involving the use of human embryonic stem cells in subsequent steps to obtain them'.

15. Third, it was proposed that a new paragraph 5 be inserted into Article 2 of Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation. (9) According to that proposed paragraph: 'the assistance of the Union, on the basis of this Regulation, shall not be used to fund abortion, directly or indirectly, through the funding of organisations that encourage or promote abortion. No reference … made in this Regulation to reproductive and sexual health, health care, rights, services, supplies, education and information at the International Conference on Population and on Development, its principles and Program[me] of Action, the Cairo Agenda and the Millennium Development Goals, in particular MDG No 5 about health and maternal mortality, can be interpreted as providing a legal basis for using EU funds to finance directly or indirectly abortion.'

16. On 28 February 2014, pursuant to Article 9 of the ECI Regulation, the organisers submitted the ECI to the Commission. Subsequently, on 9 April 2014, they were received by the Commission, in accordance with Article 10(1)(b) of the ECI Regulation. On 10 April 2014, the organisers presented the ECI at a public hearing held at the European Parliament, pursuant to Article 11 of the ECI Regulation.

17. On 28 May 2014, on the basis of Article 10(1)(c) of the ECI Regulation, the Commission adopted a communication on the ECI at issue (10) ('the Communication'), in which it announced that it would not adopt any proposal along the lines of the measures requested by the ECI.

18. The content of the Communication is set out in paragraphs 13 to 30 of the judgment under appeal.

IV. The judgment under appeal and the proceedings before the Court

19. By application of 25 July 2014, the Appellants sought the annulment of the Communication and, in the alternative, the annulment of Article 10(1)(c) of the ECI Regulation.

20. By order of 26 November 2015, (11) the General Court upheld a plea of inadmissibility raised by the Parliament and the Council and dismissed the action as inadmissible in so far as it was directed against Article 10(1)(c) of the ECI Regulation, because the action had been brought after the expiry of the time limit laid down in Article 263 TFEU.

21. With regard to the Communication, the application raised five grounds of annulment. By their first ground, the Appellants alleged an infringement of Article 10(1)(c) of the ECI Regulation on account of the Commission's failure to submit a proposal for a legal act in response to the ECI. By the second ground, raised in the alternative, the Appellants alleged that that failure amounted to an infringement of Article 11(4) TEU. By the third ground, the Appellants claimed that Article 10(1)(c) of the ECI Regulation had been infringed because the Commission had not set out separately, in the Communication, its legal and political conclusions on the ECI. The fourth ground alleged that the Commission had breached its obligation to state reasons. By their fifth ground, the Appellants claimed that the Commission had committed a number of errors of assessment.

22. In its judgment in *One of Us and Others* v *Commission* ('the judgment under appeal'), (12) the General Court declared, first, that the action was inadmissible in so far as it was brought by the entity known as 'Europeans Citizens' Initiative One of Us', without prejudice to the admissibility of that action in so far as it was also being brought by the seven natural persons comprising the citizens' committee of the ECI. (13) Second, the General Court found that the Communication constitutes a challengeable act against which an action for annulment can be brought. (14) Finally, it rejected the five grounds for annulment put forward by the Appellants and dismissed the application, (15) ordering the Appellants to bear their own costs and to pay the costs incurred by the Commission.

23. By the present appeal, the Appellants claim that the Court should set aside the judgment of the General Court, annul the Communication and order the Commission to pay the costs of the appeal and of the hearing at first instance.

24. By their first ground of appeal, the Appellants claim that the General Court erred in law regarding its interpretation of the scope and meaning of Article 11(4) TEU and of the ECI Regulation. By the second ground of appeal, the Appellants claim that the General Court erred in not finding that the Communication does not set out its legal and political conclusions separately, as required by the ECI Regulation. By the third ground of appeal, the Appellants claim that the General Court failed to review the Communication with the correct level of scrutiny, since it applied a test of limited review, namely, that of manifest error. By the fourth ground of appeal, the Appellants claim that even if the level of review applied was correct, the General Court failed to hold that the reasons provided in the Communication satisfied the test of manifest error. Finally, by the fifth ground of appeal, the Appellants submit that the General Court erred in mischaracterising the objective of the ECI by stating that its object was not the protection of the dignity of the embryo as a human being.

25. The Commission claims that the Court should dismiss the present appeal and order the Appellants to pay the costs.

26. The parties presented their views at the hearing before the Court that was held on 25 March 2019.

V. Assessment

27. This Opinion will deal with each of the five grounds of appeal in the order in which they are presented by the Appellants. First, I will interpret the scope and meaning of Article 11(4) TEU and of the relevant provisions of the ECI Regulation (A). Second, I will examine the obligation of the Commission to establish legal and political conclusions 'separately' (B). Third, I will turn to the issue of the standard of judicial review applied by the General Court (C). Fourth, I will deal with the existence of alleged manifest errors of assessment in the Commission's Communication (D). Finally, I will conclude by briefly examining the ground of appeal related to the mischaracterisation of the object of the ECI (E).

A. The first ground of appeal: the interpretation of Article 11(4) TEU and of the ECI Regulation

28. By their first ground of appeal, the Appellants claim that the General Court erred in law in rejecting, in paragraphs 118 and 125 of the judgment under appeal, their first and second grounds for annulment, regarding the scope and meaning of Article 11(4) TEU and of the ECI Regulation. By the first and second grounds for annulment, the Appellants had argued before the General Court that, by failing to submit a proposal for a legal act in response to the ECI, the Communication infringed Article 10(1)(c) of the ECI Regulation and, in the alternative, Article 11(4) TEU. According to the Appellants, outside of three exceptional situations, which were not given in the present case, a decision of the Commission to take no action infringes Article 10(1)(c) of the ECI Regulation. (16)

29. The Appellants advance several arguments in support of their first ground of appeal. First, they claim that the General Court erred in law by stating, in paragraph 111 of the judgment under appeal, that the 'near-monopoly' of legislative initiative conferred by the Treaties upon the Commission 'is not affected by the right … of a minimum number of citizens, under certain conditions, to "invite" the Commission to submit any appropriate proposal'. The Appellants argue that the judgment under appeal fails to appreciate the unique characteristics of the ECI. This failure is illustrated by paragraph 113 of the judgment under appeal, where the General Court declared that 'confirmation of the intention of the founding authority of the Union not to confer the power of legislative initiative on the ECI mechanism is to be found in recital 1 of Regulation No 221/2011, which equates, in essence, the right conferred on the ECI with that conferred on the Parliament, pursuant to Article 225 TFEU, and on the Council, pursuant to Article 241 TFEU. A request from the Parliament or the Council does not require the Commission to submit a proposal for a legal act …'.

30. Second, according to the Appellants, Article 17(2) TEU, pursuant to which 'legislative acts may only be adopted on the basis of a Commission proposal', does not mean that the Commission has unlimited discretion regarding the adoption of a proposal in relation to a successful ECI. The Appellants claim that the discretion enjoyed by Commission in the exercise of its power of legislative initiative must be used to promote the objectives of a successful ECI. Arguing by analogy with the judgment in *Council* v *Commission*, (17) the Appellants submit that a decision of the Commission not to launch a legislative procedure in the case of a successful ECI must be based on grounds which 'have to be supported by cogent evidence or arguments', and which are not contrary to the objective of the ECI. According to the Appellants, the only way to control the exercise of discretionary power is to create a criterion of justification by reference to general policies and public aims, and the judgment under appeal failed to address and determine the public policy objectives of the ECI and the interrelationship between Title III TEU and Article 24 TFEU, as enabled by the ECI Regulation.

31. Third, the Appellants submit that the General Court erred in law, in paragraph 124 of the judgment under appeal, by stating that the objective of the ECI mechanism is to invite the Commission to submit a proposal for an act. According to the Appellants, any individual can at any time invite the Commission to take any proposed action, without this being conditional on collecting one million verified signatures. They claim that an ECI signed by one million citizens under a burdensome formal procedure and at considerable cost must enjoy a status distinct from any invitation coming from a single person or from lobbyists or petitioners. The Appellants argue that the ECI's objective is to address the democratic deficit of the European Union. The burden of costs and the difficulties involved in organising an ECI point to an error of law in the judgment under appeal, in that it failed to attribute a higher status to the ECI than that of a mere invitation. The Appellants claim, in particular, that after securing nearly two million signatures, they were only given a frosty two-hour meeting with a Commissioner and a hearing in the European Parliament at which the MEPs intervening used the greater part of the speaking time and lectured rather than listened. According to the Appellants, this cannot have been what the legislature envisioned as the objective of the ECI. In their view, the judgment under appeal turns the ECI into a false promise.

32. In the following paragraphs, I will explain why I think that the first ground of appeal is based on an incorrect interpretation of Article 11(4) TEU and of the ECI Regulation. The propositions of the

Appellants in this regard are supported neither by the wording and genesis of the relevant provisions (a), nor by a systematic and contextual consideration of the ECI mechanism within the interinstitutional decision-making process (b), nor by the (properly identified) aims and purposes of the ECI (c). The first ground of appeal must therefore be rejected as unfounded.

(a) The wording and genesis of Article 11(4) TEU and of the ECI Regulation

33. The Appellants contest the characterisation of the ECI mechanism in paragraph 124 of the judgment under appeal as an 'invitation' to the Commission to present a proposal for an act. In that paragraph, the General Court stated that the objective of the ECI mechanism is 'to invite the Commission, within the framework of its powers, to submit a proposal for an act'.

34. However, on a purely *textual* level, that statement faithfully mirrors the wording of the constitutional definition of the ECI under EU primary law. According to Article 11(4) TEU, a group of citizens of not less than one million may take the *initiative of inviting* the Commission to submit any appropriate proposal.

35. Thus, the phrase 'initiative of inviting' in Article 11(4) TEU clearly does not refer to any 'obligation of submitting'. The same holds true of other linguistic versions. Even if some of those use more imperative formulations, in the sense of 'requesting' or 'prompting', they still cannot be understood, in the natural sense of the words, as issuing a command to the Commission. (18)

36. Certainly, the *context* of a text matters. That is especially the case when faced with a lack of textual clarity or ambiguous wording whereby, depending on the context, an 'invitation' could amount to anything on a scale from a purely optional suggestion, presented for the information of the addressee of the communication, right down to a hidden, but in practical terms rather clear, command. (19)

37. That kind of context-dependent analysis is, however, hardly relevant here. First, unless context and purpose are to be allowed to override the natural meaning of the words, an 'invitation' is optional, a 'may', not a 'must'. It opens up a possibility or opportunity, but does not impose an obligation to act. Second, there is in any case no dissonance between the text, on the one hand, and the context and purpose, on the other, in the present case. The context and purpose of the relevant provisions in terms of both primary and secondary law confirm, rather than contradict, that the ECI, as an 'initiative of inviting', cannot be interpreted as involving a command that would impose on the Commission an obligation to comply with such an invitation.

38. The genesis of Article 11(4) TEU confirms that understanding. The origins of that provision can be traced back to Article 46(4) of the Draft Treaty establishing a Constitution for Europe. (20) The *ratio legis* of that provision does not readily emerge from the *travaux préparatoires*, because the ECI was not discussed in the framework of the specific working groups of the Convention on the Future of Europe. It entered into the discussions at a later stage in a rather singular way. (21)

39. However, from the available documented evidence, it seems that, in contrast to other amendments that related to direct democracy instruments and sought to impose clear obligations on the Commission, (22) the amendment that eventually became Article 46(4) of the draft Constitutional Treaty was conceived of as a mechanism for presenting initiatives to the Commission, but without imposing any obligation on the Commission to follow them. (23)

40. The further legislative articulation of the ECI, carried out pursuant to Article 24 TFEU in the form of the ECI Regulation, remains in line with that approach. Article 2(1) of the ECI Regulation defines the 'citizens' initiative' as meaning 'an initiative …, *inviting* the Commission …, to submit any appropriate proposal …'. Accordingly, Article 10(1)(c) provides that, in response to a successful ECI, the Commission is obliged to set out in a communication the action it intends to take, *if any*, as well as its reasons for taking *or not taking* that action. This is further clarified by the sentence in recital 20, introduced following an

amendment of the Parliament, (24) according to which the Commission should 'give its reasons if it does not intend to take any action'.

41. Moreover, the *travaux préparatoires* of the ECI Regulation make explicit that it is based on a model that does not give a binding character to successful ECIs and preserves the Commission's 'near-monopoly' of legislative initiative.(25) The report of the European Parliament can be cited as a particularly relevant confirmation of that proposition. The rapporteurs underlined, 'in order to avoid disappointment and frustration (that might be the direct consequence of the high expectations that surround the European Citizen[s]' Initiative)', that 'not all successful Initiatives will end up with the Commission putting forward a legislative proposition. Indeed, the Commission's monopoly of legislative initiative prevails and, in the end, it will be the one deciding on the follow-up to be given to successful Citizens' Initiatives'. (26)

42. In short, the *wording* of the relevant provisions in terms of both primary and secondary law, as well as the *genesis* of those provisions, clearly indicate that the ECI was neither conceived of nor drafted in such a way as to impose an obligation on the Commission to adopt the requested proposal. The same flows from the systemic and institutional context within which the ECI is placed, to which I now turn.

(b) The systemic and institutional context of the ECI

43. That a successful ECI is not binding on the Commission is further evidenced by two types of systemic arguments: *first*, those limited to the ECI system as established by the ECI Regulation, and, *second*, those relating to the broader system of primary law, reflecting the proper integration of the ECI within the context of interinstitutional decision-making.

44. As regards the system of the ECI Regulation, the legislative design of the ECI relies on the non-binding character of a successful ECI as against the Commission. First, the mere existence of Article 10(1)(c) of the ECI Regulation, which states that the duty of the Commission is to take a position, but not necessarily to follow the proposition(s) made by an ECI, is in and of itself a rather clear indication of this. Second, the non-binding character of a successful ECI is also at the root of the structural relationship between that provision and Article 4 of the ECI Regulation. Indeed, if a successful ECI had a binding character, it is questionable whether the legislature would have been so open in terms of the conditions of registration that currently feature in Article 4(2) of the ECI Regulation. That article imposes on the Commission an obligation to register an ECI unless there are 'manifest' grounds for not doing so, which could be said to amount to a kind of '*in dubio pro* registration' approach. (27)

45. As far as the broader issue of the integration of the ECI in the system of EU primary law is concerned, the General Court undertook this systematic analysis in paragraphs 107 to 113 of the judgment under appeal. The Appellants essentially take issue with the finding(s) in paragraph 111 of that judgment, according to which the Commission's 'near-monopoly' of legislative initiative is not affected by the ECI. In the Appellants' view, a successful ECI affects the Commission's power of initiative. The Commission can only use its discretion to promote the objectives of the ECI and can only refuse to follow the proposals of the ECI if such refusal is justified by cogent evidence or arguments, which are not contrary to the objective of the ECI. In support of this approach, the Appellants refer to the judgment in *Council* v *Commission* by analogy. (28)

46. First, in addressing, and ultimately rejecting, those arguments, it is necessary to start with the power of initiative of the Commission. That power, vested in the Commission pursuant to Article 17(2) TEU and Article 289 TFEU, is an expression of the principle of institutional balance. (29) That institutional balance is specific and peculiar to the European Union. The 'near-monopoly' of the Commission's power of initiative, which marks an important difference between the EU legislative process and that of national States, is rooted in the specificity of the institutional architecture of the European Union as a compound of States and peoples, and is a crucial component of the 'community method'. (30) This 'near-monopoly' has historically been explained by: the need to confer the power of initiative on an independent authority capable of identifying the European general interest and not succumbing to national agendas or divided political factions along the lines of national political debates; the unequal weight of the different Member

States in the European Parliament; or the need to rely on the technical capacity of a specialised supranational (and plurinational) administration endowed with appropriate means. (31)

47. Without wishing to enter into any evaluation of the (continuing) appropriateness or otherwise of such reasons, what matters in my (legal) view is the fact that, in terms of positive law, it is clear that the Commission has been vested, with some exceptions, with the power of initiative. The Parliament and the Council traditionally act as 'co-legislators', but only have the power, at the stage of the 'initiation' of the legislative procedure, to request the Commission to present appropriate proposals, according to, respectively, Article 225 TFEU and Article 241 TFEU.

48. From the point of view of its material scope, the power of initiative of the Commission, as interpreted by the case-law, encompasses the decision whether or not to submit a proposal for a legislative act, as well as the determination of the subject matter, the objective and the content of any such proposal, in accordance with the duty to pursue the general interest under Article 17(1) TEU. (32) It is true that the case-law envisages the possibility that the Commission may be obliged under EU law to submit a proposal in specific circumstances. (33) However, as the Commission has rightly pointed out in its written observations, that exception refers to instances where the Treaties oblige the institutions to make use of their powers in order to legislate. (34) Indeed, in principle, it cannot be excluded that an ECI may concern an area in which there exists an obligation to adopt a proposal in order to fulfil the mandate of the Treaties. However, should that scenario arise, it would be that mandate which would ultimately form the basis of the obligation to act, and not the fact that the initiative to adopt such a proposal emanates from a successful ECI.

49. Those essential features of the power of initiative, encompassing the choice to present a proposal, its objective and its content, are fundamental elements of the EU decision-making system. They form the bedrock of the independence of the Commission and its mandate to pursue the general interest of the European Union.

50. The interpretation advocated by the Appellants would conflict with the mandate of the Commission, enshrined in Article 17(1) TEU, to promote the general interest of the European Union and to take the appropriate initiatives to that end. It would also imply a departure from the general obligation of the Commission to act with complete independence in the exercise of its power of initiative, in accordance with Article 17(3) TEU. Both provisions define the way in which the Commission must exercise its power of initiative. (35)

51. Indeed, if an ECI that received the support of more than one million citizens were to impose an obligation on the Commission to present an initiative, the Commission would effectively be forced to follow the instructions of a (potentially numerous, but in terms of total numbers still likely to be quite limited) number of EU citizens. Not only would that contradict the mandate in Article 17(3) TEU to act in complete independence, but it would also mean that the Commission would not be able to carry out with total impartiality its own assessment in the pursuit of the general interest, in accordance with Article 17(1) TEU. It is undisputed that that latter obligation also entails taking into account objective elements and complex assessments of a technical nature, as well as the interests and input of *other citizens and interested parties*, who may express their views on the policy options envisaged by future initiatives as an integral part of the exercise of their democratic rights. (36)

52. The power of initiative vested in the Commission includes the possibility for that institution to engage in prior consultation and gather all the necessary information, (37) which could involve taking into account interests and information that support options divergent from the objectives pursued by a given successful ECI. The multiplicity of actors and considerations that might otherwise make an impact on EU decision-making through the drafting of proposals cannot be reduced and limited to the ECI as the sole democratic mechanism enabling participation of citizens, as Article 11 TEU makes apparent. Indeed, that article not only provides for the ECI, but it also contains a mandate for the institutions to enable citizens and representative associations to make known their views (paragraph 1) and to maintain an open, transparent and regular dialogue with representative associations and civil society (paragraph 2), and for

the Commission to carry out broad consultations in order to ensure that the actions of the European Union are coherent and transparent (paragraph 3).

53. It should be stressed that it cannot be inferred, either from Article 11(4) TEU or from the ECI Regulation, that the Commission is required to further the *objectives* of a successful ECI. Bearing in mind the particularities of the institutional and decision-making system of the European Union and the current constitutional framework, this would hinder the capacity of the Commission to carry out its power of initiative within the framework of its legislative programme in a consistent manner. Indeed, if the Commission were bound to pursue every successful ECI, somewhat erratic situations could not be excluded, in which the Commission would be obliged to submit colliding proposals arising out of ECIs that support opposing, diverging or overlapping views. (38)

54. Moreover, one cannot but be puzzled at how all that, even if possible in principle, would work in practical terms. At the hearing, the Appellants argued that despite the (potential political) opposition of the Commission to a successful ECI, that institution must draft the corresponding proposal and present it for parliamentary debate. Would then the Commission be obliged to draft every successful ECI, including ECIs with overlapping subject matters but divergent content? Would the Commission be bound not only to present a proposal, but also to adopt a specific approach and to include all the elements of the ECI? Would the Commission be turned into a kind of 'secretariat for the ECI'? How and according to what criteria would the 'compliance' of a Commission proposal with the ECI mandate be assessed, given that the mandate is often likely to be expressed at a relatively high level of abstraction, as a policy that opens up a number of further legislative choices?

55. Second, the European Parliament and the Council enjoy, in accordance with Article 225 and Article 241 TFEU respectively, the power to *request* the Commission to submit any appropriate proposal and impose on the Commission the duty to state reasons if it does not submit such a proposal. It is true that the expression 'may take the initiative of inviting' in Article 11(4) TEU differs from the word 'request' used in Articles 225 and 241 TFEU. However, notwithstanding the lack of identical wording and the room for interpretation that this creates, the ECI Regulation expresses, in its first recital, the intention of the legislature of placing the ECI on *an equal footing* with the Council and the Parliament by conferring on EU citizens a right similar to the right conferred on those institutions.

56. The interpretation suggested by the Appellants would disrupt this balance. It would mean that an ECI supported by a group of more than one million citizens would gain power of initiative surpassing that of the directly democratically elected European Parliament and also that of the democratically legitimised, albeit indirectly, Council. In practical terms, a (vocal) fraction of European citizens would be given more weight than the two EU institutions that are directly and indirectly legitimised by (potentially) all European citizens.

57. At this point, a word of clarification is called for with regard to the extent of the similarity between the rights of initiative of the Parliament and of the Council, on the one hand, and those of the ECI, on the other. In an order of the Vice-President of the Court concerning an application for leave to intervene in a case between a Member State and the Commission by the citizens' committee of an ECI, it was stated that a proposed ECI could not be treated in the same way as proposals for the adoption of legal acts by the EU institutions, which are the object of the general provisions on the institutions contained in Chapter 1 of Title I of Part Six TFEU and are governed, for the purposes of their adoption, by the rules of the ordinary legislative procedure laid down in Chapter 2 of that Title I. (39)

58. That statement has to be read and understood in its proper context. It concerned the interpretation of Article 40, second paragraph, of the Statute of the Court of Justice of the European Union, according to which natural or legal persons shall not intervene in cases between Member States and institutions of the Union. The lack of similarity between the procedural rights enjoyed by an ECI and by the EU institutions in cases of a 'constitutional' nature before the EU Courts is quite a different matter from the overall systemic constitutional function of their respective rights of initiative. In other words, the fact that by the application of specific provisions of the Statute of the Court of Justice of the European Union, different

rules on standing and intervention apply to different kinds of entities, can hardly be made into a general, constitutional statement as to the incomparability of their rights of initiative as such.

59. Finally, in support of their arguments, the Appellants also refer by analogy to the judgment in *Council* v *Commission*. (40) They submit that a failure to launch a legislative proposal after a successful ECI can only be justified by *cogent evidence or arguments, which are not contrary to the objective of the ECI.*

60. In *Council* v *Commission*, the Court declared that the power of the Commission to withdraw a proposal already presented and formally introduced into the legislative process cannot 'confer upon that institution a right of veto in the conduct of the legislative process, a right which would be contrary to the principles of conferral of powers and institutional balance'. The Court also added that 'if the Commission, after submitting a proposal under the ordinary legislative procedure, decides to withdraw that proposal, it must state to the Parliament and the Council the grounds for the withdrawal, which, in the event of challenge, have to be supported by cogent evidence or arguments'. (41)

61. Thus, on the facts, the *Council* v *Commission* case concerned a situation in which the Commission sought to withdraw a legislative proposal after it had itself launched the decision-making process. I fail to see how any analogy at all could be made with that case for the purposes of the present one, which concerns a different matter and different actors. The position of the Commission on a successful ECI, which precedes the adoption of a Commission proposal and the beginning of the legislative process is, quite logically, different from the situation where the Commission has itself already adopted a proposal and triggered the decision-making procedure in other institutions.

62. Those considerations confirm, in my view, that the General Court did not err in law when it stated, in paragraph 124 of the judgment under appeal, that the objective of the ECI mechanism is to invite the Commission, within the framework of its powers, to submit a proposal for an act, while allowing the Commission broad discretion in exercising its powers of legislative initiative. Nor did the General Court err in finding, in paragraph 111 of the judgment under appeal, that the Commission's right of legislative initiative was not affected by the introduction of the ECI.

(c) The aim and purpose of the ECI

63. The Appellants also argue that the reasoning of the General Court in the judgment under appeal would lead to the ECI becoming a dead letter and having no added value. The Appellants effectively suggest that if their interpretation of Article 11(4) TEU and of the ECI Regulation are not upheld (in other words, if it is confirmed that, save in exceptional circumstances, a successful ECI does not impose on the Commission a duty to present a proposal for a legal act), then the ECI mechanism would be deprived of any *effet utile*.

64. To the extent that this argument is not a mere extension of the previous argument made by the Appellants, only restated at a higher level of abstraction, this argument also fails to convince, for a rather simple reason: no such aim as suggested by the Appellants has ever been claimed to exist. What would allegedly be compromised is, rather, the aim that the Appellants would like the ECI to pursue, and not what, objectively, it was established to pursue. Put bluntly, a kind of purposive switch is suggested, by asserting that the *effet utile* of a rabbit would be lessened if it were not interpreted as being a pigeon. But, unless some genuinely advanced magic is employed, and the audience is successfully induced to believe that the aim and purpose of looking at a rabbit is to see a pigeon, a rabbit remains a rabbit.

65. The aim that the legislature (then) had in mind in introducing the ECI has already been outlined above. (42) Assuming that it were possible, for relatively fresh constitutional and secondary law texts, to substitute the original will of the legislature with the (different and new) contemporary will, even then I still fail to see why the aim of the ECI should be any different today.

66. To assess the aim of the ECI, the broader objectives of the ECI, as evidenced by the system of primary law now in force, are of importance.

67. The introduction of the ECI in the Treaty of Lisbon was prompted by the debates on the Convention for the Future of Europe and forms part of a wider attempt to engrave the democratic principle, a founding value according to Article 2 TEU, at the heart of the EU institutional system. Title II TEU, which precedes the specific provisions on the EU institutions covered by Title III TEU, is devoted to the 'provisions on democratic principles', amongst which Article 11(4) TEU, the foundation stone of the ECI, is to be found.

68. In this overall framework, Article 11(4) TEU is part of the broader democratic system of the European Union, of which it constitutes one important component. Pursuant to Article 10(1) TEU, the functioning of the Union is founded on the principle of *representative* democracy, with citizens being directly represented at Union level in the European Parliament, as stated in Article 10(2) TEU.

69. That vision of representative democracy is then complemented and enhanced, in primary law, by the creation of avenues for participatory and deliberative democracy through Article 10(3) TEU, as well as Article 11, in which the ECI is enshrined. In particular, as the case-law has already stated, the ECI constitutes an instrument of *participatory* democracy linked to the right to participate in the democratic life of the Union, which is recognised in Article 10(3) TEU. (43)

70. In the same vein, at the level of secondary law, as set out in the first and second recitals of the ECI Regulation, the objective of that regulation is to encourage citizen participation and make the European Union more accessible to its citizens. (44)

71. However, the objective of the ECI to foster participation of citizens in the democratic process and promote dialogue between citizens and the EU institutions does not entail a departure from the pre-existing elements that make up the institutional balance of the legislative process, nor does it entail the abandonment of the legislative monopoly of the Commission. Enhancing or encouraging participation within the existing democratic structures is not the same as bypassing or replacing those structures.

72. It therefore appears that the genuine purpose of the ECI mechanism is rather different from the one suggested by the Appellants. It is only after identifying the correct constitutional and institutional framework that the 'added value' and/or the '*effet utile*' of the ECI can properly be assessed.

73. If assessed in its proper light, the ECI mechanism is very far from having no impact. Fulfilling the mandate of Article 24 TFEU, the ECI Regulation articulates the right of more than one million citizens to invite the Commission to adopt a proposal for a legal act through a series of provisions which contain concrete and detailed obligations, particularly for the Commission, that go beyond any pre-existing channels of interaction between citizens and the EU institutions. Thus, the added value of the ECI is present on at least four distinct levels: (i) the promotion of public debate; (ii) enhanced visibility for certain topics or concerns; (iii) privileged access to EU institutions, enabling those concerns to be tabled in a robust way; and (iv) the entitlement to a reasoned institutional response facilitating public and political scrutiny.

74. First, the ECI sets up a permanent and official avenue for citizens to organise themselves around a particular issue. It offers them a platform that enables them to launch and make public an initiative and to gather support for that initiative from other citizens in the different Member States. In that way, it serves as a vehicle to bring together issues of common interest between citizens across Member States' boundaries and furthers the strengthening of the EU public space. Second, the ECI Regulation also ensures transparency and visibility of a successful ECI by making its publication in the register without delay compulsory, pursuant to Article 10(1)(a) of the ECI Regulation. Third, the ECI provides access to the institution responsible for initiating the legislative process, the Commission. Article 10(1)(b) of the ECI Regulation establishes that once the Commission receives a citizens' initiative in accordance with Article 9 of that regulation, it is obliged to receive the organisers at 'an appropriate level' in order to allow them to explain the ECI in detail. Pursuant to Article 11 of the ECI Regulation, the organisers of an ECI are given

the possibility to present it at a public hearing at the Parliament. Fourth, Article 10(1)(c) of the ECI Regulation imposes on the Commission the obligation to set out in a communication its legal and political conclusions on the ECI, the action it intends to take (if any), and the reasoning behind its position. That communication shall, according to Article 10(2) of the ECI Regulation, be notified to the organisers, to the European Parliament and to the Council, and shall be made public.

75. The Appellants argue, however, that the ECI should lead to a (direct) debate within the framework of the legislative procedure and, in particular, before the institution holding democratic legitimacy — the Parliament.

76. I have already discussed in some detail why, in terms of its constitutional and institutional set-up, the ECI was not established as an avenue for bypassing the existing legislative process, but as a tool to fuel that process. (45) Seen from this perspective, the ECI creates an institutional mechanism to channel the citizens' political input towards the institutions, which are, and remain, in charge of the legislative process, including the launching of it.

77. The Appellants' argument concerning (the absence of) direct access to and direct engagement with the institution holding democratic legitimacy, namely the Parliament, is somewhat puzzling. It ought to be stressed again that the legislative configuration of the ECI enables the members of the citizens' committee of a successful ECI to have direct access to the Parliament. Pursuant to Article 11 of the ECI Regulation, they are given the possibility to present their initiative before the Parliament. This specific element of the procedure was introduced by an amendment of the Parliament itself during the negotiations of the ECI Regulation. (46) The discussion of an ECI at the Parliament enables a group of citizens to raise awareness of issues of interest to them before that institution, thereby also opening up the possibility that their initiative will be taken up by the Parliament or some of its members. The Parliament can espouse the objectives of an ECI and promote them through its own power to request an initiative, if the required parliamentary majorities are secured. (47)

78. Thus, the particular added value of the ECI resides, not necessarily in certainty of outcome, but in the avenues and opportunities it creates. It affords citizens the possibility of participation by presenting their initiative to the Commission and at the hearing organised at the European Parliament, thereby triggering political debate in the institutions without the need to await the launch of a legislative procedure. (48) Therefore, the success of an ECI is measured not only by whether it is transformed into a formal proposal, but also by the democratic debate that it triggers. (49)

79. Finally, as a comparative aside, it might be added that the lack of binding effects of an ECI on the addressee institution is not exceptional.It fits well within the model of 'agenda-setting' initiatives, which differ from 'direct popular initiative' systems where the proposal is directly submitted for a referendum to the electorate. (50) As already outlined above, (51) the ECI's institutional design has always been one of the former category, not the latter one. Indeed, whereas national agenda-setting initiatives may grant access to national parliaments in their capacity as the national institutions having the right of initiative, within the *sui generis* system of the European Union, the ECI is similarly addressed to the institution which is vested, as noted above, with the power of initiative.

80. From all the above, it is apparent that the ECI is much more than a mere symbolic nod toward participative democracy. It constitutes an institutional vehicle to allow for the emergence of policy issues of interest to a group of citizens. It helps crystallise those issues as matters of European interest shared between different Member States. It gives visibility to matters of concern to citizens, which may not already be on the agenda of the institutions or even on the agenda of the political groups represented in the European Parliament. It allows direct access to the institution that, in the particular *sui generis* EU institutional system, holds the power of legislative initiative. Moreover, it obliges that institution — the Commission — to seriously consider and engage in an assessment of the proposals of a successful ECI, and to do so publicly and subject to public scrutiny. It ensures that the content of the ECI is considered and debated publicly at the democratically elected European Parliament. All these reasons highlight that, despite the fact that the ECI system as currently conceived in primary and secondary law does not lead to

an obligation on the Commission to present a proposal, it has an indubitable added value as a *sui generis* agenda-setting mechanism.

81. The submissions of the Appellants fail to demonstrate that the interpretation of Article 11(4) TEU and of the ECI Regulation embraced by the General Court in the judgment under appeal is contrary to the (properly defined) objective or the *effet utile* of the ECI mechanism.

82. The arguments put forward by the Appellants rather reveal a slightly different problem: after having successfully made use of the ECI mechanism and, as a result, engaged with the relevant institutions, the Appellants effectively disagree with the substantive outcome of their participative experience. They remain unsatisfied not only with the political choice of the Commission not to present a proposal, but also with the discussion held at the hearing that they were granted at the Parliament. The interaction with the Commission (a meeting with a member of the Commission) is described, in the words of the Appellants, (52) as frosty, whereas the members of the Parliament are said to have been more interested in lecturing than listening. It can be left open at this juncture what such propositions imply about respect for the essence of democracy, namely the potential for disagreement with an individual policy outcome while respecting the deliberative process and its institutions.

83. However, all the preceding considerations lead to the conclusion that the ECI, on a correct interpretation of Article 11(4) TEU and the ECI Regulation, is far from being a 'dead letter'. The letter of those instruments just says something different from what the Appellants would like it to say.

84. One last concluding remark is warranted. The analysis of the first ground of appeal raised by the Appellants led to interpreting, on the basis of its text and context (historical and present), as well as its aim and purpose, the proper place of the ECI as currently designed in the legislative process of the European Union. Although stressing in a positive light some of its novel features, this Opinion certainly does not suggest that the ECI is a perfect mechanism that provides a miraculous solution to the alleged or real shortcomings of the European Union in terms of democratic legitimacy, including the reduction of the alleged distance between citizens and the EU institutions. Indeed, a number of aspects of the current institutional design of the ECI have been the object of (more or less constructive) scholarly criticism. (53) Its legislative framework was also recently the subject of institutional discussions (54) and an amendment. (55) Those debates then logically link back to the discussion on potential changes to the role of the Commission and the role of its power of initiative on a request from other institutions.

85. Thus, in the context of debates about the potential future institutional design and set-up, a number of other, perhaps even better, options might be envisaged, pursuing the same or even different aims. However, the present case concerns the ECI mechanism in its institutional design as set out in the TEU and developed further by the ECI Regulation. Closing with the metaphor already introduced, it is for the legislature to decide, if it wishes to, that there shall no longer be a rabbit, but indeed a pigeon, or even a cat or a whale for that matter.

86. As a result of all the foregoing considerations, it is my view that the first ground of appeal must be rejected in its entirety as unfounded.

B. Second ground: distinction between legal and political reasons

87. By the second ground of appeal, the Appellants submit that, while admitting that the Commission failed to distinguish in the Communication between 'legal' and 'political' reasons, as required by recital 20 of the ECI Regulation, the General Court erred in law by finding, in paragraphs 128 and 132 of the judgment under appeal, that recital 20 is irrelevant. The Appellants claim that recitals play a role in the interpretation of substantive provisions of EU law. Recital 20 interprets Article 10(1)(c) of the ECI Regulation and is not inconsistent with that provision. The division between legal and political conclusions is, moreover, important to enable the review by the Court of those two categories.

88. The Commission contends that the judgment under appeal contains no error of law and argues, in the alternative, that the Communication has actually set out its legal and political conclusions separately.

89. In paragraph 128 of the judgment under appeal, the General Court observed that, according to established case-law, the preamble to an EU act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of an act or for interpreting them in a manner which is clearly contrary to their wording. (56)

90. On the basis of that case-law, the General Court found in paragraphs 129 and 130 of its judgment that, since the obligation to set out separate legal and political conclusions mentioned in recital 20 of the ECI Regulation is not reiterated in the body of Article 10(1)(c), the Commission is not under such an obligation when drafting the communication provided for in that provision. Next, the General Court added in paragraph 131 of the judgment under appeal that, in any event, supposing that the Commission were legally obliged to set out separately those legal and political conclusions, such an obligation being purely formal, it could not result in the annulment of the communication.

91. In my view, the reasoning of the General Court concerning the application in the present case of the case-law on the role of recitals in the interpretation of legal acts of the Union is indeed vitiated by an error in law. However, that error has no impact on the operative part of the judgment, which can correctly be maintained on the additional legal grounds set out in the reasoning of the General Court.

92. It is true that, according to the settled case-law relied upon in the judgment under appeal, recitals cannot derogate from the actual provisions that they are supposed to interpret, or serve as the basis for an interpretation that clearly contradicts their wording, by adding, for example, new requirements that are not envisaged in the operative part of a legal act. Thus, recitals are naturally not in themselves operative legal provisions.

93. However, beyond those two clear categories (no ‘mirroring provision’ and a clear contradiction), recitals in general are an important interpretative element, which set out authoritatively the will of the legislature, operating in connection with the specific provisions to which they correspond. In this way, they are often used for the purposes of teleological interpretation in order to clarify or offer a more precise interpretation of a legal provision contained in the legal text. (57) However, if used in such a way, there is no disguising that the dividing line between interpretation and not adding new obligations on the basis of a recital might become dangerously blurred. (58)

94. In the present case, the only crucial difference between the wording of Article 10(1)(c) of the ECI Regulation and recital 20 is that the word ‘separately’, which features in recital 20, is not used in the text of the article in question. The rest is, however, virtually the same (the Commission must set out its legal and political conclusions within a period of 3 months).

95. There is thus a nuance in wording. But, in view of the logical scope of the rules in question, that hardly qualifies as a contradiction between the recital and the article. In the absence of a contradiction, and in view of the practice of the Court just outlined, it would not be inconceivable to read the word ‘separately’ into the wording of Article 10(1)(c) of the ECI Regulation.

96. I do not think, however, that that should be done, for the following reasons.

97. The term ‘separately’ could be understood in two different ways: either meaning that both legal and political considerations must be *present* and/or that they must not only both be present, but also *physically separated* in the text of the communication. (59)

98. Recital 20 was introduced by an amendment of the European Parliament during the negotiations of the ECI Regulation, together with the reference in Article 10 to ‘legal and political’ conclusions. The justification accompanying that amendment merely points to the fact that ‘the Commission’s reaction … should be both legally and politically justified’. (60)

99. Having regard to its context and purpose, recital 20 could indeed be understood as underlining the obligation of the Commission to state in a clear fashion its conclusions of a legal and political nature, in such a way that citizens can understand the distinct nature of such considerations. In this way, the obligation contained in Article 10(1)(c) of the ECI Regulation to make the legal and political conclusions explicit relates to the quality and content of the reasoning in the response of the Commission to a successful ECI. This is in line with the need, as described in recital 20, for the Commission to 'explain in a clear, comprehensible and detailed manner the reasons for its intended action' and likewise to 'give its reasons if it does not intend to take any action'. Indeed, such an enhanced obligation to state reasons is, as well as being an essential procedural requirement, the guarantee and proof of thorough, serious and detailed consideration of a successful ECI.

100. In this way, Article 10(1)(c) of the ECI Regulation interpreted in conjunction with recital 20 simply means that both legal and political considerations must be present in the reasoning of the Commission, and that a reader must be able to decipher what is what. However, I have difficulty in adhering to a formalistic interpretation that would suggest that, beyond that requirement, the Commission is obliged to structure its communication into different sections compulsorily bearing the titles of 'legal considerations' and 'political considerations', the lack of observance of which would lead to the automatic annulment of the communication.

101. There is one additional, pragmatic reason: the physical separation of legal and political conclusions at this stage of the ECI process is somewhat artificial and might be difficult to achieve.

102. First, the legal assessment of a proposed ECI takes place primarily at the time of registration under Article 4(2), when the Commission checks compliance with the values of Article 2 TEU, as well as its own powers to submit the requested proposal. Since that examination can only lead to a rejection of the registration in certain 'manifest' circumstances, there remains a place for legal analysis at the stage when the communication is made under Article 10(1)(c). That legal analysis can, moreover, check compatibility with other EU legal acts. However, at that stage, it is natural that the greater part of the assessment contained in the Commission's communication is likely to be of a political nature, as the decision on the follow-up on a successful ECI is essentially a political one. Thus, legal conclusions at this stage are likely to be limited to a descriptive presentation of the law in force, which serves as the necessary context of reference to develop the political conclusions.

103. Second, even if that were not the case and the nature of the legal conclusions could be interpreted to be broader, at the final stage of an ECI, where the Commission is obliged to address the merits of the ECI in quite some depth, it might be difficult to categorically state which of the arguments are legal and which are political in nature. Unless the concept of 'legal considerations' were to be limited to a dry restatement of the relevant law and international obligations (the interpretation of which could in any event already be said to include some political assessment), a fair number of the arguments advanced at this stage of the substantive assessment are likely to be transitive.

104. In the light of the above, it must be concluded that the Communication fulfils the requirements of Article 10(1)(c), interpreted in conjunction with recital 20. It presents its conclusions in a way that allows for an understanding of the legal and political nature of the considerations it contains. As the Commission notes, Section 2 of the Communication, entitled 'State of play', is devoted to laying out the state of the law. Section 3, entitled 'Assessment of the European citizens' initiative requests', explains the political assessment of the ECI. Moreover, the Appellants have at no point argued that they were unable to identify the political or legal nature of the considerations of the Commission in the Communication.

105. In points 128 to 131 of the judgment under appeal, the General Court relies on an interpretation of recital 20 as imposing a formal requirement and, on that basis, there is an apparent contradiction between recital 20 and Article 10(1)(c). For the reasons stated above at points 92 to 96 of this Opinion, I suggest that such reasoning is vitiated by an error of law.

106. However, it is also clear that the operative part of the judgment under appeal continues to stand, as it is well founded on the legal grounds explained in points 97 to 105 of this Opinion.

107. As a result, since the operative part of the judgment under appeal remains well founded, the second ground of appeal must be rejected as ineffective.

C. Third ground: judicial review

108. By the third ground of appeal, the Appellants claim that the General Court erred in law in paragraph 170 of the judgment under appeal, where it declared that the decision of the Commission not to submit a legislative proposal on the basis of the ECI is subject only to limited review by the Court of Justice, with only manifest errors of assessment capable of vitiating such a decision.

109. The Appellants argue that it is not possible to know whether the Communication is free of manifest errors because there is no criterion offered for distinguishing manifest from non-manifest errors. In their view, the General Court has set the bar too low and has reserved for itself the right to freely determine whether the test has been passed or not. The Appellants further claim that there is a paradox in holding that the reasons for the Communication must be reviewable if the standard of review is so low and obscure. Moreover, they contend that the present case differs from the *Rica Food* case, (61) cited by the General Court as a relevant precedent for the application of the 'manifest errors' test. That case dealt with rights of non-citizens in relation to nebulous financial interests, unlike the present case, which is about the rights of EU citizens with regard to a clearly defined democratic right. The Appellants summarise the position of the General Court as follows: 'because the Community enjoys a wide margin of discretion with regard to sugar from the Antilles, it also must enjoy a wide discretion with regard to dismissing an ECI it does not happen to sympathise with'.

110. The Commission submits that the third ground of appeal should be rejected as unfounded. Only limited judicial review is compatible with the Commission's power of initiative. Referring to the judgment in *Schönberger* v *Parliament*, (62) the Commission further claims that it would be inconsistent if a communication adopted pursuant to Article 10(1)(c) of the ECI Regulation were subject to full review, while decisions taken by the Parliament regarding how a petition ought to be dealt with are not amenable to judicial review at all.

111. The present ground of appeal raises the crucial issue of the degree of scrutiny to which EU Courts should subject a communication containing the decision of the Commission on the follow-up to a successful ECI. This matter is necessarily connected with the issues raised in the first ground of appeal, the examination of which confirmed that the Commission is under no obligation to adopt a proposal for a legal act proposed by a successful ECI.

112. Paragraph 170 of the judgment under appeal, which is the object of criticism under the present ground of appeal, is included in the examination by the General Court of the fifth ground for annulment raised by the Appellants at first instance. After having noted that the Commission must be allowed broad discretion in its power of legislative initiative and, consequently, in deciding whether to take action following a successful ECI, (63) paragraph 170 of the judgment under appeal sets out the scope and the level of judicial review applicable to the Communication. According to that paragraph, it 'must undergo limited review by the Court, aimed at verifying, in addition to the adequacy of its statement of reasons, the existence, inter alia, of manifest errors of assessment vitiating that decision'. In arriving at that statement, the General Court referred by analogy to the judgment of the Court in *Rica Foods* (64) as the relevant authority.

113. In my view, the arguments of the Appellants have not revealed any error of law in the paragraph of the judgment under appeal just quoted.

114. Before analysing the *standard* of judicial review applied in the judgment under appeal, it is necessary to start by recalling the *scope* of judicial review that follows from that judgment.

115. In the paragraph contested by the Appellants, the General Court firmly declared that the Communication is subject to judicial review. That confirmation could be said to strengthen considerably the position of the ECI. It provides for a judicial guarantee of adequate consideration by the Commission of a successful ECI. It might only be added that such a finding was far from a foregone conclusion, as previous academic discussion of the issue bears out. (65)

116. Moreover, the judgment under appeal has established the reviewability of both the *adequacy of the statement of reasons* in the Communication and the *assessment* that forms the basis of its substantive content.

117. As the Commission notes in its submissions, that position contrasts with the case-law of the Court on judicial review of the Parliament's position on how a petition should be dealt with. Indeed, the Court found that position not to be amenable to judicial review, due to the broad discretion of a political nature enjoyed by the Parliament. (66) Conversely, despite acknowledging the broad discretion of the Commission in this regard, the judgment under appeal does not consider that the *assessment* contained in the Communication is a decision of a political nature shielded from judicial review. (67)

118. In my view, rightly so. That robust approach correctly reflects the system and aims of the ECI. The crucial significance of the ECI mechanism as an expression of the democratic principle, the exigent requirements to have such an ECI succeed, and the procedural guarantees established by the ECI Regulation, all justify that, even in the face of considerable discretion of a political nature, the review by the EU Courts covers not only the adequacy of the statement of reasons, but also the verification of the merits on which the decision of the Commission is based. (68)

119. Indeed, the reviewability of communications adopted pursuant to Article 10(1)(c) of the ECI Regulation is intrinsically connected with the obligations imposed on the Commission by the ECI Regulation at this last stage of the ECI process. The Commission is required to produce a clear, detailed and complete statement of the reasons behind its position. The statement must contain both legal and political considerations. However, the obligations imposed by Article 10 of the ECI Regulation are not merely of a procedural nature, but encompass the obligation to give due and in-depth consideration to the proposals of a successful ECI.

120. Regarding the *standard* of review, the judgment under appeal adopts two different approaches. First, it states that EU Courts must verify the adequacy of the statement of reasons. The review of this element, which is, as noted above, a crucial institutional obligation triggered by a successful ECI, (69) is not limited to the 'manifest errors' test. It is thus a full review. Second, the General Court states that the review shall cover, additionally, verification of the existence of *manifest errors of assessment* vitiating that decision.

121. In this regard, the Appellants contest the level of review applied to that second element, namely, the *material assessment* contained in the Commission's Communication. In particular, the Appellants focus their criticism on the case-law referred to in the judgment under appeal which serves as authority for the standard of judicial review adopted. They insist on the differences between the situation at issue and that of the judgment in the *Rica Foods* case, in order to criticise the standard of judicial review offered by the General Court in the judgment under appeal.

122. The criticism of the Appellants in this regard is, in my view, mistaken.

123. It must be emphasised that the standard of judicial review limited to the verification of manifest errors of assessment attaches to situations where EU institutions enjoy wide discretion, in particular, when they adopt measures 'in areas which entail choices, in particular of a political nature'. (70) Indeed, it is settled case-law of the Court that the intensity of its review varies with the discretion accorded to the institutions. (71)

124. It was in this context, that is, when referring to the appropriate standard of review, that reference was made to *Rica Foods* as a relevant authority. In that context, the reference is entirely appropriate, since it

has, contrary to the suggestions of the Appellants, little to do with the subject matter of the imports in that case, but is cited as an indication of the appropriate standard of review in general. It might even be added, on a side note, that the reference to that particular case was well chosen, since that case gave rise to consideration of the specific question of the standard of review of political discretion adopted by the then Court of First Instance, as is apparent from the Opinion of Advocate General Léger in that case. (72)

125. Thus, in general, in areas in which the discretion of the Commission is very wide, as noted in connection with the first ground of appeal, the correlating standard of judicial review is a limited one. That discretion is above all of a political nature, but it can also involve the Commission carrying out complex assessments when it decides (not) to make use of its power of initiative.

126. In any case, having in mind that the core of the Commission's decision, contained in the Communication, not to adopt the proposal requested by the ECI rests predominantly on an assessment of a political nature, (73) and assuming that such an inherently political decision is to be made subject to judicial review at all, I do not see how such assessment could be subjected to stringent judicial review without transgressing the boundaries imposed by the principle of institutional balance, in particular as between the EU executive and EU Courts.

127. Indeed, a limited standard of review is necessitated by the political latitude in the power of initiative of the Commission, which intrinsically involves reconciling divergent interests and selecting policy options. That latitude also follows from the political nature of the core assessment in the Commission's communication of how and whether to follow up on successful ECIs, as part as its power of initiative. EU Courts cannot substitute the political assessment made by the Commission, which must inform the Commission's decision whether to trigger the decision-making process by exercising its power of initiative.

128. The third ground of appeal must therefore be, in my view, dismissed as unfounded.

D. Fourth ground: manifest errors of assessment

129. By the fourth ground of appeal, the Appellants claim that even if the standard of review applied by the General Court were correct, the General Court failed to hold that the reasons provided by the Commission in the Communication satisfy the test for manifest error.

130. The Appellants take issue with five points of the Commission's Communication which, in their view, are vitiated by such manifest errors of assessment.

131. First, the Appellants claim, relying on the judgment in *Brüstle*, (74) that it is clearly inconsistent to prohibit the patenting of inventions that presuppose the destruction of human embryos and at the same time to fund that very same research.

132. The inferences drawn by the Appellants from the Court's ruling in the judgment in *Brüstle* go far beyond the proper scope of that case.

133. As the Commission rightly points out, that judgment concerned exclusively the issue of patentability. Indeed, the purpose of Directive 98/44/EC, (75) which was the object of interpretation in that case, 'is not to regulate the use of human embryos in the context of scientific research. It is limited to the patentability of biotechnological inventions'. (76) Exclusion from patentability is unrelated to the prohibition of scientific research or its funding in a given field. (77) Indeed, a specific preclusion of patentability in a given field means making it impossible to establish an exclusive right of commercial exploitation, which is quite different from the issues raised by scientific research in its different applications.

134. The General Court did not therefore err in stating, in paragraph 173 of the judgment under appeal, that the Commission's conclusion in point 2.1 *in fine* of the Communication, according to which the

Brüstle judgment did not deal with the question whether such research could be carried out and funded, was not vitiated by a manifest error of assessment.

135. Second, the Appellants claim that it is self-evident that it is impossible to strike a balance between the right to life of the embryo and the interests of human embryonic stem cell ('hESC') research. The concept of human dignity forbids striking such a balance. Accordingly, the Appellants claim that the Communication was manifestly wrong to state that there is no need to clarify the legal status of the embryo.

136. I agree with the Commission that this argument is ineffective. It is not directed against a point of the General Court's reasoning where it analysed the alleged errors of assessment raised by the Appellants in their fifth ground for annulment, but against one of the statements of the General Court concerning the fourth ground for annulment, related to the alleged infringement of the duty to state reasons. Indeed, in paragraph 156 of the judgment under appeal, the General Court examined the adequacy of the statement of reasons.

137. Third, the Appellants have put forward a series of arguments that essentially take issue with the reasoning of the General Court regarding hESC research. The Appellants claim that the statement in the Communication that the 'triple lock' system provides an ethically sound criterion for the assessment of a research project constitutes a manifest error of assessment. The Commission's claim that such a system, which allows the funding of research projects that are illegal in 27 out of 28 Member States, is a high standard, is not only a manifest error but is outright absurd. In this connection, the Appellants claim that the approach of the General Court to differing ethics amounts to an error of law because it is not the role of the Court with respect to a successful ECI to determine the merits of competing socio-ethical issues, that being an issue not for the judiciary but for the political process. The Appellants further argue that the position of the General Court is itself unethical. It has adopted an approach of pure subjectivism which attempts to make the Commission's views unfalsifiable. Finally, the Appellants claim that the review carried out by the General Court is incomplete as it does not examine all the errors of assessment alleged by the Appellants. In this regard, the Appellants complain that, despite the fact that the *Brüstle* case is discussed, the judgment under appeal does not contain any further discussion about the Commission's assertions regarding the 'triple lock' system.

138. The arguments put forward by the Appellants outlined above are unfounded. Those arguments appear to be based on an incorrect understanding of the judgment of the General Court.

139. In paragraph 176 of the judgment under appeal, which is the focus of criticism of the Appellants' argument, the General Court first outlined the essential features of the different ethical approaches of the ECI and of the Commission, by pointing out that 'the ethical approach of the ECI at issue is the one whereby the human embryo is a human being which must enjoy human dignity and the right to life, whereas the Commission's ethical approach, as it appears from the Communication, takes into account the right to life and human dignity of human embryos, but, at the same time, also takes into account the needs of hESC research, which may result in treatments for currently incurable or life-threatening diseases …'. It then concluded that 'therefore, it does not appear that the ethical approach followed by the Commission is vitiated by a manifest error of assessment in that regard and the applicants' arguments, which are based on a different ethical approach, do not demonstrate the existence of such an error'.

140. It is apparent that the General Court did not endorse any position or take any ethical stance which could be criticised as 'juridifying' political choices. Contrary to what the Appellants argue, the judgment of the General Court precisely preserves political discretion, which, under the current institutional decision-making set-up, appertains to the Commission, including where an ECI has been successful. In reviewing whether the Communication contained any manifest error of assessment, it merely pointed to the fact that the Appellants endorse an ethical standpoint different from the one supported by the Commission.

141. That reasoning cannot be criticised. As rightly pointed out by the Commission, in conformity with the applicable standard of judicial review, that approach highlights the political discretion of the Commission in its assessment of the sufficiency and adequacy of the current legal framework, as one of the elements of reasoning supporting its decision not to exercise its discretion to use its power of initiative in the sense proposed by the ECI at issue.

142. The reasoning of the General Court in paragraphs 176 and 177 of the judgment under appeal therefore adequately covers, in my view, the arguments raised by the Appellants. I see no reason to further expand on those arguments, since they either criticise the value choices expressed by the Commission in the exercise of its discretion, or reproach the General Court for failing to adopt ethical standpoints and endorse certain values when it had no reason to do so.

143. Fourth, the Appellants claim that the assertion, unaccompanied by any evidence, that the provision of abortions funded by EU taxpayers reduces abortions is manifestly paradoxical.

144. That argument is ineffective, inasmuch as it does not affect the main thrust of the argument of the General Court in response to the Appellants' complaints regarding the Commission's considerations relating to development cooperation. (78) In any case, this argument seems to be based on a rather questionable reading of the Communication, since no such assertion is to be found in it. (79)

145. Fifth, the Appellants argue that the General Court's judgment has misrepresented their arguments by stating, in paragraph 164 of the judgment under appeal, that 'the applicants also argue that the MDGs and the IPCD Programme of Action do not constitute binding legal commitments, but policy objectives'. Instead, the Appellants sought to raise the point that the Commission had falsely claimed that those documents contained binding legal commitments, which was a manifest error by the Commission.

146. Even if it is understood as claiming that the General Court erred in not finding that the Commission's declaration that the MDGs and the IPCD programme contain legal obligations was a manifest error, this argument cannot succeed as, indeed, the Commission's Communication does not contain such proposition. That argument does not therefore reveal any error of law in the finding of the General Court that the arguments of the Appellants presented in paragraph 164 of the judgment under appeal do not demonstrate the existence of manifest errors of assessment.

147. As a result of all these considerations, the fourth ground of appeal shall be dismissed, in my view, as partly ineffective and partly unfounded.

E. Fifth ground: mischaracterisation of the ECI

148. By the fifth ground of appeal, the Appellants claim that the judgment under appeal contains an error of law in its paragraph 156, where it was held that there was no need to address the argument on whether the human embryo is a human being.

149. The Appellants contend that the purpose, objective and rationale of the ECI is clear from the subject matter, which it describes as the 'juridical protection of the dignity, the right to life and to the integrity of every human being from conception …'. According to the Appellants, the General Court arrived at that conclusion because it mischaracterised the purpose of the ECI by holding that its aim is not the protection of the embryo as a human being, but simply the enactment of the three proposals made to the EU legislature.

150. According to the Commission, the interpretation of a document emanating from a private party pertains to the assessment of facts and does not, save where the clear sense of the evidence has been distorted, constitute a point of law, which is subject to review by the Court on appeal. (80)

151. I am not convinced about the appropriateness of characterising the issue of the definition of the subject matter of a (successful) ECI as an element of fact, similar to a document of a private party. While,

of course, what has been written down where is a question of fact, the immediate legal qualification of those facts, for the purpose of 'registrability' under Article 4(2) of the ECI Regulation, as well as other later stages of an ECI, is clearly not just factual. Moreover, it could hardly be suggested that an ECI is similar to a contract negotiated between two private parties and then taken note of by the EU Courts in a competition law context, for example. In the context of an ECI, there is an ongoing exchange and evaluation of (effectively a series of) acts by private parties with the EU institutions.

152. However, as intriguing as a discussion about the boundary between facts and law could be in general, I think in the context of the present case, it would also be entirely redundant. The judgment under appeal has not mischaracterised the purpose of the ECI in any way.

153. The argument of the Appellants boils down to claiming that the Commission should not have construed the ECI as requiring only what was specifically asked for (the three concrete legislative proposals in the annex), but should also have construed the subject matter of the ECI as a specific request to adopt an explicit legal position on the human nature of embryos.

154. I disagree.

155. Pursuant to Article 4(1) of the ECI Regulation, in order to request registration of an ECI, the organisers must provide the relevant information set out in Annex II. That annex requires providing a title in no more than 100 characters (1); a subject matter, in no more than 200 characters (2); and a description of the objectives, in no more than 500 characters (3). Moreover, and on a non-compulsory basis, the organisers may, if they wish, submit a draft legal act.

156. In the ECI at issue, the specific objectives under (3) are clearly identified as a proposal to 'ban and end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health'. (81) These objectives were accompanied by a specific draft legal act.

157. In this connection, the Court has already emphasised, for the purposes of the registration of a proposed ECI pursuant to Article 4 of the ECI Regulation, the importance of careful and impartial examination by the Commission of all the elements provided by the organisers of an ECI, when they attach, as an annex to their proposal, more detailed information on the subject, objectives and background of their proposal. (82) All those elements must, moreover, be duly taken into account for the purposes of the Commission's communication pursuant to Article 10(1)(c) of the ECI Regulation.

158. At both of these stages, the objectives of an ECI logically remain the same. In the present case, the Commission understood the objectives by reference to the specific proposals made by the ECI, thereby concluding that they could be registered, since they fulfilled the conditions of Article 4 of the ECI Regulation. I find the argument that the Commission should have, in parallel (or in addition), understood the objectives of the ECI also by reference to the subject matter referred to above very peculiar, since that could quite possibly have meant that the objective would not have fulfilled the requirements of Article 4(2)(b) of the ECI Regulation.

159. Thus, in a nutshell, the Commission is in fact being reproached for not construing, in addition to the specific, clearly stated objectives of the ECI, a further objective drawn from the title of the ECI. Construing the ECI in that way would probably have been to its detriment, since that objective (or potentially the entire ECI) would then have had to be excluded from registration. I personally must admit to having quite some difficulty in identifying a power of the Commission entitling it to submit a proposal for a legal act of the European Union settling the issue whether the human embryo is a human being, in line with Article 4(2)(b) of the ECI Regulation.

160. In those circumstances, it cannot be stated that the General Court erred in law in paragraph 156 of the judgment under appeal where it found that the objective of the ECI at issue was not the definition or

clarification of the legal status of the human embryo, but the submission by the Commission of those three proposals to the EU legislature.

161. It is therefore my view that the fifth ground of appeal must be dismissed as unfounded.

VI. Costs

162. According to Article 138(1) of the Rules of Procedure, applicable to appeal proceedings pursuant to Article 184(1) thereof, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.

163. The Commission has applied for the costs. The Appellants have, in my view, been unsuccessful. The Appellants should therefore be ordered to pay the costs relating to the present appeal proceedings.

VII. Conclusion

164. In the light of the foregoing considerations, I propose that the Court:

– dismiss the appeal;

– order the Appellants to bear their own costs and to pay those incurred by the Commission.

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1 Original language: English.

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2 Judgment of 23 April 2018, *One of Us and Others* v *Commission* (T-561/14, EU:T:2018:210).

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3 Regulation of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (OJ 2011 L 65, p. 1), ('the ECI Regulation').

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4 See judgments of 12 September 2017, *Anagnostakis* v *Commission* (C-589/15 P, EU:C:2017:663), and of 7 March 2019, *Izsák and Dabis* v *Commission* (C-420/16 P, EU:C:2019:177), as well as the judgments of the General Court of 19 April 2016, *Costantini and Others* v *Commission* (T-44/14, EU:T:2016:223); of 3 February 2017, *Minority SafePack — one million signatures for diversity in Europe* v *Commission* (T-646/13, EU:T:2017:59); of 5 April 2017, *HB and Others* v *Commission* (T-361/14, not published, EU:T:2017:252); and of 10 May 2017*, Efler and Others* v *Commission* (T-754/14, EU:T:2017:323).

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5 The other three successful ECIs to date being *Right2Water*, *Stop vivisection* and *Ban glyphosate*. See http://ec.europa.eu/citizens-initiative/public/initiatives/successful.

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6 ECI (2012) 000005.

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7 OJ 2002 L 248, p. 1.

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8 COM(2011) 809 final.

9 OJ 2006 L 378, p. 41.

10 COM(2014) 355 final.

11 Order of 26 November 2015, *One of Us* v *Parliament and Others*, (T-561/14, not published, EU:T:2015:917).

12 Judgment of 23 April 2018 (T-561/14, EU:T:2018:210).

13 Paragraphs 53 to 65 of the judgment under appeal.

14 Paragraphs 66 to 101 of the judgment under appeal.

15 Paragraph 102 et seq. of the judgment under appeal.

16 These three situations are set out in paragraph 103 of the judgment under appeal: '… first, where the measures requested by the ECI are no longer necessary … second, where the adoption of the measures requested by the ECI has become impossible subsequent to the registration of the ECI and, third, where the ECI contains no specific proposal for action but only raises awareness of a problem that should be resolved, leaving it to the Commission to determine what action, if any, may be taken.'

17 Judgment of 14 April 2015 (C-409/13, EU:C:2015:217, paragraphs 75 and 76).

18 See, for example: in German, '… können die Initiative ergreifen und die Europäische Kommission auffordern'; in Spanish, '… podrá tomar la iniciativa de invitar a la Comisión Europea'; in Italian, '… possono prendere l'iniziativa d'invitare la Commissione europea'; in Dutch, 'kunnen zij het initiatief nemen de Europese Commissie te verzoeken'; in Portuguese, 'pode tomar a iniciativa de convidar a Comissão Europeia'; and in Czech, 'se může ujmout iniciativy a vyzvat Evropskou komisi'.

19 For an illustration, see my Opinion in *Belgium* v *Commission* (C-16/16 P, EU:C:2017:959, points 114 to 115 and 140 to 141).

20 OJ 2003 C 169, p. 1. That provision read as follows: 'No less than one million citizens coming from a significant number of Member States may invite the Commission 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 Constitution. A European law shall determine the provisions for the specific procedures and conditions required for such a citizens' initiative.'

21 See, for example, Morelli, M., *La democrazia partecipativa nella governance dell'Unione europea*, Giuffrè editore, Milan, 2011, p. 55 et seq.

22 See, for connected amendments which draw on elements of the citizens' initiative, the European referendum and the right to petition, Lamassoure, A., 'Proposition d'amendement à l'Article 34 (bis)', containing an obligation on the Commission to present a proposal, and Einem, C., and Berger, M., 'Suggestion for amendment of Article: 34a', on an obligation to hold a referendum. The amendments can be consulted at: http://european-convention.europa.eu/EN/amendemTrait/amendemTrait2352.html?lang=EN.

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23 See, Meyer, J., 'Suggestion for amendment of Article: I-46, part I, title VI (CONV 724/03)'. According to the explanation for that amendment: 'It will extend the existing right of petition to a right of the citizens to present legislative proposals to the Commission of the EU. The Commission has then to decide whether it will take legislative activity or not.'

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24 Amendment 19, Report I on the proposal for a regulation of the European Parliament and of the Council on the citizens' initiative (COM (2010) 0119 — C7-0089/2010 — 2010/0074 (COD)), Committee on Constitutional Affairs A7-0350/2010.

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25 On the debate of the European Parliament, see Szeligowska, D., and Mincheva, E., 'The European Citizens' Initiative — Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis', *Perspectives on European Politics and Society*,Vol. 13, 2012, issue 3, pp. 270 to 284, at p. 274.

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26 Explanatory Statement, Report I on the proposal for a regulation of the European Parliament and of the Council on the citizens' initiative (COM(2010) 0119 — C7-0089/2010 — 2010/0074 (COD)), Committee on Constitutional Affairs A7-0350/2010.

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27 The broad approach to admissibility at the registration stage is confirmed by the case-law of the Court, which has so far only interpreted the criterion of Article 4(2)(b) of the ECI Regulation. The Court has declared, in that connection, that the Commission, upon receipt of a proposed ECI, 'is required to interpret and apply the condition of registration of [Article 4(2)(b)] in such a way as to make an ECI more accessible and is entitled to refuse registration only if the ECI manifestly falls outside the framework of its powers'. See, to that effect, judgments of 12 September 2017, *Anagnostakis* v *Commission* (C-589/15 P, EU:C:2017:663, paragraphs 49 and 50), and of 7 March 2019, *Izsák and Dabis* v *Commission* (C-420/16 P, EU:C:2019:177, paragraph 64).

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28 Judgment of 14 April 2015 (C-409/13, EU:C:2015:217, paragraphs 75 and 76).

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29 See, to that effect, judgment of 6 September 2017, *Slovakia and Hungary* v *Council* (C-643/15 and C-647/15, EU:C:2017:631, paragraph 146).

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30 See, in this connection, Opinion of Advocate General Jääskinen in *Council* v *Commission* (C-409/13, EU:C:2014:2470, points 44 and 45).

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31 See, on this debate, Ponzano, P., 'Le droit d'initiative de la Commission européenne: théorie et pratique', *Revue des affaires européennes*, 2009-2010/1, pp. 27 to 35; Ponzano P., Hermanin, C., and Corona, D., *The Power of Initiative of the European Commission: A Progressive Erosion?*, Notre Europe, 2012, p. 7; or von Buttlar, C., *Das Initiativrecht der Europäischen Kommission*, Duncker & Humblot, Berlin, 2003, p. 17.

32 Judgments of 14 April 2015, *Council* v *Commission*, (C-409/13, EU:C:2015:217, paragraph 70), and of 6 September 2017, *Slovakia and Hungary* v *Council* (C-643/15 and C-647/15, EU:C:2017:631, paragraph 146).

33 Judgment of 14 April 2015, *Council* v *Commission* (C-409/13, EU:C:2015:217, paragraph 70).

34 As was the case with regard to a common transport policy under Articles 74 and 75 of the EEC Treaty. See judgment of 22 May 1985, *Parliament* v *Council* (13/83, EU:C:1985:220, in particular, paragraphs 64 to 68).

35 In this regard, the case-law of the Court has consistently recalled that 'the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or of the institutions themselves'. See, for example, judgment of 10 September 2015, *Parliament* v *Council* (C-363/14, EU:C:2015:579, paragraph 43 and the case-law cited).

36 See, to that effect, with regard to the importance of access to documents, judgment of 4 September 2018, *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660, paragraph 108).

37 See, to that effect, judgment of 23 March 2004, *France* v *Commission* (C-233/02, EU:C:2004:173, paragraph 51).

38 It is true that, in a democracy, the simultaneous processing and discussion of initiatives having different or even opposing content is certainly possible. An analogy with the national level could readily be made, where various proposals might be tabled simultaneously and discussed in a parliament. That analogy is, however, not fully pertinent since, at the national level, such situations are inherently tied to the right of initiative of individual members of parliament, of parliamentary groups, or of political clubs in the parliament, which are then likely to clash amongst themselves or with a governmental proposal already tabled. A better analogy in this regard would be with a situation in which one and the same government sends contradictory proposals to the national parliament at the same time, which could hardly be called effective (or even democratic) governance, at whatever level.

39 Order of 5 September 2018, *Minority SafePack — one million signatures for diversity in Europe* v *Commission* (C-717/17 P(I), not published, EU:C:2018:691, paragraph 31).

40 Judgment of 14 April 2015 (C-409/13, EU:C:2015:217).

41 Judgment of 14 April 2015 (C-409/13, EU:C:2015:217, paragraph 75 and 76).

42 Above, points 38 to 41 of this Opinion.

43 Judgment of 12 September 2017, *Anagnostakis* v *Commission* (C-589/15 P, EU:C:2017:663, paragraph 24).

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44 Judgments of 12 September 2017, *Anagnostakis* v *Commission* (C-589/15 P, EU:C:2017:663, paragraph 49), and of 7 March 2019, *Izsák and Dabis* v *Commission* (C-420/16 P, EU:C:2019:177, paragraph 53).

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45 Above, points 39 to 42 of this Opinion.

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46 Amendment 52, Report I on the proposal for a regulation of the European Parliament and of the Council on the citizens' initiative (COM(2010) 0119 — C7-0089/2010 — 2010/0074 (COD)), Committee on Constitutional Affairs A7-0350/2010.

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47 It might be added that the Framework Agreement on relations between the European Parliament and the European Commission (OJ 2010 L 304, p. 47) establishes an important connection between the follow-up of a request from the Parliament pursuant to Article 225 TFEU and the ECI in point 16. The Commission commits itself to report on the follow-up within 3 months of the resolution and, if it does not submit a proposal, it shall give 'detailed explanations' of the reasons. In particular, the Commission 'shall also commit itself to a close and early cooperation with Parliament on any legislative initiative requests emanating from citizens' initiatives'. See, on the interaction with the European Parliament, Karatzia, A., 'The European Citizens' Initiative and the EU Institutional Balance: On realism and the possibilities of affecting EU law-making', *Common Market Law Review,* Vol. 54, 2017, p. 177, at pp. 187 to 190.

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48 See, to that effect, judgment of 10 May 2017, *Efler and Others* v *Commission* (T-754/14, EU:T:2017:323, paragraph 45).

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49 As noted in the Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2013/TN concerning the European Commission of 4 March 2015, point 20.

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50 For a discussion of other systems of initiative in comparative perspective, see Cuesta López, V., 'A Comparative approach to the Regulation on the European Citizens' Initiative', *Perspectives on European Politics and Society*, Vol. 13, 2012, pp. 257 to 269, at p. 263; Petropoulos, E., 'Die Europäische Bürgerinitiative im paneuropäischen Kontext: Wo steht die direkte Demokratie in der EU im Vergleich zu ihren Mitgliedstaaten?', *Saar Blueprints*, 11/2016; Qvortrup, M., 'The Legislative Initiative: A comparative Analysis of the Domestic Experiences in EU Countries', in Dougan, M., Nic Shuibhne, N., and Spaventa, E., *Empowerment and Disempowerment of the European Citizen*, Hart, Oxford, 2012, pp. 291 to 304.

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51 Above, points 39 and 71.

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52 See point 31 of the present Opinion.

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53 For example, Organ, J., 'Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals', *European Constitutional Law Review*, Vol. 10, No 3, 2014, pp. 422 to 443; Guilloud-Colliat, L., 'La mise en oeuvre de

l'initiative citoyenne européenne: anatomie d'un échec', *Revue du droit de l'Union européenne,* Vol. 4, 2008, pp. 175 to 200; and Bouza Garcia, L., and Del Río Villar, S., 'The ECI as a Democratic Innovation: Analysing its Ability to Promote Inclusion, Empowerment and Responsiveness in European Civil Society', *Perspectives on European Politics and Society*, 13(3), 2012, pp. 312 to 324.

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54 See the Reports of the Commission on the Application of Regulation (EU) No 211/2011 on the citizens' initiative (COM(2015) 145 final and COM(2018) 157 final) and the document 'The European Citizens' Initiative: the experience of the first 3 years. European Implementation Assessment', European Parliamentary Research Service, p. 27 et seq. and the resolutions of the European Parliament cited therein.

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55 Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative (OJ 2019 L 130, p. 55). The new regulation does not alter the non-binding character of a successful ECI on the Commission. However, it introduces in this specific regard modifications related to political oversight by the Parliament of the follow-up by the Commission (Article 16), and the obligation of the Parliament to assess the political support for the initiative after the hearing (Article 14(3)).

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56 By reference to judgments of 19 November 1998, *Nilsson and Others* (C-162/97, EU:C:1998:554, paragraph 54); of 25 November 1998, *Manfredi* (C-308/97, EU:C:1998:566, paragraph 30); and of 24 November 2005, *Deutsches Milch-Kontor* (C-136/04, EU:C:2005:716, paragraph 32).

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57 By way of illustration, see, for example, judgment of 12 July 2005, *Alliance for Natural Health and Others* (C-154/04 and C-155/04, EU:C:2005:449, paragraphs 91 and 92); of 21 December 2011*, Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866, paragraphs 42 and 43); or of 25 July 2018, *Confédération paysanne and Others* (C-528/16, EU:C:2018:583, paragraphs 44 to 46 and 51).

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58 The textbook examples in this category are situations in which the scope of an undefined or indeterminate legal concept contained in the articles of a legal act is interpreted either narrowly or broadly in view of a recital. In this way, an obligation might be imposed on a party, or a right given to another, formally of course on the basis of an article of a legal act, but in reality on the basis of a recital that might considerably modify the scope of the legal concept in question.

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59 Without wishing to engage in 'retroactive interpretation', it is noteworthy that the word 'separately' has disappeared in recital 28 of Regulation 2019/788, which corresponds to recital 20 of the ECI Regulation.

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60 See the justification for Amendment 19, Report I on the proposal for a regulation of the European Parliament and of the Council on the citizens' initiative (COM(2010) 0119 — C7-0089/2010 — 2010/0074 (COD)), Committee on Constitutional Affairs A7-0350/2010. Similarly, Amendment 52 indicates that 'the Commission should arrive at legal and political conclusions on the initiative. The communication should contain both types of conclusions'.

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61 Judgment of 14 July 2005, *Rica Foods* v *Commission* (C-40/03 P, EU:C:2005:455).

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62 Judgment of 9 December 2014 (C-261/13 P, EU:C:2014:2423).

63 Paragraph 169 of the judgment under appeal.

64 Judgment of 14 July 2005, *Rica Foods* v *Commission* (C-40/03 P, EU:C:2005:455, paragraphs 53 to 55 and the case-law cited).

65 See, on the debate about the justifiability of the follow-up communication on a successful ECI, for example, Dougan, M., 'What are we to make of the citizens' initiative?', *Common Market Law Review*, 48, 2011, pp. 1807 to 1848, at p. 1839; Vogiatzis, N., 'Between discretion and control: Reflections on the institutional position of the Commission within the European citizens' initiative process', *European Law Journal*, 23, 2017, pp. 250 to 271, at p. 257.

66 Judgment of 9 December 2014, *Schönberger* v *Parliament* (C-261/13 P, EU:C:2014:2423, paragraph 24).

67 Thus not embracing any exclusion from judicial review by reference to the existence of a 'political question', which could have been, at some level, also conceivable. If it is acknowledged that the Commission enjoys *political* discretion in terms of whether or not to follow up on a successful ECI, then what would there be to review? Taste, beliefs, and political convictions are hardly amenable to (rational) judicial review. See, on this debate in general, Butler, G., 'In search of the Political Question Doctrine in EU law', *Legal Issues of Economic Integration*, Vol. 45, No 4, 2018, pp. 329 to 354.

68 Thus mirroring, on another level, the 'added value' discussion, above at points 73 and 74 of this Opinion.

69 See point 100 of this Opinion.

70 See, for example, judgment of 6 September 2017, *Slovakia and Hungary* v *Council* (C-643/15 and C-647/15, EU:C:2017:631, paragraph 124 and the case-law cited).

71 See, for example, judgment of 18 March 2014, *Commission* v *Parliament and Council* (C-427/12, EU:C:2014:170, paragraph 40); of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 24); or of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)* (C-611/17, EU:C:2019:332, paragraphs 57 and 120).

72 Opinion of Advocate General Léger in *Rica Foods* v *Commission* (C-40/03 P, EU:C:2005:93, points 45 to 50).

73 See above, point 103 of this Opinion.

74 Judgment of 18 October 2011 (C-34/10, EU:C:2011:669).

75 Directive of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ 1998 L 213, p. 13).

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76 Judgments of 18 October 2011, *Brüstle* (C-34/10, EU:C:2011:669, paragraph 40), and of 18 December 2014, *International Stem Cell Corporation* (C-364/13, EU:C:2014:2451, paragraph 22).

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77 See, to that effect, Opinion of Advocate General Bot in *Brüstle* (C-34/10, EU:C:2011:138, point 44), stressing that 'patentability and research do not appear to be indissociable from one another'.

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78 See paragraphs 179 and 180 of the judgment under appeal.

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79 The Communication, in point 3.3., contains merely the following statement: 'In developing partner countries where the EU supports the health sector, it provides assistance to the health-care systems, either supporting integrated service provision that includes sexual, reproductive, maternal, newborn and child health services across the continuum of care, or providing budget support to assist countries to improve national health service delivery. By definition, that assistance will contribute directly or indirectly to the entire spectrum of health services offered by partner countries, which may or may not include abortion-related services to save the mother's life. This comprehensive EU support contributes substantively to a reduction in the number of abortions because it increases access to safe and quality services, including good-quality family planning, a broad range of contraceptive methods, emergency contraception and comprehensive sexual education.'

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80 Invoking judgment of 13 July 2006, *Commission* v *Volkswagen* (C-74/04 P, EU:C:2006:460, paragraphs 49 to 53) in support of that proposition.

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81 See point 11 of this Opinion.

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82 See judgments of 12 September 2017, *Anagnostakis* v *Commission* (C-589/15 P, EU:C:2017:663, paragraphs 35 and 45), and of 7 March 2019, *Izsák and Dabis* v *Commission* (C-420/16 P, EU:C:2019:177, paragraph 51).