

Direct Democracy In and Between the EU and UK:
a legal Analysis of the European Citizens' Initiative and the
European Union Act 2011

Thesis submitted in accordance with the requirements of the
University of Liverpool for the degree of Doctor in Philosophy

by

James Brian Organ

16th April 2015

Acknowledgements

I would like to thank Professor Michael Dougan and Dr. Michael Gordon for the excellent advice and extensive support that they have given me throughout the writing of this thesis.

Thank you as well to all those in the School of Law and Social Justice at the University of Liverpool who have helped me over the last few years.

I would particularly like to thank Susana whose support has made this PhD thesis possible.

Table of Contents

Acknowledgements	
Abstract	
Introduction	1
Chapter One Legitimacy in the EU	12
Duality of EU democracy	13
Sociological legitimacy	16
Political legitimacy	19
Identity based political legitimacy	22
Performance based political legitimacy	28
European Union democratic legitimacy	33
Democratic criteria for ECI and EUA analysis	34
Justification of supranational democracy	39
Institutional form of democracy	48
Typology of democratic governance	50
Democratic provisions in the Treaty on European Union	54
EU democratic paradigm	58
Conclusion	62
Chapter Two Democratic Potential of the European Citizens' Initiative	64
Analysis of the European Citizens' Initiative legislative design	67
Treaty provision for ECI – Art 11(4) TEU	67
ECI Regulation No. 211/2011	70
ECI Process step one – citizens committee	71
ECI process step two – initiative registration and admissibility check	73
ECI process step three – signature collection and support thresholds	75

ECI process step four – verification of statements of support	76
ECI process step five – submission and examination of successful initiative	78
Barriers for ECI campaign organisers	79
Procedural complexity for supporters of ECI proposals	80
Substantive issues arising from ECI legislative design	83
Equality	83
Support thresholds in a dual EU democracy	85
Strength of legal obligations imposed by successful initiative	90
Scope of subject matter of ECI proposals	94
Review and critical analysis of Commission registration decision for ECI proposals	97
Categorisation of ECI proposals	98
First part of admissibility criteria: manifestly outside the framework of the Commission’s powers	100
Restrictive interpretation of treaty articles due to uncertain legal base for action	100
Refusal when criteria for admissibility partially met	101
Inconsistency in registration decisions	102
Increased legal burden on ECI organisers	105
Second part of admissibility test: for the purpose of implementing the treaties	107
Concluding remarks - institutional mediation or direct democracy?	111
Conclusion	115
Chapter Three Democratic Potential of the European Union Act Referenda	117
Referenda classification	120
Institutional mediation and challenging established policy preferences	123
Mechanics of the EUA referendum Clauses	126
s2 EUA – treaty amendment – ordinary revision procedure	127
s3 EUA – treaty amendment – simplified revision procedure	127

s4 EUA – situations that attract a referendum	129
s6 EUA – other decisions requiring approval by referendum	132
Legal compatibility of EUA referenda provisions	134
EU law compatibility	134
UK law compatibility	138
Prioritisation of citizen participation or party politics?	141
Political motivation for introducing EUA	141
Criteria in the EUA that trigger referenda	145
Potential subject matter of referenda triggered by the EUA	148
Democratic potential of the EUA – referendum initiation and binding results	155
Conclusion	161
Chapter Four Direct Democracy In and Between the EU and the UK	163
Democratic paradigm of the EU	164
The ECI, EUA and their combined implications for the current EU democratic paradigm	168
Supranational legitimisation of EU treaty amendment	169
Member state level legitimisation of EU law and policy making	174
Implications of the ECI and EUA for the dual democratic legitimacy of the EU	180
Democratic criteria	181
Effective participative opportunity	181
Citizen agenda influence	181
Citizen outcome influence	182
Institutional mediation of EU direct democracy	183
Ability of direct democracy to challenge established policy preferences in the EU	188
Challenge to policy preferences from citizen initiated debate	189
Challenge to policy preferences from citizen initiated outcomes	191
Impact of EU political structure on citizen ability to challenge policy preferences	192

Conclusion	196
Bibliography	199

Direct Democracy In and Between the EU and UK: a Legal Analysis of the European Citizens' Initiative and the European Union Act 2011

James Brian Organ

Abstract

Participation is an important theme in current democratic theory and there is burgeoning use of its institutional form, direct democracy, to legitimise political bodies and their decision-making. This thesis analyses the legislative design and implementation of two recent direct democracy innovations: the European Citizens Initiative (ECI) and the referenda in the European Union Act (EUA). The agenda setting ECI, which gives EU citizens the chance to propose legal acts of the Union, is the first supranational instrument of direct democracy, and the EUA contains the UK's first ongoing legislative criteria that trigger a referendum. The duality of EU democracy is an essential aspect of its legitimisation. Two dichotomies are therefore used to frame the analysis of direct democracy in the EU: the supranational (direct) and intergovernmental (indirect) routes of EU legitimisation and the legitimisation of the EU's constitutional framework and its daily authority. These dichotomies, and democratic criteria focussed on citizen participation and influence over the political agenda, support the analysis of the likely combined impact of the ECI and EUA on the dual EU democracy.

The critical assessment of the legislative design of the ECI and of the Commission's decision-making in relation to the ECI shows that institutional mediation and the EU's duality have a significant impact on the potential to increase the influence of EU citizens on the EU political agenda, and to facilitate a challenge to established policy preferences. Similarly the critical analysis of the EUA referenda provisions indicate that the apparently strong opportunity to vote on the UK's EU policy in a referendum is qualified in a number of respects by institutional control reflected in the legislation itself, and that the chance of citizen-led policy preferences is diminished. The thesis concludes with a combined analysis of the ECI and EUA to assess the joint impact of direct democracy on dual EU democracy through answering two questions: 'What are their implications for the EU democratic paradigm?', and 'What is their influence together on EU democratic legitimacy?'. The overall findings are that the impact of the ECI and EUA, despite posing some challenges and despite their democratic potential, is likely to be heavily restricted as a result of institutional control and the EU's political framework.

Introduction

Following the enactment of the Lisbon Treaty, the European Union (EU) sought to bolster its democratic legitimacy, by supplementing its existing representative basis with the first instrument of direct democracy at a supranational level: the European Citizens' Initiative (ECI).¹ The potential, theoretical significance of the ECI for the democratic legitimacy of the EU is widely recognised,² and the Commission itself expected it to be 'a significant step forward in the democratic life of the Union' that would add a 'whole new dimension of participatory democracy'.³ This thesis examines the potential of the ECI legislative design to meet these high expectations, and also whether this new facet of EU citizenship is starting to provide a strong opportunity for citizen-led democratic participation in the EU.

In the same year as the Regulation for the ECI was adopted,⁴ the UK Parliament passed the European Union Act 2011 (EUA) to fulfil a commitment in the Programme for Government 2010 that "no further powers should be transferred to Brussels without a referendum".⁵ The EUA introduces on-going legislative criteria that trigger a referendum for the first time in the UK, and this requirement for approval through a referendum is a fundamental alteration to the UK legislative process for certain specified areas of the UK's EU policy.⁶ The statutory provisions for direct democracy, according to the then Foreign Secretary William Hague, will 'lock' government policy to the wishes of the UK people and ensure "a fundamental shift in power from Ministers of the Crown to parliament

¹ For discussion of the development and limitations of European Union democracy see for example B Kohler-Koch and B Rittberger (eds), *Debating the democratic legitimacy of the European Union*, (Rowman and Littlefield 2007); J Weiler and others, 'European Democracy and its Critique', [1995] *West European Politics* 4; S Hix, *What is wrong with the European Union and How to Fix it*, (Polity 2008); D Beetham and C Lord, *Legitimacy and the European Union*, (Longman 1998). For alternative views on democracy in the EU see for example, A Moravcsik, 'In Defence of the 'Democratic Deficit': Reassessing legitimacy in the European Union' [2002] *JCMS* 603; A Moravcsik, 'The Myth of Europe's Democratic Deficit' [2008] *Intereconomics: Journal of European Public Policy* 331; and G Majone et al., 'Europe's Democratic Deficit: The Question of Standards' [1998] *European Law Journal* (1998) 5.

² See for example A Warleigh, 'On the Path to Legitimacy? The EU Citizens Initiative Right from a Critical Deliberativist Perspective' in C Ruzza and V Della Sala (eds), *Governance and civil society in the European Union*, (Manchester University Press 2007) 55.

³ Quoted from speech by Vice President of the European Commission Maros Sefcovic, 'The Lisbon Treaty: Enhancing Democracy' on Sept 30th 2010, pg 2. Available at europa.eu/rapid/press-release_SPEECH-10-502_en.htm, accessed 13 Apr 2015.

⁴ Regulation (EU) No. 211/2011 of 16 Feb 2011 on the citizens' initiative [2011] OJ L 65/1. The Regulation is referred to subsequently as Reg. 211/2011.

⁵

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf 19

⁶ There could also be significant implications for the UK's constitutional doctrine of parliamentary sovereignty. For discussion see M Gordon, *Parliamentary sovereignty in the UK constitution, process, politics and democracy* (Hart 2015).

and the voters themselves".⁷ The analysis of the EUA presented in this thesis is of the legislative design for the referenda in the EUA, and the likelihood of these so called 'referendum locks' passing influence over EU policy decisions from the UK government to its citizens.

The extensive democratic benefits that the political actors have indicated they expect from the ECI and the EUA rest on a presumption of the value of increased citizen participation, and increased citizen influence over the political agenda and its outcomes. The importance given to participation is underpinned by the democratic principle of popular sovereignty, the belief that 'important public decisions ... depend, directly or indirectly upon public opinion', which is central to almost all concepts of democracy.⁸ Participation in EU democracy is of course already provided through existing representative democratic mechanisms, principally through elections to the European Parliament and the Westminster Parliament for the UK citizen, but recent years participatory democracy has risen to prominence to supplement this more indirect representative democracy, which is commonly practiced in the liberal democratic states of the EU.⁹ Participatory democratic theory, as the name suggests, strongly emphasises the importance of participation, and the need for citizen engagement beyond voting at election time. The value attached to participation has grown considerably and direct democratic instruments, particularly the referendum, have increased in use to provide participation outside the usual representative elections.¹⁰

The ECI and the referenda of the EUA are part of this increasing trend towards supplementing representative democratic processes with instruments of direct democracy; a trend that is particularly noticeable in relation to the EU.¹¹ They both provide citizens an opportunity to support or vote on a specific policy issue rather than the usual democratic participation of selecting a political representative, but they do so in a contrasting manner. The ECI is an agenda setting instrument whose democratic benefit is derived largely from the formal opportunity it gives citizens to influence which issues are part of the EU's political agenda. To take up this opportunity seven citizens from different Member States register a proposal for a legal act with the Commission and then, if they gather one million statements of support from a quarter of the EU Member States, they can present their proposal to the Commission, who will consider turning it in to a proposal for a legal

⁷ HC Debate 7 Dec 2010 vol 520 col 193.

⁸ A Weale, *Democracy* (Macmillan 1999) 14. See also C Lord and E Harris, *Democracy in the New Europe* (Macmillan 2006) and R Dahl, *On Democracy* (YUP 2000).

⁹ The 1970s onwards has seen strong development in theories of participatory democracy. For a classic text on participatory democracy see C Pateman *Participation and Democratic theory* (CUP 1970).

¹⁰ 'Arguably the dominant current within contemporary democratic theory is one that places a premium on increasing and deepening citizen participation', G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 6.

¹¹ See inter alia, Mendez, Mendez and Triga, 'Referendums and the European Union, A Comparative Enquiry', (CUP 2014), for a recent analysis of the use of referenda in relation to the EU.

act of the Union.¹² This means that citizens can use the ECI to generate public debate and formally engage with the EU institutions, but there is no guarantee of a legal outcome. The EUA referenda, on the other hand, give citizens no formal means of selecting the issues that will be discussed as part of the political agenda, but when UK citizens get a chance to vote in a referendum triggered by the EUA, there is far greater certainty of legal impact. This legal impact is generated by the requirement for a positive referendum result that the EUA introduces in to the UK for the ratification of treaty amendments and the approval of a range of Council decisions that transfer powers to the EU.

If citizen participation is recognised as important in political decision-making and necessary for an instrument of direct democracy to enhance democratic legitimacy, ‘the crucial normative question is then the extent to which there should be an institutional capacity for the public at large to have a final say on issues of public policy’ - a final say that includes not just influence over legal outcomes but also the ability to influence what is discussed in the first place.¹³ Although the direct engagement of citizens with issues of public policy is unlikely to ever replace representative democracy, or even challenge its pre-eminence in the near future, this thesis operates on the premise that direct democratic instruments are considered to have greater democratic potential the more they give citizens a final say over the political agenda and over its policy and legislative outcomes. The democratic potential of the ECI and EUA is therefore analysed from this perspective of the strength of citizen influence over the political agenda.

The corollary of the position in the previous paragraph is that the greater the degree of control that remains in the hands of the existing institutions, the greater is the potential for citizen participation through direct democracy to be ignored or to fail to instigate meaningful change. This is one of the most common objections raised by those who are critical of the value of citizen participation through any form of democracy. As Mark Twain is reputed to have said: ‘If voting made any difference, they wouldn’t let us do it’.¹⁴ The control of existing institutions or the political elite is a criticism, though, that is particularly aimed at direct democracy, in part because of the history of abuse of referenda by dictators to support authoritarian regimes.¹⁵ It is perhaps inevitable, however, that the extent to which the ‘final say’ on the policy agenda falls to citizens depends in large part on

¹² This outline of the ECI is established in Art 11(4) TEU.

¹³ A Weale, *Democracy* (Macmillan 1999) 85.

¹⁴ This quote is attributed to Mark Twain but its provenance is not certain.

¹⁵ G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009). For discussion of elite control in relation to the use of direct democracy more generally see S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012). For discussion of the importance of challenging established policy preferences see R Blaug, ‘Engineering Democracy’ [2002] *Political Studies* 102. For discussion of bureaucratic interference in participatory democracy see D Held, *Models of Democracy*, (Polity 2006) 209-216.

institutional mediation because of the control that existing institutions will continue to have over the legislative design of democratic instruments and their implementation.¹⁶ The ECI and the EUA referenda certainly indicate the significance of this institutional mediation. That institutions are inclined to exercise their ability to control the impact of direct democracy should also come as no surprise. To think otherwise, to think that “incumbent bureaucracies and critical networks are compatible ... is to assume that struggle for power [is] at an end”.¹⁷ Although institutional mediation of direct democracy may be inevitable, it must not completely throttle the opportunity of increasing citizen influence or the potential democratic impact that the political actors spoke of in relation to the ECI and EUA will be negligible. The legal analysis of the ECI and EUA presented in this thesis assesses the extent of institutional mediation and the corresponding potential for citizens to be able to exercise extra power as a result of extending the use of direct democracy in the EU democratic framework.

The analysis in this thesis of the potential for the ECI and EUA to increase citizen influence by passing power over the political agenda to citizens away from the existing institutions focuses on three aspects.¹⁸ The first is the extent to which they provide an effective and equal opportunity for citizens to participate in the political agenda. This rests on the presumption that the greater the inequality in the participation of citizens resulting from issues such as the electoral franchise criteria and access to information, the less democratic potential the ECI and EUA will have.¹⁹ The opportunity to participate must also be effective in the sense that any barriers are minimised and proportionate to the aim of ensuring fair and secure participation. There will always, for example, be a need to identify citizens to avoid abuse of the system, but if procedural or identification requirements become so onerous that citizens are blocked from taking up the opportunity to participate, its democratic benefit is severely reduced. The second consideration is the extent that there is increased citizen influence over the issues discussed as part of the political agenda. The opportunity to formally place issues on the public agenda and to generate debate about those issues is one of the democratic benefits of direct democracy, particularly an instrument such as the ECI. The third consideration is the strength of citizen influence over the outcomes of the political agenda. This

¹⁶ See A Gross, ‘The Design determines the quality – some criteria for determining the design and quality of direct democracy’ in Z T Pallinger and others (eds), *Direct Democracy in Europe: Developments and Prospects*, (VS Verlag für Sozialwissenschaften 2007); G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009).

¹⁷ R Blaug, ‘Engineering Democracy’ [2002] *Political Studies* 102, 113. In particular this contrasts with the argument put forward by Fukuyama that we have reached a position of liberal democratic consensus in F Fukuyama, *The End of History and the Last Man* (Penguin 1992).

¹⁸ These reflect the well known five democratic criteria Dahl describes in R Dahl, *On Democracy*, (YUP 2000).

¹⁹ Art 9 TEU states the importance of the principle of equality: “In all its activities, the Union shall observe the principle of equality”.

criterion rests on the presumption that the more legal acts and policy decisions that are initiated as a result of direct citizen participation, the stronger the democratic potential of the democratic instrument. This is a particular strength of referenda because of the strong expectation that the political authorities will implement the citizen preference expressed through a referendum vote. The three criteria I use to assess the democratic potential of the ECI and EUA are therefore 'effective participative opportunity', 'citizen agenda influence', and 'citizen outcome influence'.

The evolution of EU democracy towards increased direct democracy at both Member State and EU level may have provided an apparent increase in opportunities for democratic participation and citizen influence over the EU policy agenda and its outcomes, but in practice the existing institutions have retained a high degree of control. The legislative design of the ECI was strongly criticised at the outset because of the control that the Commission retains over the impact that an ECI proposal might have.²⁰ The Commission is only required to consider initiating a legal act in response to an ECI proposal that reaches the necessary levels of support so any legal or policy outcomes that might occur because of direct citizen participation through the ECI are entirely at the discretion of the Commission.²¹ Less obvious was the ability of the Commission to restrict public debate and citizen influence over the political agenda as a result of its role in registering ECIs at the outset of the process.²² The EUA referenda, in contrast, give no extra formal opportunity to place topics on the political agenda, as the ECI does, but when triggered they will give citizens a specific policy vote and it will be expected that the result of the referendum is implemented. To this extent citizens have significant influence over a policy outcome when voting in a referendum, but the findings from the analysis of the legislative design of the EUA show that the institutional controls over the drafting of the legislation and the political motivation behind its implementation have limited its democratic potential.

An important indicator of the strength of the institutional mediation of democratic instruments is the extent to which citizens are able to use them to challenge established policy preferences.²³ If democratic instruments are only able to support the existing status quo, then the extent to which citizens are able to use them to influence policy and decision-making will inevitably be limited. Without any element of 'critical' democracy, in other words any challenge to the existing institutions

²⁰ M Dougan, 'What are we to make of the Citizens' Initiative?' [2011] CML Rev 1807; B Kaufmann, 'Transnational Babystep: The European Citizens Initiative' in M Setala and T Schiller (eds) *Citizen's initiatives in Europe; procedures and consequences of agenda-setting by citizens*, (Palgrave Macmillan 2012) 229.

²¹ Art 11(4) TEU states that the Commission is invited to propose a legal act. So far the Commission has decided not to initiate any legal acts in response to successful ECI proposals.

²² J Organ, 'Decommissioning Direct Democracy? A critical analysis of Commission decision making on the legal admissibility of European Citizens Initiative proposals', [2014] EU Const 422.

²³ R Blaug, 'Engineering Democracy' [2002] Political Studies 102.

or the political elite they represent and their policy preferences, the democratic instrument would act only as a democratic gloss and pass no real influence to citizens. Conversely, the more citizens are able to use a democratic instrument to introduce new policy ideas to the political agenda, generate public debate about these ideas and to lead to them being concretised in a legal act, the more this democratic instrument will facilitate a tangible impact on the power and control of the existing institutions over the political agenda. The ability to challenge established policy preferences, to some degree, is therefore necessary for a democratic instrument to increase the correlation between policy and citizen preferences and influence democratic legitimacy.

As well as the potential to influence the democratic legitimacy of the EU, this thesis also explores the implications of the ECI and EUA for the EU's democratic framework. The characterisation of the EU democratic framework that is used in this thesis is based on two dichotomies: the distinction between the EU legitimisation via supranational level institutions and via Member State level institutions, and between the legitimisation of the EU constitutional framework and its daily political authority.²⁴ The first of these dichotomies recognises the unusual combination in the EU of democratic legitimacy derived from Member State level democratic processes, which indirectly legitimise the Council and European Council and directly legitimise the role that Member State level institutions play in the EU, and from supranational democratic processes, which legitimise the European Parliament.²⁵ This duality reflects that the EU is in part an intergovernmental organisation, which would usually be indirectly legitimised through the legitimacy of the Member State, but that it also has the sort of direct legitimisation that would usually be associated with a nation state.²⁶ The democratic legitimisation processes of the EU remain founded on representative democracy, but they are now supplemented, at the Member State level in respect of the UK, by the possibility of voting on specific policy issues in the referenda of the EUA and, at the EU level, by the agenda setting instrument of the ECI.

The second dichotomy used that is a defining feature of the EU democratic paradigm is the distinction between the democratic legitimisation of the EU treaties, its constitutional framework,

²⁴ The term constitutional framework or constitutional order is used in a broad sense to indicate the fundamental nature of the treaties, but recognises the debate about whether the EU has constitutional law, particularly due to the EU not being a nation state to which a constitution is usually attached. See comment in B Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2002) 39; see N MacCormick, *Questioning Sovereignty: Law, State and nation in the European Commonwealth* (OUP 1999) 103-4 for example of broad understanding of constitution. For a full investigation of the viability of identifying European primary law as European constitutional law see A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart 2010).

²⁵ See Art 10(2) TEU.

²⁶ Dashwood first used his well known description of the EU as a 'constitutional order of states' in A Dashwood, *Reviewing Maastricht, Issues for the 1996 IGC*, (London, Sweet and Maxwell 1996) 7.

and of the daily law and policy making authority of the EU. The Member State level democratic processes in the EU are used almost exclusively to legitimise the constitutional framework of the EU, and the EU level democratic instruments are predominantly used to legitimise the daily authority of the EU. To fit this standard paradigm the ECI would be mainly used to legitimise EU law and policy making and the referenda of the EUA would be mainly used to legitimise EU treaties. The distinction within these dichotomies is not always clearly drawn and there are exceptions to the way that they interact, such as the supranational Commission being able to propose treaty amendment.²⁷ Generally it will be shown that the ECI and EUA do fit within the existing EU democratic paradigm, but they also pose some questions about how the two dichotomies outlined above interact and the limitations on direct democracy of the EU political framework.

The examination that is presented in this thesis of the democratic potential of the ECI and EUA and their possible impact on the EU democratic paradigm is organised in to four chapters. The first chapter provides the theoretical context of the thesis. The starting point for this is empirical, sociological legitimacy, which is based on the fundamental principle for all functioning polities that political authority is accepted.²⁸ Sociological legitimacy is the consideration of why there is state legitimacy, but does not define any preconditions that validate a state's legitimacy. The study of political legitimacy, on the other hand, establishes criteria that can be used to identify whether the political authority of a state is legitimate or not. A definition of political legitimacy is provided based on Beetham and Lord's threefold definition that an authority, to be legitimate, must be lawful, normatively justified, and recognised by other states.²⁹ Having given broad definitions of these two concepts of sociological and political legitimacy, the rest of the discussion in chapter one focuses on the second of these criteria: the normative justification of political legitimacy. Beetham and Lord identify three normative requirements for political legitimacy in the liberal democracies of the EU Member States: identity, performance and democracy.³⁰ These three concepts are discussed in turn in chapter one, with the majority of the discussion focussed on democracy, which is the normative principle that the ECI and EUA are expected to have most influence on.

The first normative justification for political legitimacy, identity, is particularly problematic for the EU because it is not a nation state and lacks a single definable people or demos.³¹ The position that is defended in this thesis is that although it is important to recognise the difficulties, in terms of

²⁷ Art 48(2) TEU.

²⁸ Max Weber provides a classic examination of sociological legitimacy in M Weber, *Economy and society: an outline of interpretative sociology* (University of California Press 1978).

²⁹ D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998).

³⁰ Ibid.

³¹ One suggestion is that the EU has multiple peoples or demos instead. See for example K Nikolaidis, 'The New Constitution as European Demoi-crazy?' [2004] *Critical Review of International Social and Political Philosophy* 1

political legitimacy, caused by the lack of a demos and limited identification with the EU by citizens, it is not an insurmountable failing that excludes the development of democratic legitimacy at the EU level. In the early days of “permissive consensus” the EU relied heavily on the second aspect of normative justification, performance, through successful outcomes such as peace and prosperity, for its political legitimacy.³² Some academics, such as Majone and Moravscik, have argued for a technocratic approach to EU legitimacy that relies mainly on performance outcomes and system effectiveness, only supported by indirect democratic legitimacy.³³ This form of elite led, expertise based approach to political decision-making has long been the main rival to democracy.³⁴ Performance, though, is no longer a sufficient basis for the political legitimacy of an EU of liberal democratic Member states, if it ever was, and it is argued in chapter one that democracy is possible and necessary at the supranational EU level.³⁵

The final section of chapter one defines and discusses an understanding of democracy to support the assessment of the democratic potential of direct democracy in the EU. First, there is an outline of a working definition of democracy and an explanation of the criteria against which the democratic potential of the ECI and EUA are assessed. Secondly, the case is made for the importance of democracy at the supranational EU level.³⁶ The third part of the chapter provides a typology of governance approaches based on the different institutional combinations of representative and direct democratic instruments prevalent in liberal democracies. This typology outlines a framework to contextualise the discussion of the democratic potential of the ECI and EUA. The fourth part of the chapter analyses the democratic provisions in the EU treaties, which are set out in Title II TEU, ‘Provisions on Democratic Principles’. The main focus of the treaty provisions are on representative democracy, but the introduction of Art 11 TEU takes a more participative approach to democratic

³² Auer comments on the move away from permissive consensus in S Auer, ‘New Europe: Between Cosmopolitan Dreams and Nationalist Nightmares’ [2010] JCMS 1179.

³³ G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*. (OUP 2005). Or more recently G Majone, *Europe as the Would-be World Power – The European Union at fifty* (CUP 2009). For a critique of Majone’s position see M Dougan, ‘And Some Fell on Stony Ground... A Critical Reading of Giandomenico Majone’s Dilemmas of European Integration’ [2006] EL Rev 865. A Moravscik, ‘In defence of the Democratic deficit: Reassessing the legitimacy of the European Union’ [2002] JCMS 603; and A Moravscik, ‘The European Constitutional Compromise and the Neofunctionalist Legacy’, [2005] Journal European Public Policy 349.

³⁴ Dahl clearly sets out the reasons for rejecting ‘Guardianship’ as an alternative to democracy in Ch 7 “Why Political equality II? Civic Competence” in R Dahl, *On Democracy*, (YUP 2000) 69 - 80.

³⁵ The ‘democratic deficit’ debate, which has persisted ever since the phrase was first coined by David Marquand, is a reflection of the need for legitimacy that includes democracy at EU level. Even Majone and Moravscik have moved their position in recent years to recognise the changing political environment of the EU and the benefit of EU level democracy. In Art 10(1) TEU it is stated that the functioning of the Union is founded on representative democracy.

³⁶ G de Búrca ‘Developing Democracy Beyond the State’, [2008] Columbia Journal of Transnational Law 221 uses the same terminology of ‘striving’ for supranational democracy.

legitimation and in Art 11(4) TEU has taken the innovative step of introducing the ECI and supranational direct democracy into EU democracy. The final part of chapter one describes the EU democratic paradigm using the dichotomies defined at the start of the chapter.

Chapter two contains the research analysis of the ECI. The first part of the chapter analyses the legislative design of the ECI in Art 11(4) TEU and the regulation that enacted the ECI, Reg. 211/2011, which establishes the five phases of the ECI process: the formation of the organising committee of the initiative, registration of the initiative and its proposal, the collection of support, the verification of the statements of support by Member States, and the submission and examination of the proposal by the Commission, which culminates in either a reasoned rejection of the initiative or a proposal for a legal act of the Union. These phases are outlined and then the substantive issues raised by the legislative design are discussed. First, the complexity and inequalities in the legislation, then the limitations on the scope of the ECI, and then the strength of the legal obligation it imposes on the Commission. The second part of the chapter examines the implementation of the legislative provisions of the ECI. A critical analysis is provided of the Commission's interpretation of the criteria for registering ECI proposals, particularly focussing on the requirements that an ECI proposal is 'not manifestly outside the framework of the Commission's powers' and that it is 'for the purpose of implementing the treaties', which have led to a high number of refusals to register initiatives.³⁷ Although the structure and limited competences of the EU restrict the scope of ECI proposals and the public debate they can formally initiate to some degree, the findings are that the institutional mediation by the Commission has had a significant impact on the democratic potential of the ECI and the ability of citizens to use it to challenge established policy preferences.

Chapter three moves from the supranational EU level use of direct democracy to the Member State level in the UK through an analysis of the legislative design of referenda in the EUA. The chapter is introduced first with an outline of the classification of referenda based on the manner in which they are initiated and the binding nature of the result, and secondly by commenting on how the issues of institutional mediation and challenging policy preferences specifically relate to referenda. In the second part of the chapter the mechanics of the complex legislative provisions relating to referenda in the EUA are described in detail. The third part comments on the questions of legal compatibility with EU and UK law that the EUA raises. The fourth part of the chapter assesses the democratic potential expected from the EUA provisions for direct democracy. First, this is done through analysing the political motivation behind the enactment of the EUA, and the criteria that trigger referenda and the scope of possible subject matter that reflect the prioritisation of politics over

³⁷ Art 4(2)(b) Reg. 211/2011.

participation. Secondly, there is analysis of the extent that citizen influence over the agenda content and its outcomes is likely to be facilitated by the EUA legislation, using the classification of referendum set out at the start of the chapter to structure the discussion.

The final chapter of the thesis then brings together the separate analysis and conclusions in relation to the democratic potential of the ECI and EUA from chapters two and three, and uses the theoretical context and democratic criteria of chapter one, to assess their joint impact on EU democracy. My analysis in the final chapter addresses two central questions. The first question, 'What are the implications of the ECI and EUA for the existing EU democratic paradigm?', specifically focuses on the two dichotomies set out in chapter one of constitutional/legislative legitimisation and supranational/national legitimisation to examine what we learn about the institutional framework of the EU and the tensions that arise due to the implementation of direct democracy. The second question addressed in this concluding chapter is 'What is the potential influence of the ECI and EUA on the democratic legitimacy of the EU?'. In addressing this question, the findings from chapters two and three are brought together to comment on the overall implications of the ECI and EUA for the dual EU democratic legitimisation, which rests on the interaction between the EU and Member State political levels operating as complementary, overlapping polities.³⁸ The contemporaneous introduction of the ECI and EUA at EU and Member State level, respectively, allows for this combined assessment of the potential impact of direct democracy on EU democracy, and its part in the dual democratization of the EU within the piecemeal evolution of its constitutional framework.³⁹ The conclusions drawn are that both these instruments of direct democracy are strongly mediated by existing institutions, only provide citizens with a limited opportunity to impose their own policy preferences in relation to the EU, and that direct democracy is limited by the very nature of the EU as a political entity.

The ECI and the referenda of the EUA are very different forms of direct democracy, implemented at different levels in EU democracy and which meet democratic criteria in different ways, but there are strong commonalities in the restrictions on their democratic potential. Overall the thesis concludes that the introduction of the ECI and the EUA could, in principle, bring significant changes to the democratic paradigm of the EU. However, the analysis of the legislative design and implementation to date of the ECI and EUA show that, in practice, their challenges to the current dichotomies within

³⁸ For specific discussion of the dual democratisation of the EU see M Shu, 'Referendums and Political Constitutionalisation of the EU' [2008] *European Law Journal* 423.

³⁹ 'It is beyond doubt that the development of a European constitutional law is indeed a process, and even a very long drawn out process [and] ... has been developed in a piecemeal fashion over the past fifty years', B Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2002) 39.

the dual framework of EU democracy are not extensive and unlikely to have a significant impact on the status quo in the short term. Direct democracy also has the potential to enhance EU democratic legitimacy through increasing citizen participation and influence over the EU political agenda and its outcomes, but the institutional mediation of these democratic instruments and the political framework of the EU, have limited the ability of citizens to challenge established, institutional policy preferences and have an influence on the EU's political agenda.

Chapter One

Legitimacy in the EU

The European Citizens Initiative (ECI) and the referenda required by the European Union Act 2011 (EUA) are new direct democratic instruments that could potentially increase the legitimacy of constitutional, policy and legislative decisions by European Union (EU) institutions and, through the EUA, by the UK government in relation to Europe, respectively.¹ The discussion of legitimacy and democratic theory in this chapter is for the purpose of enriching and framing the later legal analysis of the ECI and EUA legislation. This thesis is a legal/constitutional examination of the recent changes to the democratic arrangements of the EU and UK, but it is recognised that democratic theory often sits more comfortably in political science and political philosophy. This chapter, therefore, draws significantly on political science in providing the theoretical background against which the legal implications of the new direct democracy instruments will be analysed in subsequent chapters.

The argument developed in this chapter is that the EU has the potential to be politically legitimate, and therefore be influenced by the implementation of the ECI and EUA, and that this legitimacy must be viewed from the duality of EU level and Member State level legitimisation. This argument proceeds through the following stages. First, the key themes of the thesis and the methodological approach are outlined. The second stage is to provide a broad understanding of sociological, empirical legitimacy.² The third stage is to provide an understanding of political legitimacy, which is prescriptive and provides a normative basis to assess the legitimacy of a political order. Finally, performance, identity and democracy, which are three criteria for the normative justification of political legitimacy in a liberal democracy, are then assessed in turn.³ Democratic legitimacy, which is

¹ A note on terminology: Direct democracy refers to a form of democracy that engages the citizen directly with the political process through supporting or voting for a policy position or proposal; as an alternative to representative democracy. The political or democratic engagement of EU citizens with the EU and its institutions, such as voting for MEPs, which is also usually referred to as direct, is referred to as supranational participation or democracy in this thesis. Legitimation and engagement via Member State institutions or democratic processes is referred to as indirect.

² Max Weber provides, for example, a seminal account of sociological legitimacy in M Weber, *The theory of social and economic organization* (Free Press New York 1964), translated [from the German] by A.M. Henderson and Talcott Parsons; edited with an introduction by Talcott Parsons.

³ The use of these three criteria is based on the work of D Beetham and C Lord, *Legitimacy and the European Union* (Longman 1998).

the specific normative aspect of political legitimacy that the ECI and EUA have the greatest potential to influence in the EU, is dealt with in most detail in the second half of the chapter.⁴

Duality of EU democracy

Two important organisational dichotomies that frame the duality of EU democracy are used to underpin the analysis through this thesis:

- the derivation of EU legitimacy via supranational EU level institutions and indirectly via member state institutions and citizenship; and
- the distinction between the EU's legitimacy when forming or amending the treaties and the legitimacy of its daily legislative and policy decision making.

These dichotomies are central to the unusual constitutional characteristics of the EU and the interaction between them underpins the review of EU sociological and political legitimacy in this chapter and the analysis of the democratic potential of the ECI and the EUA in the subsequent two chapters. Due to their importance to the ideas developed throughout this thesis, these dichotomies are further outlined in the following paragraphs.

One of the defining characteristics of the EU is that it combines the legitimisation processes of an intergovernmental organisation with processes more commonly associated with a federal state, whilst being neither of these.⁵ In democratic terms it means that there are both supranational processes, most notably the European Parliament elections, that legitimise the EU and would usually be associated with a federal state, and also Member State level processes that legitimise the EU in the manner of an intergovernmental organisation. This legitimisation occurs through the actions of the same set of individual citizens, acting as EU and Member State citizens, via a range of democratic mechanisms that legitimise complementary aspects of the political environment they live in. Member State citizens elect the national governments and parliaments, who can then exert, presumably legitimate, political authority on behalf of the citizens of their Member States at a supranational level in the Council of Ministers and European Council; and EU citizens are able to

⁴ It is specifically the use of referenda introduced by the EUA that is analysed. When referring to the ECI and EUA it is the democratic instruments they implement that is being referred to. Specific European Citizens Initiatives are either referred to by name or as initiative(s).

⁵ Various attempts have been made to capture a concise description of the EU political construct; for example, the German Constitutional Court described the EU as an 'association of sovereign states', for discussion see F Schorkopf, 'The European Union as an association of sovereign states: Karlsruhe's ruling on the Lisbon Treaty' [2009] German Law Journal 1219; or Alan Dashwood's well known description of the EU as a 'constitutional order of states', which he first used in A Dashwood, *Reviewing Maastricht, Issues for the 1996 IGC*, (Sweet and Maxwell 1996) 7.

democratically legitimise supranational political authority through European parliamentary elections that legitimise the role of the European Parliament and, to a limited degree, the Commission.⁶

The second dichotomy is the distinction between legitimacy at the point of treaty formation or amendment, and the legitimacy of the day to day exercising of legislative and policy making authority granted to the EU institutions. EU political authority is granted through treaties, which act as a form of constitutional framework that all Member States must agree to and ratify in accordance with their Member State level constitutional requirements.⁷ The treaties allocate competences within the EU and this political authority is then implemented through the EU institutions. Member State democratic processes, mainly the election of representatives and referenda, almost exclusively legitimise the EU treaties; but there are both supranational institutions, the Council and European Council which are indirectly legitimised, and also Member State level institutions, such as national governments, involved in the process of treaty amendment. Conversely, supranational democratic processes, such as the European Parliament elections, and indirect, Member State democratic processes legitimise the EU law and policy-making authority exercised by the supranational institutions of the EU.

There are, of course, some challenges to this characterisation of EU democratic legitimisation. For example, there are questions about whether the message being communicated by citizens may relate to the polity other than the one apparently the subject of the election at hand, such as registering a protest vote against the incumbent national government in European Parliament elections.⁸ There is also the role of the European Parliament in monitoring subsidiarity in the EU, the so called yellow card process, which gives Member State level institutions a role in the EU legislative process;⁹ and the right of the supranational legitimised EU institutions of the European Parliament and Commission to propose treaty amendment in accordance with Art 48(2) TEU. The contemporaneous introduction of the ECI at supranational level and the EUA at Member State level provides an opportunity for a combined analysis of EU legitimisation of its constitutional framework

⁶ The European Parliament must approve the candidates for the Commission and the president of the Commission was nominated by the political party group that won most seats in the European elections in 2014, in accordance with Art 17(7) TEU. The European Parliament can also censure and ultimately dismiss the Commission in accordance with Art 17(8) TEU. The Santer Commission, for example, resigned before the European Parliament dismissed it in 1999.

⁷ Art 48 TEU.

⁸ This is an issue in other democratic situations, such as the use of local elections in the UK to protest against the incumbent national government, but it is noted as a particularly problematic issue for the EU. This question of second order voting is discussed as the third democratic deficit claim in S Hix, 'What is Wrong with the European Union and how to fix it', [2008] *Polity* 70, 76-82.

⁹ For more details on yellow card system see A Cygan, 'Collective' Subsidiarity Monitoring by National Parliaments after Lisbon – The Operation of the Early Warning Mechanism in Trybus and Rubini (eds) *After Lisbon: the Future of European Law and Policy* (Edward Elgar, 2012).

and daily political authority through direct democracy at both levels of EU democracy. The findings are that the ECI and EUA generally fit within the bounds of these two dichotomies, but the relatively minor challenges that they pose to the EU democratic framework are discussed in chapter four.

The extent to which these distinctions between the legitimisation of the constitutional framework and the EU's daily authority, and between Member State and EU level processes is able to be made is a significant characteristic of what sets the EU apart as a polity.¹⁰ The duality of EU democratisation should be recognised as its legitimacy develops both through using, at EU level, instruments previously tried at Member State level and also through the development of Member State level instruments that may impact EU democracy.¹¹ The ECI and the EUA at first glance appear to be very different democratic instruments that operate in different political spheres. However, their assessment together allows the duality of EU democracy to be analysed and for the impact of direct democracy to be analysed at both levels of the EU polity. The iterative, interactive nature of the EU polity means that analysing both levels of the EU is beneficial in considering its overall democratic legitimacy. This thesis takes this approach and analyses EU democracy, not supranational or intergovernmental democratic legitimacy alone, using the case studies of direct democracy at both levels to inform conclusions about their likely impact together on the overall EU democratic paradigm and its democratic legitimacy.

The premise in this thesis is that the individuality of the EU is largely defined by its lack of statehood, the dual routes of EU legitimacy, and the distinction between legitimisation of the constitutional framework and its daily political authority for policy making and legislating, and this underpins the analysis of EU democratic legitimacy that is made through the examination of the democratic potential of the ECI and EUA. These dichotomies support a more nuanced analysis of EU democratic legitimacy than would be possible if EU democracy were treated as a single democratic polity or just compared to Member State democratic legitimacy. The extent to which the ECI and the EUA have the potential to supplement the EU and Member State level democratic legitimisation of the EU treaties and law making authority, respectively, is assessed in chapters 3 and 4, and the extent to which they challenge the characterisation and legitimacy of EU democracy presented here is central to the discussion in the concluding chapter. Considering both sociological and political legitimacy from the two different perspectives of democratic legitimisation is important in indicating how the

¹⁰ For an outline of the specific features that distinguish the EU from other polities see for example L Dobson and A Weale, 'Governance and Legitimacy' in E Bomberg and A Stubb (eds) *The European Union: How Does it Work?*, (OUP 2003) 160-166.

¹¹ M Shu, 'Referendums and Political Constitutionalisation of the EU' [2008] *ELJ* 423. See also A Heritier, 'Elements of Democratic Legitimation in Europe: An alternative perspective' [1999] *Journal of European Public Policy* 269.

dual legitimacy of the EU fits together and how it might be influenced or challenged by the introduction of direct democracy at Member State and EU level. This chapter provides the theoretical context to support this analysis; starting, in the next section, by defining sociological legitimacy.

Sociological legitimacy

Analysis of legitimacy deficits in the EU have been criticised for focussing on a particular aspect of the debate without clarifying the overall legitimacy framework within which conclusions fit and how the different legitimising factors interact.¹² There has also been comment that, “much of [the literature on legitimacy deficit in the EU] also assumes that the only dimension of deficit that matters is the democratic one”.¹³ To provide a broad context to the specific democratic analysis in later chapters, the theoretical framework in this chapter will start with a broad foundational definition based largely on political science. This framework starts with a baseline definition of sociological legitimacy and then political legitimacy, before moving on to the normative criteria of political legitimacy of performance, identity and the more detailed analysis of democratic legitimacy in the second half of this chapter.

The broad starting point for defining legitimacy should also reduce the potential for an overly legalistic analysis of democracy that suffers from a sense of isolation and disengagement from the realities of EU politics. Haltern, for example, argues that “legal studies [of European democracy] are in need of a new, and different, approach” from both a political and legal perspective because of the commonality between the two.¹⁴ It is hoped that this work is able to free itself of Haltern’s “legal isolationist ghetto” and make appropriate use of political science discourse fully integrating extra legal arguments into legal thinking. This thesis, which is an analysis of EU democratic instruments, must be able to do this to successfully provide a comprehensive and coherent contribution to legal debate. It therefore analyses the constitutional impact of the ECI and EUA on EU democracy from a legal perspective that recognises the links to political science doctrine, and with a clearly located

¹² For example, Beetham and Lord: “if there is a recurrent mistake ... it is the tendency to reduce the many dimensions of legitimacy to a single one: to legality or procedural regularity alone, to effective performance, or to consent, as the case may be” in D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 5. On this point and the plurality of visions of legitimacy in the EU see also C Lord and P Magnette, ‘E Pluribus Unum? Creative Disagreement about legitimacy in the EU’ [2004] JCMS 183, 199.

¹³ D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 23. See also Nikolaidis and Howse: “it seemed to us that debates on both sides [EU and US] have often been impeded by implicit and narrow assumptions about what constitutes the ultimate sources of legitimacy and sustainability in times of institutional change.” in K Nicolaidis and R Howse (eds) *The federal vision: legitimacy and levels of governance in the United States and the European Union* (OUP 2001) 2

¹⁴ U Haltern, ‘A comment on Von Bogdandy’ in B Kohler-Koch and B Rittberger (eds) *Debating the Democratic legitimacy of the EU*, (Rowman & Littlefield 2007) 49.

position in the debate around democracy and legitimacy in the EU. The first step in this process is to define sociological legitimacy.

Legitimacy has been described as ‘amorphous’¹⁵ and ‘elusive’,¹⁶ and there are many starting points containing differing aspects of legitimacy. Dobson and Weale state: “to say that a governing system is legitimate is to say that it has the right to rule and make decisions”¹⁷ and later quoting Lipset, “Legitimate means rightful. Political legitimacy ‘involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for society’”;¹⁸ or Nikolaidis and Howse who described the concept of legitimacy as “the notion that it is fair or just in some way that a set of actors accept the influence or say of a particular collectivity exercising power”.¹⁹ These three quotes, from differing perspectives, set out the sense that the legitimacy of an organising polity relates to questions of fairness for individuals and acceptability of who exercises power over another and how. In other words, the people need to accept and consent to the authority that is exerted over them, and the wielding of that authority needs to be fair and effective. This is the basis of the distinction between sociological and political legitimacy. Acceptance and consent are aspects of an empirical, sociological legitimacy and the questions of fairness and effectiveness are normative aspects of political legitimacy, which are defined and discussed in the sections later on performance, identity and democracy.

Max Weber described sociological legitimacy as a ‘belief in legitimacy’, defining it as support for the political regime, for the authority of the state.²⁰ If those subjected to political authority recognised an authority as legitimate, it was legitimate; there are no predefined normative criteria that must be met before this measure of legitimacy can be met.²¹ The normative concepts of fairness and effectiveness may increase the likelihood of authority being accepted by citizens, but they are not essential for social legitimacy to exist. The legitimacy of a political authority could, for example, also be based on tradition, or on the charisma or other qualities of its leader, if sufficient to lead to the acceptance of their authority.²² Weber, though, believes that most commonly “legitimacy may be

¹⁵ K Nicolaidis and R Howse (eds), *The federal vision: legitimacy and levels of governance in the United States and the European Union* (OUP 2001) 4

¹⁶ A Arnall and D Wincott (eds), *Accountability and legitimacy in the European Union* (OUP 2002) 3

¹⁷ L Dobson and A Weale, ‘Governance and Legitimacy’ in E Bomberg and A Stubb (eds), *The European Union: How Does it Work?*, (OUP 2003) 157.

¹⁸ *Ibid* 160.

¹⁹ K Nicolaidis and R Howse (eds) *The federal vision: legitimacy and levels of governance in the United States and the European Union* (OUP 2001) 4

²⁰ M Weber, *Economy and society: an outline of interpretative sociology* (University of California Press 1978) 213

²¹ M Weber, *The theory of social and economic organization* (Free Press New York 1964), translated [from the German] by A.M. Henderson and Talcott Parsons; edited with an introduction by Talcott Parsons.

²² *Ibid*.

ascribed to an order by those acting subject to it ... because it has been established in a manner which is recognised to be legal".²³ Legality of the EU, as expressed through the ratification of the treaties by Member States, is an important component of its sociological legitimacy, but some acceptance of the daily, supranational authority of the EU institutions is also a necessary component of EU legitimacy.²⁴ There are strong criticisms of the EU in terms of its legitimacy, particularly in relation to its normative democratic basis, but it has persisted as a political entity that exerts some authority and, to a degree, remains accepted, consented to, and therefore maintains a degree of sociological legitimacy. As Warleigh stated, "It is also necessary to bear in mind that for most citizens a degree of acceptance of the Union's existence appears to have persisted despite the perception of the democratic [legitimacy] deficit".²⁵

One difficulty in relation to the EU is that the distinction between acceptance of an establishing authority and acceptance of a daily authority does not fit easily within Weber's statist view of legitimacy, where the focus of legitimisation is 'an order'; in other words, a single state entity that is the focus of both establishing and daily legitimisation and which brings clarity in terms of hierarchy and competence.²⁶ The EU, however, is not 'an order' in the singular, in that sense, but a dual polity that combines supranational institutions and Member State institutions in the exercise of its authority, with differentiated routes of legitimisation for the constitutional framework and for the daily policy and legislative decision-making. The entity of the state as a continued focus for the discussion of sociological legitimisation and the EU's lack of statehood therefore have an impact on the acceptance of EU authority and on strategies to resolve any EU legitimacy deficit.²⁷ Without EU statehood any imposition from its institutions can appear as coming from 'outside', which usually means authority is less likely to be accepted than imposition from well established 'internal' authorities. As a result, there have been developments to resolve EU legitimacy deficits and to 'bring EU citizens closer to the Union' at EU level, with the ECI one of the latest examples. More recently there have been developments at Member State level, such as the increased use of state level

²³ Ibid 130.

²⁴ For discussion of the importance of legality in relation to the indirect, Member State based aspects of EU legitimacy see for example D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 11-16.

²⁵ A Warleigh, *Democracy and the European Union: theory, practice and reform* (Sage 2003) 5.

²⁶ M Weber, *The theory of social and economic organization* (Free Press New York 1964), translated [from the German] by A.M. Henderson and Talcott Parsons; edited with an introduction by Talcott Parsons 329-333.

²⁷ J Weiler, 'Does Europe need a constitution? Reflections on demos, telos and the German Maastricht decision' [1995] ELJ 219.

referenda to legitimise EU treaty ratification, which recognise the need for EU legitimacy to be strengthened at Member State level as well.²⁸

If the ECI and the EUA are to increase the sociological legitimacy of the EU it will be through their potential to increase political legitimacy, particularly democratic legitimacy. The importance of democracy to the EU Member States means that the greater the democratic potential of these instruments, the more likely their implementation will increase sociological legitimacy. There is no guarantee, however, that this would be the case as other factors, such as the performance success of the EU or its lack of clear political identity, may offset any gains in democratic legitimacy; or indeed democracy may not be the major reason for EU legitimacy deficits. The theoretical framework provided here recognises the existence of the other criteria of political legitimacy, particularly to the degree they challenge EU democracy, but the link between the normative impact of the ECI and EUA and acceptance of EU authority is a complex question that will need to be the subject of research elsewhere. This thesis focuses on the prior question of the potential of the ECI and EUA to influence the EU's democratic legitimacy and therefore political legitimacy; irrespective of whether this does actually lead to an increase in the empirical legitimacy of the EU. We turn next, therefore, to the definition of political, normative legitimacy.

Political legitimacy

Political legitimacy is distinct from sociological legitimacy in that it provides a standard that the legitimacy of the EU can be assessed against. G de Búrca, for example, succinctly summarises this distinction: "legitimacy has both a social aspect, in terms of being rooted in popular consent, and a normative aspect, in terms of the underlying values on which such consent is based".²⁹ Several forms of political legitimacy have been tried or proposed over the centuries, such as Monarchy, Marxism, Communism and Theocracy, but European Member States have broadly settled for what is commonly described as liberal democratic legitimacy as the normative basis for their societies.³⁰ This is therefore the basis from which to develop an understanding of political legitimacy for the purpose of analysing the ECI and EUA potential to enhance EU democratic legitimacy.

²⁸ For a recent analysis of the increasing use of referenda in relation to the EU see F Mendez, M Mendez, V Triga, *Referendums and the European Union: a comparative enquiry* (CUP 2014).

²⁹ G de Búrca, 'The Quest for Legitimacy in the EU' [1996] MLR 59 349. For other approaches to the distinction between sociological and political legitimacy see Weiler's use of formal and social which focuses on system creation rather than its normative justification in J Weiler, *The Constitution of Europe 'Do the New Clothes Have an Emperor?' and Other Essays* (CUP 1999) 79; J Weiler, 'After Maastricht: Community legitimacy in post 1992 Europe' in Adams (ed), *Singular Europe: Economy and polity of the EC after 1992* (University of Michigan Press 1992) 11; and Arnall's approach to this distinction in A Arnall and D Wincott (eds), *Accountability and legitimacy in the EU* (OUP 2002).

³⁰ For discussion of legitimacy from the perspective of the liberal democratic tradition in European states see D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998).

Beetham and Lord provide a well recognised three part definition of political legitimacy that includes legality, which in the liberal democratic states of the EU is met through the constitutional rule of law; normative justifiability; and legitimation, which is met through electoral authorisation.³¹ Within this definition of political legitimacy, Beetham and Lord summarise the normative justifiability criteria that need to be met for liberal democratic legitimacy as performance, democracy and identity.³² The ECI and EUA are directly applicable to the criterion of democracy, but the three criteria interact and influence each other and it is important not to view democracy as the only legitimating factor for a polity. When analysing the democratic deficit debate, Joseph Weiler stated that “[There is] a loose usage of the notions of democracy and legitimacy. Very frequently in discourse about the Parliament and the Community the concepts of democracy and legitimacy have been presented interchangeably although in fact they do not necessarily coincide.”³³ To avoid this loose interchange of concepts between political legitimacy and democracy, which is just one of its component parts, this chapter therefore includes some preliminary comments on the criteria of performance and identity before moving on to a more detailed consideration of democracy in the second half of this chapter.

The “general or abstract framework” provided by Beetham and Lord for assessing the legitimacy of a political authority is intended as “a universal one; its specific form is variable according to the historical period, the society in question and the form of political system in question”.³⁴ As the role

³¹ D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 3-11; Warleigh also uses this “famous” definition of political legitimacy in A Warleigh, *Democracy and the European Union: theory, practice and reform* (Sage 2003). For specific comment on the manner in which the criteria of Legality and legitimation apply to the EU see D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 11-22.

For an alternative contractualist approach see, for example, A Follesdal ‘Democracy, legitimacy and majority rule in the EU’ in A Weale and M Nentwich (eds) *Political Theory and the EU: Legitimacy, Constitutional Choice and Citizenship* (Routledge 1998). In introducing this chapter Follesdal emphasises similar aspects of the relationship between sociological and political legitimacy within the several ways that legitimacy is used: Normative legitimacy is fundamental for sociological legitimacy to exist and legality is necessary condition of normative legitimacy. He does not state what the other conditions are however.

³² D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 22-30.

This trichotomy is widely recognised, Nicolaidis and Howse state for example, “the sources of legitimacy are diverse: some are technocratic, and relate to presumed expertise to manage the complexities of policy; others are grounded in conceptions of collective identity and culture; others still in notions of active democratic consent and interest representation”, in K Nicolaidis and R Howse (eds) *The federal vision: legitimacy and levels of governance in the United States and the European Union* (OUP 2001) 4. In relation to this trichotomy see also L Dobson and A Weale, ‘Governance and Legitimacy’ in E Bomberg and A Stubb (eds) *The European Union: How Does it Work?*, (OUP 2003) 160-166.

³³ J Weiler, ‘Introduction: We will do, and hearken’ in J Weiler (ed) *The Constitution of Europe: Do the new clothes have an emperor* (Cambridge 1999) 79. On this point see also R Dahl, *Democracy and its critics*, (Yale University Press, 1989): Of these three democracy has become such a fundamental aspect of legitimacy that the overall legitimacy of a polity is now virtually synonymous with democratic legitimacy.

³⁴ D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 5. For more analysis of this issue see D Beetham, *The legitimation of Power* (Macmillan 1991). This point reflects Weber’s belief in value free social

of a political authority changes, therefore, its political legitimacy will also need to evolve within this definition of political legitimacy, if it is to avoid losing sociological legitimacy.³⁵ The EU has evolved from a form of political legitimacy derived predominantly from the performance of the EU and the so called ‘permissive consensus’,³⁶ to a duality that includes a stronger form of direct supranational legitimisation of EU policy and legislation to complement the legitimisation already derived via the Member States. This evolution, for example through the development of the role of the European Parliament, has not avoided persistent criticisms of its political legitimacy, which have focussed particularly, although not only, on the democratic deficit.³⁷ The EU search for an institutional framework that addresses the political legitimacy dilemmas posed by the EU has been incremental and was described by Horath as “a ‘down to earth’ and pragmatic piecemeal approach in the tradition of Karl Popper”.³⁸ He continues, “Reform policies should be formulated in small, clearly stated stages so that their premises can be scrutinised and their implications are transparent”.³⁹ An incremental, evolutionary approach is perhaps the most appropriate for a novel constitutional environment, such as the EU, because there is no obvious blueprint that can be transposed to the European level.⁴⁰

The introduction of the ECI and the EUA are the latest small stages in EU development that are part of the evolving strategy to address problems with the normative justification of the EU, through influencing its democratic legitimacy. Having outlined a broad understanding of political legitimacy, the rest of the chapter addresses the three normative criteria for political legitimacy of identity, performance, and democracy. The next section will examine the criterion of identity primarily to

sciences and his reluctance to value one aspect of legitimacy as more important than another: T Banchoff and M Smith (eds) *Legitimacy and the European Union: the contested polity* (Routledge 1999) 4-5.

³⁵ “Up until recently, the EU has embraced – through default rather than design – an evolutionary constitutionalism”, J Fossum and A Menendez, ‘The Constitution’s Gift: a constitutional theory for a democratic European Union’ [2005] *ELJ* 380. See also Weiler, who argues that continuing an evolutionary process would be more beneficial than enacting an EU constitution, in J Weiler, ‘In defence of the status quo: Europe’s constitutional Sonderweg’, in J Weiler and M Wind (eds), *European Constitutionalism beyond the State* (CUP 2003) 7–23.

³⁶ S Auer provides a description of permissive consensus as “the initial method of European unification, in which enlightened elites pursued ambitious integrationist projects on the assumption that ‘ordinary people’ would eventually appreciate their advantages”, in S Auer ‘New Europe: Between Cosmopolitan Dreams and Nationalist Nightmares’ [2010] *JCMS* 1163, 1179.

³⁷ See C Lord, ‘Assessing Democracy in a contested Polity’ [2001] *JCMS* 643 for a summary of the different ways in which the democratic deficit has been framed.

³⁸ M Horeth, ‘No way out for the Beast? The Unsolved legitimacy Problem of European governance’ [1999] *Journal of European Public Policy* 249, 264

³⁹ *Ibid.*

⁴⁰ Compare Majone’s rejection of the piecemeal approach. He has concluded that “piecemeal, evolutionary reform of the present system [of the EU] is no longer sufficient” and “that there is no time left for [a] slow evolution of the institutions and practices of the EU” in G Majone, ‘Legitimacy and Effectiveness: a response to Professor Michael Dougan’s review article on Dilemmas of European Integration’ [2007] *ELRev* 70, 71 and 82. It seems unlikely however that the piecemeal approach of gradual evolution will be abandoned in the EU.

establish that the issues that have been raised in relation to the European demos and identity as an aspect of political legitimacy do not preclude democracy at the EU level.

Identity based political legitimacy

In many ways the identity criteria for political legitimacy is the most problematic for the EU and its clearest expression of difference from its Member States.⁴¹ Identity may be problematic in terms of EU legitimacy, but it is necessary for its political legitimacy.⁴² The issue for the purpose of this thesis is limited to whether the current issues with demos and identity in the EU preclude the possibility of EU level democratic legitimacy.⁴³ I argue in this section that despite the weakness of the nascent identification of citizens with the EU polity, supranational democracy is still possible in the EU. This focussed comment is related to, but does not enter in to a wide ranging political science debate about the relative strength of an EU demos and citizen identification with it, and whether and how it might develop in the future.⁴⁴ The broader questions about political identity are eschewed here in favour of comment focussed on identity legitimacy at the present time that specifically supports the later legal analysis of the ECI and EUA.

Identification with some form of EU demos is needed because if citizens feel no common bond with other EU citizens at all then they are unlikely to participate in its legitimisation through methods such as voting in elections or supporting instruments such as the ECI. Beetham and Lord summarise why identity is important for political legitimacy as follows: “people might claim that governance is not rightful ... [if] decisions have been taken by a collectivity that has no right to expect their cooperation”.⁴⁵ Having no European demos could lead the EU to be viewed as ‘other’ and to therefore have no right to expect cooperation from its citizens or be viewed as politically legitimate in liberal democratic terms. A sense of otherness could have many sources that lead to feeling no

⁴¹ E.g. A Warleigh, *Democracy and the European Union: theory, practice and reform* (Sage 2003) 109: “The absence of a European demos ... is the principal problem facing the architects of democratisation in the EU”. Also D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 18: “The absence of a shared collective identity is often considered the most serious of the obstacles to the development of political legitimacy at the European level”.

⁴² On the necessity of identity for political legitimacy see, for example, A Warleigh, *Democracy and the European Union: theory, practice and reform* (Sage 2003) and F Scharpf *Governing in Europe: Effective and Democratic?* (OUP 1999).

⁴³ Warleigh describes demos as a “community of citizens linked to each other by strong democratic bonds and pressing to acquire a measure of effective control through formal or informal means over government”, in A Warleigh, *Democracy and the European Union: theory, practice and reform* (Sage 2003) 109.

⁴⁴ For an earlier discussion of the EU demos see, for example, J Weiler, ‘Does Europe need a constitution? Demos, telos and the German Maastricht decision’ [1995] *ELJ* 219. The crisis in the EU has led to renewed debate about the EU demos, see, for example, K Nicolaidis, ‘European democracy and its crisis’ [2013] *JCMS* 351; T Risse, ‘No demos? Identities and the public spheres in the Euro crisis’ [2014] *JCMS* 1207; or in relation to the European Parliament E Eriksen, *The unfinished democratisation of Europe*, (OUP 2009).

⁴⁵ D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 33.

identification with the EU and no engagement with its attempts to increase democratic legitimacy, such as a lack of an external 'other' for EU citizens to bond against, or because of the need to recognise a common bond with citizens that were previously 'other' in nation state terms. Some identification with the EU and a sense that it is not a fully external, imposed authority is therefore needed for it to meet the liberal democratic normative requirements of political legitimacy, and some form of EU demos needs to exist to support this identification.

Instead of a common bond at EU level and some form of EU demos, intergovernmentalists might argue that there is sufficient identity legitimacy 'borrowed' from the Member States, which is a stronger source of this aspect of normative political legitimacy for citizens.⁴⁶ It is likely that the dual EU polity does continue to benefit from the identification of citizens with the nation state for the implementation of EU laws at Member State level, but to accept the Member State level as the only source of identity based political legitimacy is to accept the EU as only an intergovernmental organisation. Instead, the EU is a dual polity that combines supranational and Member State institutions in the exercise of its political authority, with a degree of autonomy that requires political legitimisation at both supranational and Member State level.⁴⁷ If this duality is accepted, then the political legitimacy of the current EU polity needs some degree of identity legitimacy at EU level to be normatively justified.⁴⁸

We next ask how such an identity can exist at an EU level that does not have a single, identifiable demos or the 'volkish' type national loyalties that might provide such an identity.⁴⁹ No strong claim is made here for the existence of this type of identity legitimacy, rather it is claimed that the significance of its absence does not have a decisive impact on the overall political legitimacy of the EU. Such thick, 'volkish' forms of identity, which are now associated closely with the nation state and lead to criticism of EU legitimacy, did not exist to the same extent at the formation of the Member

⁴⁶ A Moravcsik, 'In Defence of the 'Democratic Deficit': Reassessing legitimacy in the European Union', 40 *JCMS* (2002) p. 603; A Moravcsik, 'The Myth of Europe's Democratic Deficit', *Intereconomics: Journal of European Public Policy* (2008); A Moravcsik "The European Constitutional Settlement," *World Economy* (January 2008).

⁴⁷ The intergovernmental critique of EU level political legitimisation is discussed further in the section below titled 'democracy'.

⁴⁸ For comment on the different factors that might explain the existing level of identity with the EU at present see D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 47-55.

⁴⁹ That the EU has instead multiple demoi is argued in K Nikolaidis, 'The New Constitution as European Democracy?' [2004] *Critical Review of International Social and Political Philosophy* 1; see also F Chavenal and F Schimmelfennig, 'The case for Democracy in the European Union' [2013] *JCMS* 334.

A traditional approach to demos is, in Weiler's words, a 'volkish' one based on demos as representative of a people and based on elements such as a common language, religion, history or cultural habits and sensibilities. For a German perspective on demos and its implications for the states of Europe. In J Weiler, U Haltern and F Mayer, 'European Democracy and Its Critique', [1995] *West European Politics* 4, 10-14.

States either.⁵⁰ They are identities that developed over a long period of time; as Weiler put it, “these mutations are epochal not generational”.⁵¹ Although the EU clearly falls short of the standard of identity based political legitimacy that is apparent in the well established polities of the Member States, the more appropriate standard is to consider the EU in light of the identity legitimacy of Member States in the early years of their formation, rather than by today’s standards.⁵²

Moreover, the Member States are evidence that the lack of a ‘thick’ identity at the formation of a state does not preclude this ‘natural’ national or ethnic basis for identity from developing over time, if it turns out to be necessary for the EU. It may even be possible to construct identity over time through conscious decisions about issues such as language, political borders, currency and repeated political engagement by citizens as a single body; all issues that influence citizen identification with the EU today.⁵³ As Weiler states, at certain critical transition points identity has a high “degree of artificiality, of social constructionism and even social engineering” and identity can be formed as “a conscious decision and not only be a reflection of an already pre-existing consciousness”.⁵⁴ For these reasons the EU does not necessarily need to wait for the development of a ‘thick’, ‘volkish’ form of identity based legitimacy before attempting to develop the normative justification of its political legitimacy, such as through the introduction of new democratic instruments such as the ECI and EUA referenda.

Citizens are not currently being asked to replace their Member State identity with an EU one, but to accept a new layer of identity, particularly in terms of their civic, political life, that complements the layer(s) of their Member State identity.⁵⁵ In terms of identity, all the member states combine a national aspect and a political, state aspect for their citizens.⁵⁶ A number of the EU member states, such as UK, Belgium and Spain, already contain multiple national identities, which inherently implies

⁵⁰ Y Meny, ‘Can Europe be Democratic? Is it Feasible? It is necessary? Is the present situation sustainable?’, [2011] *Fordham International Law Journal* 1287 and D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998).

⁵¹ J Weiler, U Haltern and F Mayer, ‘European Democracy and Its Critique’, [1995] *West European Politics* 4

⁵² It has been argued that Europe possesses some of the necessary history for a ‘thick’ identity to develop. See D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 35-36 for a summary.

⁵³ For comment on the constructionist route to forming identity see for example D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 39-41.

See Eurobarometer for responses to the question of the influences that influence citizens stating they are EU citizens. See latest report at http://ec.europa.eu/public_opinion/archives/eb/eb81/eb81_citizen_en.pdf pgs 15-19.

⁵⁴ J Weiler, U Haltern and F Mayer, ‘European Democracy and Its Critique’, [1995] *West European Politics* 4, 16

⁵⁵ European citizenship is couched in these terms in the treaties: ‘Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship’, Art 20 TFEU.

⁵⁶ D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 47-48.

a distinction between nation and state identity.⁵⁷ This distinction though is not always strongly made and at the other extreme there are Member States, such as Germany, that have a very close alignment between nation and state identity.⁵⁸ This does not stop German citizens, however, from being amongst the strongest supporters of the EU. As well as the multiple national identities in Member States, there are also multiple levels of political identity for citizens and multiple sources of political authority that they legitimise, with many living in federal states or regions with strong devolved powers, at the same time as local and national governmental powers. Hence, the experience of citizens at Member State level would seem to imply that the presence of an existing form of national or political identity does not necessarily preclude another form or level of identity at EU level.

A 'thinner' form of identity has been offered as an alternative to the 'thick' ethno cultural identity that results from a community of citizens feeling that they are part of a single political community because it broadly reflects their values.⁵⁹ One well known proposal for this alternative type of civic, values based identity to support democratic legitimisation is Habermas' 'constitutional patriotism'.⁶⁰ Constitutional patriotism is the attachment to and identification with a political or legal authority as a result of engagement with this polity, for example through democratic or civil society interaction, based on generalised acceptance of the relevant constitution.⁶¹ As long as citizens sign up to the democratic framework, feel linked to other citizens as part of the democratic process and press for control over government, and that this democratic citizenship is believed to deliver the essential framework and results citizens want for society, then constitutional patriotism means that support from a thicker form of identity is not necessarily required.⁶² There are aspects of this approach already existing in Member States where civic attachment to values of the state, such as tolerance, is

⁵⁷ J Weiler, U Haltern and F Mayer, 'European Democracy and Its Critique', [1995] *West European Politics* 414-19 on this point. D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 52 for comment on this point.

⁵⁸ Weiler states that "The Volk, the nation, understood in this national, ethno-cultural sense is the basis for the modern State... Only nations 'may have' states. The state belongs to the nation, its Volk, and the Nation (the Volk) 'belongs' to the state", J Weiler, U Haltern and F Mayer, 'European Democracy and Its Critique', [1995] *West European Politics* 4, 12. This is also reflected in the German constitutional court decisions on the legality of EU treaties.

⁵⁹ On the construction of this alternative form of demos see A Warleigh, *Democracy and the European Union: theory, practice and reform* (Sage 2003) chapter 6.

⁶⁰ J Habermas, 'The European nation state. Its achievements and its limitations. On the Past and future of sovereignty and citizenship' [1996] *Ratio Juris* 125, 133 for constitutional patriotism. See also D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 41-3.

⁶¹ For a fuller introductory summary of constitutional patriotism see P Eleftheriadis, K. Nicolaidis, and others, 'Foreword: The changing landscape of European constitutionalism.' *International Journal of Constitutional Law* [2011] 673. This is the introduction to a Symposium on Constitutional Patriotism (further articles are published in the same volume) that attempts to give the theory more depth and also more independence from the viewpoint of Habermas with whom it is closely associated.

⁶² J Habermas, 'The European nation state. Its achievements and its limitations. On the Past and future of sovereignty and citizenship' [1996] *Ratio Juris* 125, 134.

a strong part of the nation state identity. Habermas goes as far as to say that “all of us live in pluralist societies that are moving further and further away from the format of a nation state based on a culturally more or less homogeneous population. ... Except for policies of ethnic cleansing, there is no alternative to this route towards multicultural societies”.⁶³ If this is correct, it means that statehood is already increasingly based on civic or political values rather than cultural ones, such as language. Citizenship and belonging to a political authority other than the one you are born in is therefore a well recognised concept, but the idea of EU level identity legitimacy only based on ‘constitutional patriotism’ is still problematic for a number of reasons; some of which are briefly touched on in the following paragraphs.

First, ‘constitutional patriotism’ does not seem to fit with the reality of the institutional structure of the EU, which is based on a combination of Member State and EU level control of political decision making. Constitutional patriotism is strongly linked to a federal concept of the EU, which is not the present political structure of the EU. As Warleigh said, “any European demos would require the continued existence of the more organic (if still at least partially invented) cultures of the Member States to give it the requisite resonance with citizens”.⁶⁴ It is likely therefore that the political duality of the EU will remain for the foreseeable future and reduce the applicability of an approach to EU level identity that focuses predominantly on an idea of a federal EU. Secondly, this type of identity may be just as difficult to construct, or take just as long to develop, as a more cultural identity. The rejection of the European Constitution, which would have provided one of the hallmarks of a single constitutional identity, is perhaps one example of how difficult this type of constitutional identity is to form through deliberate action. The rejection of the Constitutional Treaty did not stop democratic changes being made in the EU or opportunities being created for identity to form, but it has probably slowed progress towards a single EU identity formed around its values and laws, if this were ever to occur. Thirdly, it seems unlikely, or at least a remote possibility, that citizens in Europe will entirely abandon their existing sense of ethno cultural identity associated with the polities they legitimise for identification with a constitutional framework for democratic citizenship. Even at EU level the Eurobarometer surveys seem to indicate that a feeling of community with other citizens appears to be based on common culture and history more strongly than it is on values and laws.⁶⁵

These criticisms of constitutional patriotism, however, do not preclude the possibility of an EU level sense of identity that might have some civic, values based aspects within it. Instead the comments

⁶³ Ibid at 133.

⁶⁴ A Warleigh, *Democracy and the European Union: theory, practice and reform* (Sage 2003) 114.

⁶⁵ See for example the Eurobarometer report from Spring 2014 http://ec.europa.eu/public_opinion/archives/eb/eb81/eb81_citizen_en.pdf pgs 15-19, which indicates what creates a feeling of community among EU citizens.

are intended to reinforce the position in this thesis that the duality of EU legitimacy is likely to persist; one that contains citizen identification with the EU and also probably a stronger, more 'volkish' identification with their Member State. Constitutional patriotism may be problematic, but developing some form of civic values based identity at EU level to complement that which is present at Member State level could still be important. Weiler indicates the potential benefits of this dual legitimisation route as follows: "Maybe the national in-reaching ethno-cultural demos and the out-reaching supranational civic demos, by continuously keeping each other in check, offer a model of critical citizenship".⁶⁶ For the argument that is developed in this thesis, the most that needs to be claimed in terms of a thinner, civic, values-based EU identity is that it appears to be sufficient to allow the possibility of EU level, supranational democracy.

The Eurobarometer surveys also provide some empirical support for the claim that a civic based identity is possible at EU level; at least to a degree sufficient for citizens to engage democratically at EU level and to complement their existing Member State identity. The acceptance of a European identity may be novel in that it is decoupled from the idea of a nation state, but there is evidence that, as of Spring 2014, over 50% of citizens already identified themselves as both a Member State national and a European.⁶⁷ Further support for the claim that some form of EU level political identity exists came in 2014 from the fact that although EU citizens tend to see themselves as Member State citizens first, 65% of them also class themselves as European citizens, which reverses the decline of this measure since the financial crisis.⁶⁸ Given that there is this level of identification with the EU based on both cultural and civic aspects of political identity at EU level, the conclusion here is that there is a degree of EU level identity that provides at least a sufficient level of normative justification for there to be EU level democracy in the dual EU polity.

The novelty of the challenge for the EU is to establish sufficient identity-based, normative political legitimacy without itself being either a state or a nation. Formation of states, such as the UK, made possible what Habermas describes as "a new, more abstract form of social integration beyond the borders of ancestry and dialect".⁶⁹ The EU is now asking citizens to accept a further deliberate step

⁶⁶ This belief that Member State and EU identity are both needed, albeit in different forms, is a distinction between Weiler and Habermas, who wishes to conflate them together to a single identity based around a European (federal) constitution. For a summary of the distinction between Habermas and Weiler see S Baykal, 'Unity in Diversity? The Challenge of Diversity for the European Political Identity, Legitimacy and Democratic Governance: Turkey's EU Membership as the Ultimate Test Case', Jean Monnet Working Paper 09/05 51-6.

⁶⁷ See Eurobarometer report at http://ec.europa.eu/public_opinion/archives/eb/eb81/eb81_citizen_en.pdf Spring 2014 citizenship responses, pg 10.

⁶⁸ Eurobarometer report at http://ec.europa.eu/public_opinion/archives/eb/eb81/eb81_citizen_en.pdf pgs 5-9 Spring 2014.

⁶⁹ J MacCormick, *Weber, Habermas and the Transformations of the European State Constitutional, Social, and Supranational Democracy*, (CUP 2007) 193.

in this process to identify with the EU as a single political community that shares their values, despite its absence of state or nation hood, and to accept the democratic links with citizens of other Member States and to work together to control government. Habermas states: “Today we are faced with the task of carrying on this process with a further abstractive step ... of democratic will formation that can cross national borders”.⁷⁰ If the EU is to be successful in this, it is not necessary to be able to claim a European demos in the thick identity sense or replace the Member State level identity, but the EU does need an acceptable level of identity on which to base its democratic legitimisation, perhaps through a combination of a civic, political identity at EU level and a more volkish, national identity at Member State level. This is not to claim a high level of normative identity legitimacy for the EU, there are clear weaknesses in this aspect of its political legitimacy, particularly when compared to the Member States, but it is claimed that the levels of EU identity are sufficient to not “preclude the Union from developing a sufficient, if novel, sense of demos”,⁷¹ or from striving for further normative justification of EU political legitimacy through democracy. It is possible that democratic instruments such as the ECI and EUA may help generate a sense of EU political community that contributes to a form of EU level identity for its citizens.

The next section examines the second criteria of liberal democratic legitimacy, ‘performance’, arguing that it is no longer sufficient for EU legitimacy and that efforts need to be made to strive for strengthened supranational democratic legitimacy.

Performance based political legitimacy

Originally, the EU policy areas in which performance was expected to produce benefits were, broadly speaking, prosperity and peace.⁷² Normative justification was largely based on these performance criteria and on legality through ratification of the treaties. Democracy was limited to indirect legitimisation via Member State institutions. This situation was generally considered to be sufficient normative justification for EU political legitimacy: “As long as the Community succeeded in solving the limited problems in those few policy sectors which required European solutions, the integration process raised no legitimacy problems”.⁷³ Supranational democracy was not yet believed

⁷⁰ J Habermas, *The Postnational Constellation* (MIT Press 2001) 18.

⁷¹ A Warleigh, *Democracy and the European Union: theory, practice and reform* (Sage 2003) 110 and J Weiler, ‘Does Europe need a constitution? Demos, telos and the german Maastricht decision’ [1995] ELJ 219.

⁷² Dobson and Weale point to the Danish referendum rejection of the Maastricht treaty as an early wake-up call to political elites that securing peace and prosperity is not enough, L Dobson and A Weale, ‘Governance and Legitimacy’ in E Bomberg and A Stubb (eds) *The European Union: How Does it Work?*, (OUP 2003) 164.

⁷³ M Horeth, ‘No way out for the Beast? The Unsolved legitimacy Problem of European governance’ [1999] JEPP 249, 252.

to be required and it was thought that EU political legitimacy would develop incrementally.⁷⁴ This neofunctionalist integration approach, which relied on ‘spill over’ between policy areas to enhance EU legitimacy has its roots in the foundation of the Community itself and the technocratic vision of its early founders, such as Monnet, of a gradual elite-led development of the Community.⁷⁵ The introduction in 1979 of the European Parliament, which has become a supranational institution of representative democracy, was a fundamental, if at the time largely symbolic, break from this approach to legitimising the EU, and recognised that meeting the performance criteria of political legitimacy and the neo-functional approach to EU development was no longer enough. This section comments on and criticises the arguments that have been made for a performance based, technocratic approach to governance at EU level, arguing that strengthened supranational democracy is also necessary.

The leading advocate for a technocratic approach to EU governance during the 1990s and early 2000s was Majone, who argued that the EU is a regulatory state that requires expertise and technical administrative cooperation to produce ‘pareto optimal’ outcomes for citizens.⁷⁶ Majone argued that the focus should be on providing better performance inputs, and efficient and effective outcomes and that this is where the legitimacy deficit of the EU lies, not in a democracy deficit. According to his view, increasing supranational opportunity for democratic engagement will not help improve the outputs of the EU, or improve legitimacy as a result. The main legitimising focus should be on the supranational mechanisms that are designed to provide effective output. In fact, he argued, increasing democracy may actually lead to worse outcomes for European citizens as the impact on efficiency and reduction in expert control of policy decisions will lead to a reduced likelihood of ‘optimal’ decision making for European citizens. The outputs of liberal democratic legitimacy, however, do not seek to be ‘optimal’ in this sense, they seek to align outputs instead with the wishes of the electorate and as such rely on popular sovereignty. Majone though believed that, “the notions of popular sovereignty and popular representation, and hence the idea of direct

⁷⁴ “When the first foundations of what would become the European Union were laid down, very few had a democratic vision in mind”, Y Meny, ‘Can Europe be Democratic? Is it Feasible? Is it Necessary? Is the Present Situation Sustainable?’ [2011] *Fordham International Law Journal* 1287.

⁷⁵ For a summary of the different approaches to integration of the EU including neo functionalism see P Craig, ‘Integration, democracy and legitimacy’ in P Craig and G de Búrca (eds) *Evolution of EU Law* (OUP 2011) 13-40.

⁷⁶ See G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*. (OUP 2005). Or more recently G Majone, *Europe as the Would-be World Power – The European Union at fifty* (CUP 2009). Others include A Menon and S Weatherill, ‘Democratic Politics in a globalising world: supranationalism and legitimacy in the European Union, LSE, Law society and economy working papers 13/2007, <<http://www.lse.ac.uk/collections/law/wps/WPS13-2007MenonandWeatherill.pdf>> accessed 8 July 2015.

For a critique of Majone’s position see M Dougan, ‘And Some Fell on Stony Ground... A Critical Reading of Giandomenico Majone’s Dilemmas of European Integration’ [2006] *EL Rev* 865. For a rebuttal of the validity of technocratic legitimacy see D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 16-22.

democratic legitimation, are highly problematic, ... the only concrete form of [democratic] legitimacy available to the European institutions today is indirect".⁷⁷ Majone was therefore proposing that the EU level political legitimacy should rely predominantly on the criterion of performance for its normative justification and have a technocratic form of governance.

There may have been justification for emphasising supranational performance legitimacy in the early days of the EU when more limited policy goals were being achieved and political support rested on a 'permissive consensus'.⁷⁸ Since then, however, each treaty has introduced significant policy changes that have broadened the areas of EU competence and increased the EU's influence on the lives of its (Member State) citizens, in areas such as crime, foreign policy, and trade regulation.⁷⁹ The EU may not be a fully fledged state, but it has taken on many of the traditional functions of the state. The more that the EU takes on the traditional functions of a liberal democratic state, the greater the need, broadly speaking, to meet the legitimacy criteria of the states these functions have moved from, which includes democracy.⁸⁰ More recently, Majone, himself, has recognised that an increasing level of politicization of EU policymaking becomes unavoidable as more and more tasks involving the use of political discretion are shifted to the European level, and also that the EU is no longer just a regulatory state; describing, for example how the recent economic crisis of the EU has highlighted the democratic deficit and the need for democratic reform.⁸¹

The further the EU goes beyond being a regulatory state, the greater the influence over the lives of citizens and the more traditional functions of a state that it takes on, the more likely it is for an EU polity based on performance to be normatively insufficient, in liberal democratic terms.⁸² Moreover,

⁷⁷ G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP 2005) 26-7.

⁷⁸ S Auer, 'New Europe: Between Cosmopolitan Dreams and Nationalist Nightmares' [2010] *JCMS* 1163, 1179 provides a description of permissive consensus as "the initial method of European unification, in which enlightened elites pursued ambitious integrationist projects on the assumption that 'ordinary people' would eventually appreciate their advantages".

⁷⁹ On the increasing breadth of European Union policies see inter alia, P Craig, 'Integration, democracy and legitimacy' in P Craig and G de Búrca (eds) *Evolution of EU Law* (OUP 2011) 39, and D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 94. Majone also accepted that there has been an increase in the breadth of EU policies in G Majone, 'From Regulatory state to democratic default' [2014] *JCMS* 1216, 1216-7.

⁸⁰ Dehousse describes this dispossession of national legitimacy and its insufficient compensation at supranational level as the basis of 'classical democratic deficit theory'. Institutional reform in the EC: Are there alternatives to the majoritarian avenue? Cited from C Lord 'Assessing Democracy in a contested polity' [2001] *JCMS* 641, 642.

⁸¹ G Majone, 'From Regulatory state to democratic default' [2014] *JCMS* 1216. See also G de Búrca 'Developing Democracy Beyond the State', [2008] *Columbia Journal of Transnational Law* 221, 236 regarding this point.

⁸² Majone's characterisation of the EU as just a technocratic, regulatory state might have been applicable to some of the more specific economic related policies, such as internal tariffs and quotas or anti-trust policy, but EU policy-making goes beyond these technical issues now.

the ongoing economic crisis since 2007 is testing the belief in the positivity of the EU's outcomes,⁸³ and it is during these times of crisis that stronger normative justification for political legitimacy, beyond its performance, is likely to be required to sustain a political system and its decision making institutions.⁸⁴ The 'public regarding nature' of EU policy and institutions cannot be guaranteed by a technocratic approach to EU governance that provides little opportunity for alignment of policies with citizen preferences, or for policies to be tested against public opinion. The EU institutions taking these policy and legislative decisions are permanent public bodies that act as a form of governing executive with influence over the lives of European citizens and as Armin Von Bogdandy succinctly stated in relation to the EU, "the exercise of any public authority begs the question of its democratic justification".⁸⁵ Democracy is therefore necessary at EU level as part of its political legitimacy, and just relying on performance is not sufficient.

The argument for technocratic governance based on effective specialist performance as an alternative to democratic legitimacy is not a new one. As Dahl said, "The claim that government should be turned over to experts deeply committed to rule for the general good and superior to others in their knowledge of the means to achieve it – Guardians Plato called them – has always been the major rival to democratic ideas".⁸⁶ Although expertise is needed, it is not enough to govern a political system and expertise should not be viewed as a superior alternative to public opinion but as a complement. "An old adage has it, experts should be kept on tap, not on top ... it is one thing for government officials to seek the aid of experts; but it is quite another for a political elite to possess the power to decide on the laws and policies you will be compelled to obey".⁸⁷ In other words expert guidance should inform the decision-making not make the decision itself; democratic and performance legitimacy should complement each other not work in isolation. In considering technocracy from a wider legitimacy perspective Beetham and Lord put it even more strongly: "it

⁸³ C Pinelli, 'The Discourses on Post-National Governance and the Democratic Deficit Absent an EU Government', [2013] *Eu Const* 185 "the Eurozone crisis has dissolved the narrative of the EU as a well-functioning technocratic organization, which should thus have provided it output legitimacy". From among the many commentaries on EU legitimacy in light of the early 21st century economic crisis see R Bellamy and A Weale, 'Political legitimacy and European monetary union: contracts, constitutionalism and the normative logic of two-level games' [2015] *JEPP* 2577 and H Macartney, *The Debt Crisis and European Democratic Legitimacy* (Macmillan 2013).

⁸⁴ L Dobson and A Weale, 'Governance and Legitimacy' in E Bomberg and A Stubb (eds) *The European Union: How Does it Work?*, (OUP 2003). For further discussion of a potential legitimacy deficit in terms of EU performance based legitimacy criteria see inter alia D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 23-25.

⁸⁵ A Von Bogdandy 'The European Lesson for International Democracy: The significance of Articles 9-12 EU Treaty for international organisations'. [2012] *EJIL* 315, 317.

⁸⁶ R Dahl, *On Democracy*, (YUP 2000) 69 Dahl sets out the reasons for rejecting 'Guardianship' as an alternative to democracy in Ch 7 "Why Political equality II? Civic Competence" 69-80. See also R Dahl, *Democracy and its critics* (YUP 1989) 52-82.

⁸⁷ R Dahl, *On Democracy*, (YUP 2000) 71.

should be evident that technocracy [is not] an independent alternative to a democratic legitimacy, on which it remains parasitic ... Even as a temporary expedient technocratic forms of rule suffer from the characteristic delusion that the decision makers 'know best', that their decisions are merely technical or instrumental, and that they can be assumed to be benevolent agents of the public good".⁸⁸ Once it is accepted that political legitimisation of the EU through performance is not sufficient, and technocratic governance is inappropriate, the question becomes how to introduce and develop supranational democratic tools for the dual EU polity at both Member State and EU level.

Performance criteria need to be met in all polities for their political legitimacy to be accepted, but democracy is the fundamental basis for political legitimacy in all Member States, and the experience of the last decades is that even with the success of its outcomes relatively high,⁸⁹ the EU is failing to attract the support of the general public and a much stronger input of democratic legitimacy than in its formative decades is needed to complement any performance based, output legitimacy.⁹⁰ ECIs and referenda are democratic supplements to the legitimisation process that influence the degree of popular sovereignty. As such they have little direct impact on either the performance input of expertise and efficient decision-making or on the outputs of decision optimisation and outcome targets. In many respects they are the other side of the balance, adding weight to participation rather than efficiency. The purpose of this section has been only to justify one of the assumptions this work rests on that excessive reliance on the performance criterion for political legitimacy in the EU is outmoded at best, and a form of technocratic governance is not appropriate for a decision making polity, such as the EU.⁹¹ The second half of this chapter turns to the third criterion of normative justifiability for liberal democratic political legitimacy, democracy, which is the core of the theoretical framework of this thesis. This section of the chapter provides a definition of democracy, a justification of why democracy is needed at EU level, a typology and concludes with a description of the democratic paradigm of the EU, which builds on the two dichotomies outlined at the start of this chapter.

⁸⁸ D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 22.

⁸⁹ L Dobson and A Weale agree with this in 'Governance and Legitimacy' in E Bomberg and A Stubb (eds) *The European Union: How Does it Work?*, (OUP 2003). However, the ongoing economic crisis in 2012 is testing the belief in the positivity of the European Union's outcomes. It is during these times of crisis that wider legitimacy is required to sustain a political system and its decision making. For further discussion of a potential legitimacy deficit in terms of EU performance based legitimacy criteria see D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 23-25.

⁹⁰ See G Majone, 'From regulatory state to a democratic deficit' [2014] JCMS 1218-1219 on this point that outcomes have not been sufficient for legitimisation.

⁹¹ Beetham and Lord describe it as "a basic assumption of both liberal and democratic thought" in D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 20.

European Union democratic legitimacy

Democracy is the preeminent normative criteria for the political legitimacy of the liberal democracies of the EU Member States, to such an extent that it is almost synonymous with legitimacy. Its importance is reflected in the EU Treaties, where it is a founding value of the Union and also required of all states that want to be members of the Union.⁹² The growth of democracy across the world political landscape over the last 100 years has had a dramatic impact on political legitimacy. As Dahl said, “Today, the idea of democracy is universally popular. Most regimes stake out some sort of claim to the title of “democracy”...even dictators appear to believe that an indispensable ingredient for their legitimacy is a dash or two of the language of democracy”.⁹³ The EU is no different in wanting to be considered as democratically legitimate and a highly significant part of the contestation about its political existence focuses on its democracy, or more commonly on the deficits of its democracy.⁹⁴ The subsequent chapters enter this arena through a legal analysis of new democratic instruments in the EU polity. To prepare for the analysis of the ECI and EUA, this chapter examines the democratic criteria of political legitimacy in more detail than the previous criteria of identity and performance.

An institutional rather than a behavioural approach to democracy is taken in this thesis.⁹⁵ Broadly speaking the institutional approach to democracy will tend towards an analysis of the legal and constitutional rules that govern democracy, and the institutional framework that enables democracy to be the basis for the political system.⁹⁶ Political scientists on the other hand will tend towards an analysis of democracy that considers more strongly the behavioural patterns that influence and are influenced by the institutional choices made within a constitution.⁹⁷ The distinction between the two approaches is one of degree rather than polarisation and the subject area of this work is one that inevitably requires an awareness of both political science and legal studies. The focus, though, of the

⁹² Art 2 TEU describes democracy as a founding value of the EU and its Member States. See also Art 10 (1) that states that the Union is founded on representative democracy and Art 10(2) that describes Member State governments as ‘democratically accountable to either their national parliaments, or their citizens’.

⁹³ R Dahl, *Democracy and its critics* (YUP 1989) 2

⁹⁴ For a summary of the democratic deficit see C Lord ‘Assessing Democracy in a contested polity’ [2001] JCMS 641; J Weiler, U Haltern and F Mayer, ‘European Democracy and Its Critique’, [1995] West European Politics 4; Hix and Follesdal’s standard version in S Hix and A Follesdal, ‘Why there is no democratic deficit in the European Union: A response to Majone and Moravcsik’ [2006] JCMS 533. See also P Craig and G de Búrca (eds) *Evolution of EU Law* (OUP 2011) 28-40 for review of democratic deficit positions.

⁹⁵ For discussion of this distinction see A Weale, *Democracy* (Macmillan 1999) 20-23.

⁹⁶ Weale uses Oran Young’s definition of an institution: “identifiable practices consisting of recognised roles linked by clusters of rules or conventions governing relations among the occupants of these roles”, A Weale, *Democracy* (Macmillan 1999) 20.

⁹⁷ The capacity and capability of citizens to engage democratically are two such behavioural, political science issues of particular relevance to direct democracy. See G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009).

discussion of democracy in this chapter and the analysis of the ECI and referenda of the EUA in subsequent chapters takes a predominantly institutional, legalistic approach.

The first section of this chapter provides an outline of the definition of democracy and sets out the three democratic criteria that are used in this thesis to analyse the democratic potential of the ECI and EUA referenda.⁹⁸ The second part of the chapter puts forward a positive case for striving for democratic legitimacy at the supranational, EU level to complement the argument in the previous section that performance is not sufficient on its own. The third part of the chapter then considers the interaction between the representative and direct institutional forms of democracy, and sets out a typology of the forms of government that combine them. The final section of the chapter describes the specific democratic provisions of the EU and provides a characterisation of the EU's democratic paradigm that is used in the subsequent analysis of the ECI and EUA.

Democratic criteria for ECI and EUA analysis

The fundamental normative principles underpinning liberal democracy are popular sovereignty and political equality; in other words the belief that the only valid source of political authority is the people and each citizen should have an equal influence on this authority.⁹⁹ David Beetham gives a typical basic starting point for describing democracy that includes these two principles: "Democracy can be most simply understood as a procedure for taking decisions in any group, association or society, whereby all members have an equal right to have a say and to make their opinions count".¹⁰⁰ Within this broad conception of democracy there is little consensus as to what the precise definition of democracy should be and wide recognition of the difficulties in trying to provide one; for example Amaryllis Verhoeven: "democracy is a highly elusive concept. Democracy means different things to different people";¹⁰¹ or James Hyland who, having summarised various meanings

⁹⁸ A full exploration of the philosophical debate surrounding democracy is out of scope of this work. Amongst the many volumes on this subject are R Dahl, *Democracy and its critics*, (Yale University Press, 1989); J Schumpeter, *Capitalism, Socialism and Democracy* (Routledge 1992); J Burnheim, *Is Democracy Possible*, (University of California Press 1988); and A Weale, *Democracy* (Macmillan 1999).

⁹⁹ D Beetham and C Lord *Legitimacy and the European Union*, 8-11 and 59-61. Similarly Phillip Kliver recognises democratic legitimacy as a 'vast notion', but sums it up as "the requirement that rule-making be a reflection of popular will": P Kliver, *The National parliaments in the European Union*, (2006) 95; A Weale, *Democracy* (Macmillan 1999) - democracy is based on public control with political equality. C Lord and E Harris, *Democracy in the New Europe* (Macmillan 2006) 3: "public control with political equality forms the core definition of democracy". A Lipjhart, *Democracies: patterns of majoritarian and consensus government in 21 countries*, (YUP 1984) 1: "An ideal democratic government would be one whose actions were always in perfect correspondence with the preferences of all its citizens".

¹⁰⁰ D Beetham *Democracy: a beginner's guide* (One World 2005) 2.

¹⁰¹ A Verhoeven *The European Union in search of a democratic and constitutional theory* (Kluwer Law International 2002) 3: "democracy is a highly elusive concept. Democracy means different things to different people".

of democracy,¹⁰² concluded that “to identify a single precise and determinate meaning of ‘democracy’ is fundamentally mistaken”.¹⁰³

Hyland goes on to argue that democracy should be approached as a term that indicates similarities in characteristics rather than a single precise meaning.¹⁰⁴ This is the approach taken here for the purposes of analysing the ECI and EUA. Robert Dahl provides a classic list of such characteristics, which he selected, “from within the enormous and often impenetrable thicket of ideas about democracy”: effective participation, voting equality, gaining enlightened understanding, exercising final control over the agenda, and inclusion of adults.¹⁰⁵ These characteristics are the democratic attributes that need to be in place for the members of a political system to be politically equal in determining the policies of the association.¹⁰⁶ Generally these are discussed by Dahl within the context of a form of representative democracy, which he describes as polyarchy, but he leaves open the question of whether representative democracy is sufficient on its own and recognises its potential downside.¹⁰⁷ Dahl’s criteria are modified here for the purposes of a legal assessment of the principal democratic attributes of the ECI and the EUA referenda of broadening citizen participation and increasing citizen influence over the decisions taken by political authorities, and which focus, therefore, on just two of Dahl’s criteria: ‘effective participation’ and ‘exercising final control over the agenda’.¹⁰⁸

The first modified criterion used in this thesis is an ‘*effective participative opportunity*’. This needs to be met for an instrument of direct democracy to be able to offer a useable alternative and supplement to other political processes. This criterion covers Dahl’s criteria of ‘effective

¹⁰² J Hyland *Democratic Theory: The Philosophical Foundations* (Manchester University Press 1995) ch 2: Hyland compares the definitions used by Schumpeter, Macpherson and Burnheim.

¹⁰³ *Ibid* pg 45.

¹⁰⁴ Cf. A Weale, *Democracy* (Macmillan 1999) 17-18 where he outlines reasons for taking a sortal approach rather than the scalar one advocated by Hyland.

¹⁰⁵ First set out in his book R Dahl, *Democracy and its critics*, (YUP 1989). Quoted here from R Dahl, *On Democracy*, (YUP 2000) 38-39. Schiller describes Dahl’s criteria as ‘his five famous principles’ in ‘Direct democracy and theories of participatory democracy – some observations’ in T Schiller (ed) *Local Direct Democracy in Europe* (Springer 2011) 54. These criteria are used by a number of other writers such as D Held, *Democracy and the Global Order* (Polity 2007).

Beetham and Lord take an alternative approach to the characteristics of democracy. They focus on the “legitimising qualities of democracy” rather than the characteristic indicators of a democratic political environment. They describe these qualities as “the popular authorisation of political leadership, accountability of power holders to the public, and representative government”. D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 60.

¹⁰⁶ Also expressed as fundamental in D Beetham *Democracy: a beginner’s guide* (One World 2005).

¹⁰⁷ Dahl specifically comments on the difficulties of using direct democracy for international organisations, such as the EU in R Dahl, *On Democracy*, (YUP 2000) 114-117. On the possible downsides of representative democracy see for example, R Dahl, *On Democracy*, (YUP 2000) 113, ‘The Dark side: Bargaining among elites’.

¹⁰⁸ Dahl’s criteria are used to assess the democratic legitimacy of a polity, whereas the criteria are used here to assess specific democratic instruments.

participation', and to a limited degree includes aspects of two of Dahl's other criteria, voting equality and adult inclusion; at least to the extent that inequality and exclusion might result from the specific provisions in the ECI and EUA legislation. This criterion of 'effective participation' would be fully met when citizens have an equal opportunity to engage with policy and when any practical barriers have been minimised, fairly applied, and do not preclude the possibility of the other democratic criteria from being met. The wider reasons that this criterion might not be met, such as an unequal availability of information, educational inequality, or lack of capacity,¹⁰⁹ are more appropriate for a political science analysis and the legislative design of the ECI or the EUA referenda have little impact on them. As a result comment on effective participation is limited to specific issues that have occurred as a result of the legislation, such as the ECI identification requirements that exclude some EU citizens, technological requirements written in to the legislation that are prohibitively expensive or complex, or referenda topics that are unlikely to add to citizen participation because of their low public salience.

The second of Dahl's criterion that is modified for use in this thesis, 'citizens exercising final control over the political agenda', is defined by Dahl as follows: "The members must have the exclusive opportunity to decide how and, if they choose, what matters are to be placed on the agenda ... The policies of the association are always open to change by the members, if they so choose".¹¹⁰ The first part of this definition of an *exclusive* opportunity for citizens to decide agenda items would only be possible in a polity based on just direct democracy. However, a radical position of completely replacing the indirect participation in the policy agenda through representative democracy with full direct democracy is little supported today, and direct democracy is generally viewed as a complementary rather than substitute mechanism for representative democracy.¹¹¹ Even Marx's political structure of the commune, which he intended as a replacement for 'undemocratic' representative institutions, could not completely avoid the use of representatives in some form.¹¹² As David Held put it, "Centralised state institutions ... must be viewed as necessary for enacting legislation, enforcing rights, promulgating new policies and containing inevitable conflicts between

¹⁰⁹ For comment G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 14-17.

¹¹⁰ R Dahl, *On Democracy*, (YUP 2000) 38.

¹¹¹ For example, M Breuillard, 'Direct Democracy in Britain: Citizen Empowerment or Political Cosmetics' 173, in T Schiller (ed) *Local Direct Democracy in Europe* (Springer 2011): "More than a century after John Stuart Mill, Western Europe has come to terms with the idea that direct democracy does not compete with representative democracy but rather reinforces and supplements it".

¹¹² Marx viewed representative democracy as the legitimising basis for establishing state apparatus for the non-democratic control of society. Representation, according to Marx, was a means to avoid popular sovereignty and effective participation and its removal followed by the subsequent introduction of direct democracy would signal the move from a non-democratic to a democratic society. For comment on Marx see, for example, D Held, *Democracy and the Global Order* (Polity 2007) 105-139.

particular interests. Representative electoral institutions, including parliament and the competitive party system are an inescapable element for authorising and co-ordinating these activities".¹¹³ In a largely representational form of democracy supplemented to a limited degree by direct democracy, as we have in the EU, it is suggested therefore that it is more appropriate to talk of citizen *influence* over the political agenda rather than *control*.¹¹⁴

Although, *exclusive* citizen control over the political agenda is impractical because of the need for representative democracy, the capacity for citizen *influence* over the issues that are deliberated as part of the political agenda remains a key indicator of democratic potential. The greater the degree, therefore, to which citizens influence what items go on the agenda the stronger the expression of popular sovereignty and the higher the democratic standard of the instrument that enables this; and conversely the more strongly mediated a democratic instrument is, and the greater the restrictions on the issues that citizens are able to place on the political agenda, the weaker the instrument's democratic potential will be to enhance popular sovereignty. 'Citizen *agenda influence*' is therefore the second of the democratic criteria against which the democratic potential of the ECI and EUA are assessed.

Influence over the agenda content is important because of the impact it has on the prioritisation of policy debate, but if there is no obligation subsequently imposed, legally or politically, on institutions that would increase the chance of an outcome that is guided by citizen preference, then the democratic potential of the instrument is heavily restricted, and the policies will not be open to change. At its extreme, citizen policy preferences that are expressed through direct democracy might be ignored or only ever have a tangible impact when the institutions involved in the process decide that they align with existing policy preferences. If this happens, then there has been almost no democratic impact from introducing a new instrument of direct democracy, aside perhaps from some deliberative democratic benefits from the public debate generated.¹¹⁵ The inverse is that the greater the likelihood and the frequency of outcomes as a result of citizen participation, the greater the democratic potential of the instrument of direct democracy.¹¹⁶ Dahl's second criterion of

¹¹³ D Held, *Democracy and the Global Order* (Polity 2007) 282.

¹¹⁴ Full control of the agenda would negate the influence of representative democracy because the elected officials would not be putting items on the policy agenda for consideration simply responding continually to the citizens' selection, which is not the expectation of the ECI or the EUA.

¹¹⁵ See R Blaug, 'Engineering Democracy', [2002] *Political Studies* 102, on the importance of being able to challenge established preferences. On deliberative democracy see for example, J Steiner, *The Foundation of Deliberative Democracy*, (CUP 2012).

¹¹⁶ It should be remembered that system effectiveness is also required in a political system and that the existing representative democracy institutions should be able to influence the outcomes from direct democracy engagement to provide this, and not be replaced for the reasons commented on in the previous paragraphs.

‘exercising final control’ is therefore expanded and split into two criteria for the purposes of this thesis: the second criterion of ‘*citizen agenda influence*’ already outlined above and the third criterion in this thesis of ‘*citizen outcome influence*’.

‘*Effective participation*’ is critical for both the ECI and the EUA referenda because these democratic instruments are introduced to widen citizen participation. If there are inequalities or practical barriers built in to the legislative design of any democratic instrument, the possibility of increased participation will be reduced. This criterion is the gateway to the other criteria that directly influence the extent to which popular sovereignty has been enhanced. Of these two subsequent criteria the ECI will be expected to have most impact on ‘*citizen agenda influence*’ because a citizens initiative allows citizens to make policy proposals that institutions may or may not implement, and the EUA referenda will be expected to have most impact on ‘*citizen outcome influence*’ because referenda usually provide an opportunity of a vote that binds institutions on a topic selected by these institutions. The three criteria of ‘*effective participative opportunity*’, ‘*citizen agenda influence*’, and ‘*citizen outcome influence*’, which are used in this thesis as the three organising criteria for the assessment of the democratic potential of the ECI and EUA referenda, focus on the purpose of direct democracy as a participative opportunity to increase the extent that citizen preferences are reflected in policy and legislative decision-making, possibly at odds with existing institutional preferences.

One of the central themes in this thesis and a key factor that influences the potential of the ECI and EUA to meet the three democratic criteria outlined above is the extent of institutional mediation, which is reflected in the ability of citizens to challenge existing policy preferences. Institutions are able to control the extent that influence is passed to citizens over agenda content and its outcomes through their influence on the drafting of the legislation implementing an instrument of direct democracy and through their interpretation of this legislation once enacted. A democratic instrument that gives citizens a participative opportunity to engage with and influence the existing policy agenda is far weaker in democratic terms than an instrument that gives citizens an opportunity to challenge established policy preferences. Blaug describes this distinction between mere agenda confirmation and agenda change as ‘incumbent’ and ‘critical’ democracy, respectively.¹¹⁷ Incumbent democracy sees democratic instruments supporting the policy preferences of the existing political institutions, whereas critical democracy facilitates citizen led change. The extent of institutional mediation and challenge to established policy preferences are therefore an important part of the later analysis of the ECI and EUA.

¹¹⁷ R Blaug, ‘Engineering Democracy’, [2002] *Political Studies* 102.

A final point before presenting the argument in favour of EU supranational democracy is that it is not intended as a call for EU competences to be increased or for further political integration. Strengthening the direct democratic legitimacy of the EU provides political legitimacy for the authority that the Member States choose to allocate to the EU institutions; irrespective of the final outcome of EU integration. The claim that the EU needs to develop its democratic legitimacy is intended to be a politically neutral position, neither Europhile nor Eurosceptic, separated as far as possible from the question of whether the EU is on a path to more or less federalism or intergovernmentalism. This neutrality with regard to the ultimate political future of the EU, however, is tempered by the presumption that a form of political engagement between the European Member States is probably beneficial in today's global political and economic environment,¹¹⁸ and that in the medium term the EU is likely to remain as a constitutional order of states containing aspects of both an intergovernmental and a federal polity.¹¹⁹ It is difficult to detach the political question of EU integration completely from the normative question of EU democratic legitimacy; for example because weak political legitimacy makes it easier to criticise the EU and therefore those who defend the development of EU level democracy might be viewed as defending its existence, or because introducing new democratic instruments may be used to serve political objectives related to EU development. However, this present work is not concerned with the political debate about whether the EU *should* exist or not. The EU *does* exist as a polity and therefore it should be democratically legitimate. Whatever the assumed finality of the integration process, EU democracy needs to continue to be developed at both EU and Member State level to support its current political role.¹²⁰ It is a justification of this claim of the need for supranational democracy that is put forward next.

Justification of supranational democracy

The justification of democracy and comment on its benefits may seem almost superfluous given that all EU Member States are democracies, of varying type and age, and they have accepted democracy

¹¹⁸ See for example: D Held (ed) *A globalizing world? Culture, Economics, Politics* (Routledge 2000).

¹¹⁹ Alan Dashwood's first used his well known description of the EU as a 'constitutional order of states' in A Dashwood, *Reviewing Maastricht, Issues for the 1996 IGC*, (London, Sweet and Maxwell 1996) 7. Moravcsik commented that the current political status of the EU might be a relatively stable long term situation in A Moravcsik, 'The European Constitutional Compromise and the Neofunctionalist Legacy', [2005] *Journal European Public Policy* 349, 376.

¹²⁰ Majone claims that it is the end point that is critical: "the notions of popular sovereignty and popular representation, and hence the idea of direct democratic legitimisation, are highly problematic... arguments about Europe's democratic deficit, to the extent that they are at all meaningful, must be about the assumed finality of the integration process, rather than about the present system." G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*. (OUP 2005) 26-7. This position is refuted because the end point is unknown and does not help the legitimisation of the current powers of the EU polity.

as a founding principle of the EU. However, as Weale points out, if democracy is the best we have then a reminder of its value ensures some protection against changes in political fashion and public disappointment in the system.¹²¹ This is not to say that one should seek to stop the development of democracy, we are certainly not at the end of history,¹²² but that the values on which its development proceeds in light of changing political systems and approaches to its institutionalisation should be properly assessed. It is from this perspective that the analysis of the potential of the ECI and EUA to influence the democratic legitimacy of the EU is carried out.

Why should democratic legitimacy be the focus of the efforts to legitimise the EU polity? After all, democracy has been shown to be far from a perfect form of government and support for democracy is often only based on the premise that it is merely a lesser evil than the alternatives, as famously expressed by Churchill: "Democracy is the worst form of government, except for all those other forms that have been tried from time to time".¹²³ Dahl too recognises the shortcomings of democracy: "in practice democracy has fallen far short of its ideals. Like all previous attempts to achieve a more democratic government, modern democracies also suffer from many defects."¹²⁴ However, Dahl goes on to state that, "In spite of its many flaws ... we must never lose sight of the benefits that make democracy more beneficial than any feasible alternative to it".¹²⁵ These benefits of democracy, such as peace, prosperity and the avoidance of tyranny, are wide ranging and fundamental and have been sufficient for it to persist as the preeminent normative criteria for political legitimacy, despite criticisms and difficulties.¹²⁶

Within these general benefits of democracy, there are a number of specific benefits that it is believed participatory democracy will achieve through increased democratic participation and self government of citizens, which can be grouped in to educative and popular control/decision making categories.¹²⁷ The inherent benefits of participation, particularly its potential to increase political understanding and awareness of citizens, have long underpinned participatory democracy. Smith sums up the attitudes of participatory democrats in relation to this function: "Participation is a beneficial activity in its own right, increasing citizens' political efficacy and understanding of their

¹²¹ A Weale, *Democracy* (Macmillan 1999) 40-41.

¹²² F Fukuyama *The end of history and the last man* (Penguin 1992)

¹²³ from House of Commons speech on Nov. 11, 1947.

¹²⁴ R Dahl, *On Democracy*, (YUP 2000) 60.

¹²⁵ Ibid.

¹²⁶ Dahl offers a list of the desirable outcomes of democracy as: 1- Avoiding tyranny, 2 – Essential rights, 3 – General freedom, 4 – Self determination, 5 – Moral autonomy, 6 – Human development, 7 – Protecting essential personal interests, 8 – political equality. In addition, modern democracies produce: 9 – Peace seeking, 10 – Prosperity in R Dahl, *On Democracy*, (YUP 2000) 45-61.

¹²⁷ Smith describes the benefits related to decision making and popular control as essential for democracy in G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 13-14.

own interests and political responsibilities".¹²⁸ Beetham gives a typical summary of the common educative benefits: better informed citizens, knowledge and capacities of citizens harnessed, more sophisticated public debate considering factors such as the wider public interest when reaching a decision, and a virtuous circle of increased involvement resulting from the positive experience of participation.¹²⁹ These educative benefits are more likely to be the subject of political science and therefore it is the decision-making benefits, which are more strongly influenced by the legislative design of a political instrument and discussed as part of the analysis of the ECI and EUA referenda.

Schiller and Setala summarise the decision-making benefits as being "to enhance democratic empowerment and self government", and that these are the principal benefits of direct democracy.¹³⁰ There are varying ways in which these benefits through participation are described, which should increase citizen influence over the decision-making by those in power and keep them more in touch with citizen preferences.¹³¹ Smith summarises the decision-making benefits in the following way: "participation as the most effective defence against arbitrary power; the individual as the best judge of their own interests; ... increased legitimacy and trustworthiness of political decisions".¹³² In short, it is believed that further democratic participation is essential for popular sovereignty. In the next two chapters the legal analysis of the ECI and EUA considers the potential to achieve, broadly speaking, these decision-making benefits through an assessment of the legislative design of these instruments based on the three democratic criteria outlined earlier in the chapter.

Although there is wide acceptance of the need for a form of EU democracy in academic writing,¹³³ and the discussion is usually focussed on how rather than whether democracy should be

¹²⁸ G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 5. See also M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 2: "participatory democrats have emphasised the positive side effects of democratic participation, especially the development of citizens' civic skills, such as political knowledge and understanding of alternative viewpoints". Pateman also emphasised these educative benefits in C Pateman *Participation and Democratic theory* (CUP 1970).

¹²⁹ D Beetham *Democracy: a beginner's guide* (One World 2005) 132-3. A similar list is used in M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 2 and G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 4-6.

¹³⁰ M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 2.

¹³¹ D Beetham *Democracy: a beginner's guide* (One World 2005) 132.

¹³² G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 5

¹³³ For example Y Meny, 'Can Europe be Democratic? Is it Feasible? Is it necessary? Is the present situation sustainable?', [2011] *Fordham International Law Journal* 1287, 1297: "Apart from these two major exceptions [of Majone and Moravscik], there is quasiunanimity insisting that Europe should be democratic ... given that many decisions cannot be taken any longer at the national level, the only way out is democratisation at the supranational level". The exceptions of Majone and Moravscik are discussed below.

developed,¹³⁴ there has also been considerable debate about the EU democratic deficit and doubts raised about whether EU level democracy is possible or beneficial.¹³⁵ Dahl, for example, was unequivocal in his assessment of the chances of democracy in the EU: “the European Union offers telling evidence. There, such nominally democratic structures as popular elections and a parliament are formally in place. Yet virtually all observers agree that a gigantic democratic deficit remains ... Bargaining, hierarchy and markets determine the outcomes. Except to ratify the results, democratic processes hardly play a role.”¹³⁶ Despite this damning indictment of the democratic credentials of the EU, Dahl recognises that democracy is an evolving concept, that “democracy can be independently invented and reinvented whenever the appropriate conditions exist”.¹³⁷ Since Dahl made these comments 15 years ago, EU democracy has evolved and continues to evolve significantly at both supranational and Member State level; the European Parliament is now co-legislator and able to hold the Commission to account,¹³⁸ direct democracy has been introduced through the ECI,¹³⁹ referenda are more widely used to legitimise treaties, and the national parliaments have a strengthened role at EU level.¹⁴⁰ These changes and the democratic provisions introduced in to the Treaties by the Lisbon Treaty are part of the ongoing reinvention of EU democracy and the

¹³⁴ E.g. In V Bogdanor, ‘The Future of the European community: Two models of democracy’ [1986] *Government and Opposition* 161: “it is unlikely that the pressure for reform will disappear .. it is only natural ... to consider again how the Community can be made both more effective and more democratic... This article does not ask whether [democratic] reform of the Community is desirable, but considers two alternative models of democratic development”. More recently P. Schmitter wrote “I am taking two things for granted at this point: (1) that the apposite criteria for the legitimation of the EU (whatever they may be) should be “democratic” in some fundamental/foundational sense” in P Schmitter, ‘What is there to legitimize in the European Union... and how might this be accomplished?’ in [2001] Jean Monnet Working Paper No. 6/01 Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance. Accessed at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/011401.html>.

¹³⁵ For a standard version of the democratic deficit see J Weiler, U Haltern and F Mayer, ‘European Democracy and Its Critique’, [1995] *West European Politics* 4 or S Hix and A Follesdahl, ‘Why there is no democratic deficit in the European Union: A response to Majone and Moravcsik’ [2006] *JCMS* 533. See also P Craig and G de Búrca (eds) *Evolution of EU Law* (OUP 2011) 28-40 for review of democratic deficit positions. See also D Beetham and C Lord, *Legitimacy and the EU* (Longman 1998) 60 for discussion of the difficulties of EU democratisation.

¹³⁶ R Dahl, *On Democracy*, (YUP 2000) 115.

¹³⁷ R Dahl, *On Democracy*, (YUP 2000) 9.

¹³⁸ The European Parliament approves candidates for the Commission and the European Parliament elections decide the Commission president nomination, in accordance with Art 17(7) TEU. The European Parliament can also censure and ultimately dismiss the Commission in accordance with Art 17(8) TEU.

¹³⁹ Art 11(4) TEU.

¹⁴⁰ See A Cygan, *Accountability, Parliamentarism and Transparency in the EU: The Role of National Parliaments* (Edward Elgar 2013). There are other alternatives proposed for legitimising the European Union, such as the direct election of the Commission president, which are not discussed here. For criticism of this idea see L Pech, *The European Union and its Constitution* (Clarus 2008), pgs 129-132.

legitimation of the EU, and have led to Meny stating that there is “quasi-unanimity that Europe should be democratic”.¹⁴¹

In a recent analysis of the application of democracy at transnational level, de G de Búrca offers 3 groupings for the range of responses to the legitimacy problems of transnational governance; “the denial approach: the claim that there is no “democracy problem” ... the wishful thinking approach: the assumption that transnational governance is either sufficiently democratic or that it can readily be democratized;”¹⁴² and “the compensatory approach [that] encompasses the view that democracy cannot be transposed directly to the transnational level, and instead that other more partial ways of strengthening the legitimacy of transnational governance must be found.”¹⁴³ De Búrca rejects the wishful thinking approach for being insufficiently realistic about the challenges that are faced when implementing democracy beyond the state, particularly the possibility of recreating a political community to replace the state. The legal analysis of direct democracy instruments in this thesis does not fit within the wishful thinking approach because the EU is characterised as a dual democratisation process, not a transfer of democracy from one polity to another, and that there are significant challenges to overcome, even though further democratic legitimacy is possible.

The compensatory and denial approaches, broadly speaking, are rejected by De Búrca for being too negative about the possibility or need for democracy at the transnational level.¹⁴⁴ De Búrca states that, “Compensatory approaches generally take the view that a democratic system of transnational governance is not feasible because democracy ... cannot work properly beyond a certain scale and size”, and that a defined demos is required for democratic legitimacy.¹⁴⁵ These writers therefore seek to compensate for the lack of democracy at EU level with limited, albeit related, alternatives such as transparency. The issues relating to identity and the size of the EU are problematic for democratic legitimisation but they do not preclude EU level democratic legitimisation. Supranational

¹⁴¹ Y Meny, ‘Can Europe be Democratic? Is it Feasible? Is it necessary? Is the present situation sustainable?’, [2011] *Fordham International Law Journal* 1287.

¹⁴² G de Búrca ‘Developing Democracy Beyond the State’, [2008] *Columbia Journal of Transnational Law* 221, 236-7.

¹⁴³ *Ibid* 241. A compensatory approach to EU democracy is offered by Heritier focussing on transparency and support networks as “elements of substitute democratic legitimation” in A Heritier, ‘Elements of Democratic Legitimation in Europe: An alternative perspective’ [1999] *Journal of European Public Policy* 269.

¹⁴⁴ The compensatory approach is a grouping of negative positions in relation to the democratisation of transnational governance that generally consider that “it is misguided or inappropriate to try to transpose democracy to the transnational domain”. G de Búrca ‘Developing Democracy Beyond the State’, [2008] *Columbia Journal of Transnational Law* 221, 242.

For a full discussion of the compensatory approach and its flaws see G de Búrca ‘Developing Democracy Beyond the State’, [2008] *Columbia Journal of Transnational Law* 221, 240-248.

¹⁴⁵ De Búrca states that these approaches also believe that democracy requires a demos, a defined political community, G de Búrca ‘Developing Democracy Beyond the State’, [2008] *Columbia Journal of Transnational Law* 221, 241. This issue was dealt with in the earlier section on identity.

democratic instruments, such as the European Parliament are already used at the supranational level and, as will be seen in later chapters, the direct democratic participation is possible despite the size of the EU. Two of leading writers to deny the need for EU level democracy were Majone and Moravcsik.¹⁴⁶ Majone's claim for a regulatory state was argued against in the previous section. In the following paragraphs Moravcsik's intergovernmentalist approach to EU democracy is argued as being insufficient for a polity such as the EU.

As with Majone's argument for no democracy at the EU level, the strength and type of political role played by the EU institutions is central to the intergovernmentalist argument.¹⁴⁷ Moravcsik characterises EU law and policy-making as relatively limited because it is only a small percentage of Member State law making, substantively insignificant because the EU does not 'tax, spend, implement or coerce', and because the EU has almost no influence over a wide range of the most important issues, such as taxation, health, education etc.¹⁴⁸ However, he does recognise some exceptions to this characterisation of the role of EU institutions, which, it could be argued, are already enough to warrant supranational democratic legitimisation: for example, the degree of autonomy reflected in Moravcsik's estimated 10-20% of EU based law-making; and the salience of the policy agenda that the EU institutions are able to influence, such as the economic difficulties of the Eurozone, agricultural policy, and the balance between free trade and social rights. The political salience of EU issues have continued to increase in recent years and the influence of the EU institutions has strengthened, which has even been recognised by Moravcsik himself.¹⁴⁹

Moravcsik highlights the limited strength of EU institutional control over its own constitutional framework: 'In sum, the EU is not simply unwilling to act in new areas that require coercive, fiscal or human resources; it is constitutionally unable to do so, even as a result of unintended

¹⁴⁶ Majone and Moravcsik specifically address EU democracy rather than transnational governance more broadly, which is the subject of de Búrca's article. The general denial of the possibility of democracy at the level of international law is not discussed here because the EU is a specific case that does not fit within the general position of international law, acting as it does as a hybrid form of supranational polity with aspects of the state and also of an intergovernmental organisation.

¹⁴⁷ A Moravcsik, 'In defence of the Democratic deficit: Reassessing the legitimacy of the European Union' [2002] JCMS 603; and A Moravcsik, 'The European Constitutional Compromise and the Neofunctionalist Legacy', [2005] Journal European Public Policy 349.

¹⁴⁸ A Moravcsik, 'The European Constitutional Compromise and the Neofunctionalist Legacy', [2005] Journal European Public Policy 349, 364-5.

¹⁴⁹ A Moravcsik *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998) 8.

See P Craig and G de Búrca (eds) *Evolution of EU Law* (OUP 2011) Ch2, for discussion of changing theories applied to the EU.

consequences'.¹⁵⁰ As indicated by the dichotomies at the start of the chapter, the EU constitutional framework is strongly controlled by the Member States and legitimised, almost exclusively, through Member State institutions and democratic processes.¹⁵¹ However, as Moravscik himself recognises, "it is important not to go to the opposite extreme and argue that we need not worry about European integration because the EU is so weak".¹⁵² This characterisation of an EU polity that is in the political middle ground of not having the powers of a federal state, but also not so weak as to only be an intergovernmental organisation is the position taken in this thesis. It is agreed that the daily authority of the EU should not be exaggerated and that the Member States strongly control the constitutional change, but the not inconsiderable political role for the supranational EU institutions in guiding and implementing EU policy do in fact retain aspects of a federal type state, which means that supranational democratic legitimacy is appropriate and necessary for the legislative and policy making role of the EU institutions, and that indirect democratic legitimacy as seen in intergovernmental organisations is not sufficient.

Part of the denial of the need for supranational level EU democracy for Moravscik, and also Majone, relates to the transfer of state level democratic processes to the supranational level and that it is a category mistake to discuss the EU in the same manner as the Member States.¹⁵³ Moravscik asks: "Is EU governance as democratic as the (presumptively legitimate) domestic decision-making procedures of its Member States in dealing with similar issues".¹⁵⁴ His answer is that 'the EU appears to act largely consistently with mobilised public opinion',¹⁵⁵ that there is transparency in EU decision-making,¹⁵⁶ that the issues that would be presented to citizens for engagement would often lack salience,¹⁵⁷ and that therefore there is no need for supranational legitimisation. This may mean that some aspects of EU legitimacy compare more favourably with Member State democracies and the EU democratic deficit be less extreme than sometimes portrayed, but it downplays the growing salience of EU issues and the limitations of transparency in aligning the decision making powers of

¹⁵⁰ A Moravscik, 'The European Constitutional Compromise and the Neofunctionalist Legacy', [2005] *Journal European Public Policy* 349, 367. This contrasts with Majone's position of believing that the EU institutions have expanded their powers significantly over the years.

¹⁵¹ There are already some supranational influences, albeit weak ones, over treaty amendment, such as the Art 48(2) TEU right for the Commission or the European Parliament to propose treaty amendment or the European Council involvement in the treaty amendment process.

¹⁵² A Moravscik, 'The European Constitutional Compromise and the Neofunctionalist Legacy', [2005] *Journal European Public Policy* 349, 370.

¹⁵³ G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*. (OUP 2005) 24-25.

¹⁵⁴ A Moravscik, 'The European Constitutional Compromise and the Neofunctionalist Legacy', [2005] *Journal European Public Policy* 369.

¹⁵⁵ *Ibid* 373.

¹⁵⁶ *Ibid* 371-2.

¹⁵⁷ *Ibid* 375.

the EU institutions with popular preferences. Even if you accept this favourable comparison with Member States, however, the EU still needs to strive to be more democratically legitimate than this minimum standard and at a supranational level.

It is self evident that the EU and its Member States are not the same type of polity and that they should not be discussed in the same manner, and that using the normative language of democracy that has been developed in close connection with the nation state is problematic when developing democratic legitimacy at the supranational level. However, there is little alternative at the present time to trying to adapt the democratic experience of state level democracy to the supranational level because of the dominance of democracy as the normative approach to the political legitimisation of power, the lack of comparators to the EU and because of the close association between democracy and the state.¹⁵⁸ The difficulties of democratic comparison and translation between Member States and the EU must be recognised, but they do not necessarily make the dual democratisation of the EU impossible or inappropriate. Furthermore, the approach taken in this thesis differs in that the democratic potential of the ECI and EUA are assessed in their own right, rather than in comparison with the use of citizens initiatives and referenda in a non-EU context. The analysis is intended to be of the democratic potential of two new strands of direct democracy at the Member State and EU level, together in EU democracy, rather than about the extent of the legitimacy of the EU's current, largely representative democratic paradigm or how it compares to Member State democracy.¹⁵⁹

One of the organising assumptions in this thesis, therefore, is that the EU should continue to attempt to develop its democratic legitimacy whilst recognising its dual nature and that, despite the need and possibility of democracy at the supranational level, there are inherent difficulties in implementing democracy in a new political environment such as the EU. De Búrca has proposed a 'democratic striving approach', which supports this presumption that the EU can and also should be democratically legitimised at the supranational level.¹⁶⁰ She states that:

¹⁵⁸ Y Meny, 'Can Europe be Democratic? Is it Feasible? Is it necessary? Is the present situation sustainable?', [2011] *Fordham International Law Journal* 1287, 1289-1291. Also see G de Búrca 'Developing Democracy Beyond the State', [2008] *Columbia Journal of Transnational Law* 221, 224-5 on this point: "Our understanding of democracy is so closely tied to the context of the nation state, ... that a meaningful notion of democracy beyond the state cannot yet be imagined".

¹⁵⁹ This analysis could also be applied to UK democracy. Whether the UK is viewed as being in democratic deficit or not, the question can be asked whether the EUA has the potential to increase UK democratic legitimacy.

¹⁶⁰ G de Búrca 'Developing Democracy Beyond the State', [2008] *Columbia Journal of Transnational Law* 221, 277-278 states that she is not claiming that this is a fully fledged theory of democracy beyond the state, rather it is an argument for the feasibility and importance of democracy.

“Although the dominant model of democracy cannot simply be transposed from the national domain, we can and should try to translate the core values of democracy into a realizable institutional form when designing or reforming transnational governance practices. The democratic striving approach takes as its initial building block the principle of fullest possible participation by and representation of all those concerned with a commitment to ensuring the public regarding nature of the process”.¹⁶¹

De Búrca is specifically assessing the appropriateness of this approach for transnational organisations such as the International Financial Institutions, but the argument is also applicable to a supranational body such as the EU, if not more so because of the greater powers allocated to the EU institutions, the greater degree of autonomous institutional influence over the policy and legislative agenda, and the democratic aspects of the EU that have already evolved, such as the European Parliament.

In conclusion, the EU is independently involved in making policy decisions and drafting legislation that goes beyond the sort of technocratic regulation that Majone once proposed, and beyond the level of political influence of an intergovernmental organisation as claimed by Moravcsik. Reliance on the indirect, intergovernmental democratic legitimisation of EU policy and institutions is also not sufficient, and there is a need to strive to improve the current status quo for EU democracy at supranational as well as at Member State level. If the benefits that democracy brings are to be enjoyed by citizens when they are affected by EU decision-making, and if the EU institutions are to enjoy a strengthened political legitimacy, EU governance needs to strive for democratic legitimacy as far as possible.¹⁶² Having looked at the meaning of democracy and argued for the need and possibility of democratic legitimacy at the EU supranational level, the next section moves on to look at the dominant institutional strands of democracy, direct and representative democracy, and to provide a typology of democracy in political systems before the chapter concludes with a characterisation of the EU democratic paradigm.

¹⁶¹ Ibid 276-277.

¹⁶² Dougan makes a similar point: “if such questions [as the balance between free trade and social rights, or the standards of environmental and consumer protection to which we aspire, or the manner in which we organise our agricultural industries and protect ourselves against risks posed by new and often controversial technologies] are to be addressed at the supranational level at all, surely the task should be approached with as much democratic input as can be mustered.” M Dougan, ‘And Some Fell on Stony Ground... A Critical Reading of Giandomenico Majone's Dilemmas of European Integration’ [2006] EL Rev 865.

Institutional form of democracy

Early institutional development of democracy was in the form of direct democracy in city states such as Athens and later in the use of forms of parliament called Tings by the Scandinavians.¹⁶³ Representative democracy, which is the most widely practiced form of democracy underpinning government today, came to the fore in the 17th century onwards as nation states were established across Europe, populations began to grow, and a new structure for managing political powers was sought. Today the democratic participation of citizens in constitutional, legislative and policy decision-making processes is largely provided through the election of representatives. In the 1970s new normative theories of participatory democracy began to emerge with the work of writers such as Pateman, often as an answer to criticisms of the prevailing liberal representative democracy, such as the over reliance on periodic elections to provide effective citizen participation.¹⁶⁴ The strengthening of democratic participation is now an important part of democratic theory,¹⁶⁵ and a number of theoretical approaches to participatory democracy have developed that prioritise different aspects of how the quantity and quality of citizen participation might be maximised.¹⁶⁶ There has been considerable analysis of the theories of democratic participation, but little attention has been given to the practical institutionalisation of the normative theories of participatory democracy to achieve these benefits.¹⁶⁷ Direct democracy, which is assessed in this thesis, is one institutional means by which these broad conceptions of participation can be provided with a decision-making channel; a means by which citizens can directly influence the policy agenda or policy outcomes through a subject specific vote.¹⁶⁸

¹⁶³ For a brief history of the development of democracy through the ages see R Dahl, *On Democracy*, (YUP 2000), Ch 2, 7-25.

¹⁶⁴ C Pateman *Participation and Democratic theory* (CUP 1970).

¹⁶⁵ G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 6: "the dominant current within contemporary democratic theory is one that places a premium on increasing and deepening citizen participation".

¹⁶⁶ Theo Schiller groups the approach to participatory democracy in to five main strands: the civil society approach, co-operative democracy, deliberative democracy, applied models of participation, and new technology approaches in T Schiller, 'Direct Democracy and Theories of Participatory Democracy – Some Observations' 52 in Palinger, Kaufmann, Marxer, Schiller (eds) *Direct democracy in Europe* (VS Verlag für Sozialwissenschaften 2007).

¹⁶⁷ For a notable exception and a comprehensive exposition on the application of direct democratic instruments to achieve strengthened citizen participation see B Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984).

¹⁶⁸ Schiller leaves open the question of whether the benefits of participatory theory can be achieved through the use of direct democracy; concluding that 'from the general common ground of participatory theory some closer links to direct democracy seem to be possible, but have rarely been developed so far.' T Schiller, 'Direct Democracy and Theories of Participatory Democracy – Some Observations' 61 in Palinger, Kaufmann, Marxer, Schiller (eds) *Direct democracy in Europe* (VS Verlag für Sozialwissenschaften 2007).

Representative democracy and its reliance on the periodic vote has been criticised for being an infrequent participative opportunity that does not sufficiently provide for the effective and equal participation of all citizens in the political process.¹⁶⁹ Rousseau famously said that the English are only free on the day of election.¹⁷⁰ Direct democracy is one possibility to redress this over reliance on the election of individuals by providing citizens with the opportunity to select policy. This ability to vote on specific policies rather than for representatives to take policy decisions is the fundamental difference between the two forms of democracy. As Weale put it, 'In a direct democracy the people choose the content of public policy. In an indirect democracy the people choose representatives who in turn determine the content of public policy'.¹⁷¹ Representative democratic institutions are still a central part of current European political systems, but they are increasingly being supplemented by direct democracy, such as the ECI and EUA, to meet the normative criteria for a democratically legitimate polity. For example, at EU level the claims of democratic deficit persist, despite the developed role of the European Parliament and the Member States Parliaments, and the indirect democratic legitimacy of the Council and European Council derived from each Member State's democratic processes. There is also growing use of direct democracy at Member State level to supplement existing institutions of representative democracy, particularly in relation to the EU, which implies dissatisfaction with current democratic provisions.¹⁷²

The use of direct democracy may potentially be a means to ameliorate any deficiencies, or supplement the benefits, of representative democracy, but there are also significant issues facing the use of instruments such as the citizen initiative and referenda. Graeme Smith, for example, offers a standard range of five 'challenges' to increasing the use of direct democracy to institute the benefits of participatory democracy: 1 - 'inclusiveness cannot be realised because of differential rates of participation across social groups'; 2 - 'citizens tend to lack the skills and competence to make coherent political judgements'; 3 - the issues of scale, which has been commented on above; 4 - 'participation will have little or no effect on political decisions – citizens viewpoints will be ignored or the process and results of participation will be manipulated by political authorities to suit their own interests'; and 5 - 'embedding citizen participation ... will place too many burdens on both

¹⁶⁹ D Held, *Models of Democracy*, (Polity 2006) 289.

¹⁷⁰ J Rousseau, *The Social Contract* (Wordsworth 1998) 96

¹⁷¹ A Weale, *Democracy* (Macmillan 1999) 24.

¹⁷² In recent years in the UK, for example, there has been increased use of referenda, the introduction of the petition system, and the Recall of MPs Act 2015. On the use of referenda across Europe see F Mendez, M Mendez, V Triga, *Referendums and the European Union: a comparative enquiry* (CUP 2014). On the use of citizens initiatives in Europe see M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012).

citizens and institutions ... [and] cannot be considered an efficient mode of governance'.¹⁷³ All five of these criticisms are relevant to the assessment of the ECI and the EUA, but as they are mainly influenced by a wide range of social factors, such as education and wealth, rather than the legislative design of the democratic instrument, comment on them in the analysis in the subsequent chapters is reserved to the limited occasions when they are directly relevant to the legislative provisions. The exception to this approach is in relation to the fourth of Smith's challenges: the extent that institutional mediation limits the democratic potential of direct democracy to increase citizen influence over agenda contents and legislative and policy outcomes.¹⁷⁴ The impact of institutional mediation on the democratic potential of direct democracy is a key theme throughout the thesis and it is a 'challenge' to direct democracy that the legislative design of direct democracy instruments can have a strong influence over. The next section offers a typology of the political systems based on the combination of representative and direct institutional forms of democracy.

Typology of democratic governance

The broad typology of democratic forms of government offered next combines the use of direct and indirect (representative) forms of democracy in political systems today. For this I draw heavily on Albert Weale's typology in his book 'Democracy'.¹⁷⁵ He takes an institutional approach to outlining the different forms of democracy, and a key distinguishing feature between the different versions of democracy in his typology is the extent that direct democracy is used to support and facilitate democratic participation provided through representative democracy. This makes the typology particularly suitable for the analysis of the ECI and the EUA referenda within an EU democratic paradigm based on representative democracy that direct democracy is being introduced to, and that is being strongly conditioned by the mediation of the existing representative institutions. The purpose of presenting this typology is to broadly locate the manner in which representative and direct democracy are combined in EU democracy.

Weale sets out, in his words, 'simplified descriptions of the distinctive characteristics' of 5 versions of democracy: Unmediated popular government, party-mediated popular government, representational government, accountable government, and liberal constitutionalism.¹⁷⁶ The first two versions of democracy are examples of direct democracy as the principal means of democratic

¹⁷³ G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 14-18. On the challenges to direct democracy see also S Tierney *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012).

¹⁷⁴ Tierney specifically comments on the elite control of referenda in chapter two of S Tierney *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012).

¹⁷⁵ A Weale, *Democracy* (Macmillan 1999) 24-39.

¹⁷⁶ *Ibid.*

legitimation, making use of instruments such as the citizens' initiative and referendum, and the last three are forms of representational democracy. The first, unmediated popular government, is described by Weale as a Rousseauian form of direct democracy in which the connection between public opinion and the making of rules and laws is direct and constitutive, similar in many respects to Marx's vision of direct democracy.¹⁷⁷ Within this political organisation, effective participation and citizen control of the agenda and its outcomes, through direct engagement with policy making, is supposed to be achieved without any organising factionalism and therefore no political parties. This idealised form of direct democracy highlights possible features of a democratic system, emphasising the importance of consensus and the implementation of the general will through citizen participation. It is not, however, a description of any functioning democracy, which confirms that direct democracy is a complement to representative democracy and not a replacement.¹⁷⁸

The second type of government system, party mediated popular government, is a more realistic version of a system based primarily on direct democracy. It makes full use of instruments such as the citizens initiative and referendum to achieve the benefits of participatory democracy, but unlike unmediated popular government, it recognises the need for political organisation. Political parties would still exist and seek election to executive office and organise the political agenda, but legislative and policy decision making is carried out by citizens rather than elected representatives. Although more plausible, this version of democracy is also hard to find except at a local level.¹⁷⁹ EU democracy is certainly far from being a system of party mediated popular government, and as will be seen by the later analysis, the ECI and the EUA have done little to move the EU towards such a system, particularly due to the continued exertion of institutional control over citizen participation.

Weale's next two versions of democracy, Representational and Accountable, are based on Powell's classification of representative democracies and are commonly found in operation amongst EU Member States.¹⁸⁰ Representational democracies, found for example in the smaller European states, have rules that encourage their representatives to more strongly reflect society in number and opinion, often through proportional electoral systems. They also tend to have a more consensual approach to policy making and a stronger emphasis on citizen participation, which facilitates the

¹⁷⁷ Ibid 24-27.

¹⁷⁸ Ibid 25.

¹⁷⁹ The case studies analysed by Smith are examples of situations that approach this position through direct citizens votes over budgets in G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009).

¹⁸⁰ For table that shows the countries falling in to the different categories related to this distinction see A Weale, *Democracy* (Macmillan 1999) 30. Powell's classification, which Weale uses, can be found in G Powell, 'Constitutional Design and Citizen Electoral Control' [1989] *Journal of theoretical politics* 107.

inclusion of direct democracy as a complement to the existing representative democracy.¹⁸¹ The second group, which includes democracies such as the UK and France, have more executive dominated legislative processes and are more focussed on ensuring accountability of the elected government through elections, than they are on representativeness.¹⁸² Popular participation in both of these versions of democracy relies heavily on voting in periodic elections, but deliberation is actively encouraged and forms of direct democracy are not excluded, particularly in representational democracies, such as Switzerland where direct democracy is used extensively. It is notable that direct democracy is also increasingly being used in accountable democracies that have traditionally made little or no use of it, such as the Netherlands, Portugal and the UK, which held its first national referendum in 1975 and has now written referenda in to part of its legislative process using the EUA.

The final form of government described by Weale, Liberal constitutionalism, is distinguished by its relative lack of concern for popular deliberation and popular direct engagement with political representatives and their policies.¹⁸³ “The people do not rule, they merely choose who is to rule them”.¹⁸⁴ This is the most passive form of democracy in terms of citizen participation, and direct democratic instruments are not appropriate for this form of government. It relies exclusively on periodic elections to maintain an appearance of democracy, and mechanisms such as separation of powers, judicial review and the ability to throw a government out at elections to avoid tyranny. This elitist version of democracy, closely associated with writers such as Schumpeter, only meets the criteria of democracy set out above to a minimal extent, relying as it does on the exercise of power by a political elite who are chosen to rule, and focussing on the avoidance of tyranny rather than on the implementation of popular sovereignty through effective citizen participation.¹⁸⁵ The justification for liberal constitutionalism that the general will is unstable and incoherent and therefore requires elite control and expertise for policy making is similar to the justification for the type of approach to EU legitimacy proposed by Majone, and is not far removed from ‘guardianship’.¹⁸⁶

One limitation of this typology for the purposes of this thesis is the number of government types focussed on the use of direct democracy. Direct democracy is presented as a relatively extreme form of democracy with little representative institutions, just party political organisation, in ‘party mediated popular government’, and an even more extreme version in ‘unmediated popular government’ that is unlikely ever to exist. This ideal type approach to direct democracy does not

¹⁸¹ A Weale, *Democracy* (Macmillan 1999) 29-32

¹⁸² *Ibid* 32-33.

¹⁸³ *Ibid* 34-5.

¹⁸⁴ *Ibid* 34.

¹⁸⁵ J Schumpeter, *Capitalism, Socialism and Democracy* (Routledge 1992).

¹⁸⁶ See comment above on the failings of guardianship as an alternative to democracy on pgs 31-32.

reflect the reality of its use in combination with both types of representative democracy. One possible addition might be an extra, more feasible version of democracy between the 'party mediated popular government' category and the representational government category, perhaps called 'directly mediated representative government'. This category would still have some decision-making by elected representatives, but would make more extensive use of direct democracy institutions within their democratic processes to enable citizens to directly mediate policy decisions and influence the political agenda.¹⁸⁷ The ECI and the EUA referenda would need to strongly fulfil their potential to meet the democratic criteria of effective participation, agenda and outcome influence, and EU democracy would probably need to incorporate further instruments of direct democracy before it is likely to be suggested that citizens influence institutional decision-making strongly enough to be described as a 'directly mediated representative government', let alone as a 'party mediated popular government'.

Whatever the exact typology used, different aspects from a range of the versions of democracy are recognisable in the governance system of the EU, which highlights its unusual, hybrid nature. For instance, there are elements of liberal constitutionalism, such as its strong separation of powers and the COREPER system of policy development; but there is also a consensual approach to legislating and emphasis on representativeness usually found in representational systems; and also, in recent years, efforts to increase transparency in decision making that is an important tenet of accountable systems of governance.¹⁸⁸ More important for the analysis in later chapters is the indication in Weale's typology of a direction of travel for democracies from liberal constitutionalism through the two versions of representative democracy towards a more strongly popular government system that makes greater use of direct democracy. The analysis of the ECI and EUA will indicate the strength of their potential to influence the balance of representative and direct democracy in EU democracy and towards increased direct citizen influence over the political agenda and decision-making. The next section moves from this general overview of political systems to look in more detail at how representative, participatory and direct democracy are reflected in the institutional framework of the EU democratic paradigm established by the EU treaties.

¹⁸⁷ B Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984) describes a government system that would probably fit in to this category.

¹⁸⁸ Transparency was an important aspect of the Laeken Declaration.

Democratic provisions in the Treaty on European Union

Democratisation of the EU was not an early priority for the Union,¹⁸⁹ and it was not until 1979 that the first form of democratic institution, the European Parliament, appeared at the EU level, and then 1992 when the first limited reference to democratic principles were included in the Treaties.¹⁹⁰ The political systems of the Member States continued to be the main source of the EU's democratic legitimacy and the first express reference to democracy as the basis for the EU itself was included after the Treaty of Amsterdam in 1997: Article 6 (1), "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." A decade later a fuller description of the democratic basis for the EU was proposed during the drafting of the constitutional treaty and was then included in the Lisbon Treaty as Title II, "Provisions on Democratic Principles", which contains specific reference to a range of democratic principles such as representation, participation, the need for transparency,¹⁹¹ equality,¹⁹² and accountability of Member State governments to their citizens.¹⁹³

Two important aspects of the representational form of democracy now exist to some degree at EU level: MEPs proportionally elected to a European Parliament that has a co-legislation role with the Council in most areas of EU law; and the ability to hold the Commission to account. However, a number of issues have limited the impact of the European Parliament, such as low voter turnout;¹⁹⁴ elections that have been called second order elections that reflect voter preferences in relation to incumbent national parliaments and governments rather than European institutions or policy;¹⁹⁵ its difficulty in acting to the same degree as most national parliaments in shaping the formation of a government because it does not initiate legislation;¹⁹⁶ and it is not the focus of debate and policy

¹⁸⁹ Y Meny, 'Can Europe be Democratic? Is it Feasible? Is it necessary? Is the present situation sustainable?' [2011] *Fordham International Law Journal* 1287. A Von Bogdandy 'The European Lesson for International Democracy: The significance of Articles 9-12 EU Treaty for international organisations'. [2012] *EJIL* 315, 318. P Craig and G de Búrca (eds) *Evolution of EU Law* (OUP 2011) 16: "Democracy was a secondary consideration".

¹⁹⁰ In the preamble to the Treaty on EU was included the wish to "enhance further the democratic and efficient functioning of the institutions", and Article F stated that "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy".

On the development of treaty references to democracy see Bogdandy 'The European Lesson for International Democracy: The significance of Articles 9-12 EU Treaty for international organisations'. *EJIL* 23 (2012), 315–334 at pgs 318-319.

¹⁹¹ Article 10(1), 11(2) and 11(3) TEU.

¹⁹² Article 9 TEU.

¹⁹³ Article 10(2) TEU. V Cuesta Lopez, 'The Lisbon treaty's provisions on democratic principles: a legal framework for participatory democracy' [2010] *European Public Law* 123; section 2 outlines the range of aspects of democracy included in Title II TEU.

¹⁹⁴ Turnout has steadily declined since the first election in 1979 from 61.99% to 42.61% in 2014: <<http://www.europarl.europa.eu/elections2014-results/en/turnout.html>> accessed 8 July 2015.

¹⁹⁵ S Hix, *What is wrong with the European Union and How to fix it* (Polity 2008).

¹⁹⁶ The Commission exercises the role of legislative initiative in the EU.

challenge between political parties.¹⁹⁷ Despite strengthening the role of the European Parliament in each of the treaties since its introduction in 1979, its existence has therefore never led the EU to a point of ‘sufficient’ democratic legitimacy that silenced criticism.¹⁹⁸

The Laeken Declaration on the Future of Europe in 2001, which had a dozen general references in its short text on the need to strengthen democracy, such as: “The Union needs to become more democratic, more transparent and more efficient”, still focussed predominantly on legitimising through elections and national parliaments, and on institutional procedure, rather than on developing the democratic environment of the EU in a new direction.¹⁹⁹ In the same year, though, participation was recognised as one of the general principles of good governance in the Commission White Paper on European Governance (2001).²⁰⁰ The White Paper proposed “opening up the policy making process to get more people and organisations involved in shaping and delivering EU policy. It promote[d] greater openness, accountability and responsibility for all those involved”.²⁰¹ This paved the way for an Article to be included in the draft Treaty Establishing a Constitution for Europe (2003) entitled ‘The Principle of Participatory Democracy’. This shift in attitude was important as it recognised the need for democratic legitimisation of EU legislation and policy-making beyond the traditional route of elections and parliamentary accountability.²⁰²

The discourse on participation was a precursor to the introduction of the ECI as a complement to parliamentary, representative governance as the means of increasing popular sovereignty.²⁰³ The Treaty establishing a Constitution for Europe was rejected in referenda in France and the Netherlands and was subsequently not ratified, which put many of its reforms, such as the new

¹⁹⁷ S Hix and A Follesdal, ‘Why there is no democratic deficit in the European Union: A response to Majone and Moravcsik’ [2006] JCMS 533.

¹⁹⁸ For more detail on the democratic achievements and failings of the European Parliament see Laurent Pech, *The European Union and its Constitution* (2008) and also A Warleigh, *Democracy and the European Union: theory, practice and reform* (Sage 2003).

¹⁹⁹ UK Parliament report on the Laeken Declaration available at <<http://www.parliament.uk/briefing-papers/RP02-14/laeken-declaration-and-the-convention-on-the-future-of-europe>> accessed 8 July 2015.

²⁰⁰ Brussels, 25.7.2001 COM(2001) 428 EUROPEAN GOVERNANCE, A WHITE PAPER. It should be recognised that improvements to participation had already been taken in increasing access to information and transparency of decision making, amongst other things.

²⁰¹ *Ibid* 3.

²⁰² Craig cautions, however, that although there has been much discussion of participation to enhance democratic legitimacy there has been little tangible commitment: “The reality was nonetheless that the extent to which the judicial or political organs were willing to commit to legally binding participation rights was decidedly limited”, P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP 2010) 67.

²⁰³ For discussion of the attitudes towards the use of representative democracy at European level and its shortcomings see, inter alia, R Dehousse, ‘Beyond Representative Democracy: Constitutionalism in a polycentric polity’ in J Weiler and M Wind (eds) *European Constitutionalism Beyond the State* (CUP 2003), and L Pech, *The European Union and its Constitution* (Clarus Press 2008) 97-122.

democratic provisions, including the ECI, in jeopardy. However, when the Lisbon Treaty entered in to force on Dec 1st 2009, the 'Provisions on democratic principles' and the ECI had survived.

Art 10(1) TEU baldly reaffirms the representational basis of EU democracy: "The functioning of the Union shall be founded on representative democracy". Art 10(2) TEU confirms the dual routes of democratic legitimacy for the EU. First, it states that "Citizens are directly represented in the European Parliament", so the EU, despite being a non-federal polity of derived powers, enjoys direct democratic legitimacy from its citizens. Secondly Art 10(2) TEU confirms the indirect democratic legitimisation of EU institutions by stating that, "Member States are represented in the European Council by their Heads of State or Government and in the Council by their Governments, themselves democratically accountable either to their national Parliaments, or to their citizens". Art 10 TEU concludes by emphasising the importance of citizen participation and affirming the role of political parties at the supranational level.²⁰⁴

Art 11 TEU supplements the representational form of EU democracy with participatory and direct democracy. The first three clauses of Art 11 TEU state the importance of citizen and civil society dialogue and consultation, and provide standards against which Union activity can now be held to account. Although participative in nature these provisions are more significant in terms of accountability and transparency, which reinforce representational governance principles, rather than in terms of popular governance, which wider forms of participation may ordinarily be expected to strengthen.²⁰⁵ Art 11(3) TEU, for example, states that broad consultations shall be carried out by the Commission, but the purpose is not to improve the alignment of policy preferences with citizen wishes, but 'to ensure that the Union's actions are coherent and transparent'. Art 11(4) TEU is different in character from these first three clauses as it provides citizens, through the ECI, with a proactive democratic opportunity that they can initiate to try to influence the EU policy agenda.²⁰⁶ Its introduction is an institutionalisation of principles of participatory democracy and has the potential to increase citizen influence over legislative and policy decision-making by EU institutions.

²⁰⁴ Art 10(3) TEU: Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen. Art 10(4) TEU: Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

²⁰⁵ For further analysis see See V Cuesta Lopez, 'The Lisbon treaty's provisions on democratic principles: a legal framework for participatory democracy' [2010] European Public Law 123.

²⁰⁶ E Monaghan, 'Assessing Participation and Democracy in the EU: The Case of the European Citizens' Initiative', *Perspectives on European Politics and Society* [2012] 285, 292, also distinguishes 11(1) to 11(3) from 11(4) because of their institutional basis.

Art 12 TEU, the third article of the TEU's democratic provisions, returns to representational democracy, this time at the Member State level.²⁰⁷ Art TEU 12 strengthens the indirect democratic legitimisation of the EU and the role of national parliaments in EU law and policy decision-making. For some years, at least since the Laeken declaration, national parliaments have been seen as a source for increasing the democratic legitimacy of the EU.²⁰⁸ Article 12 explicitly, and in some detail, sets out the role of national parliaments with regard to the legitimisation of EU legislation and strengthens indirect parliamentary legitimacy of the EU through some innovative new mechanisms such as the yellow card process.²⁰⁹ This is a significant exception to the EU democratic paradigm because it introduces Member State level institutions in to an EU legislative process that is usually controlled by EU level institutions. For Member State citizens this is a new indirect means of democratic legitimisation of EU institutional activity. Art 10 and 12 TEU therefore confirm the strongly parliamentary basis of the representational EU democracy, despite the shift in emphasis towards participation in Art 11 TEU.

The provisions on democratic principles are a significant development for EU democracy, but it is difficult to identify a clear, organising principle behind the structure of the Provisions on Democratic Principles.²¹⁰ Article 10 relates to both direct and indirect democratic legitimacy, but Article 12 only relates to national parliaments, not to both European and national parliaments; there are references to general EU principles, such as taking decisions as closely as possible to the citizen, as well as specific mechanisms such as the yellow card system; and specifics relating to the implementation of direct democracy through the ECI are included with general principles of good governance, such as transparency. As well as this lack of clarity, which reflects the piecemeal and ongoing development of EU democracy, the dichotomies of the two organisational themes of this work between supranational and Member State level legitimisation, and between the legitimisation of the EU constitutional framework and its policy/legislative agenda are also not clearly identified in the democratic provisions of the EU. This is indicated more clearly in the next and final section of this chapter describing the current EU democratic paradigm.

²⁰⁷ For further comment on national parliaments' involvement in the EU see A Cygan, *Accountability, Parliamentarism and Transparency in the EU: The Role of National Parliaments* (Edward Elgar 2013); for specific comment on legislative provisions relating to national parliaments after the Lisbon Treaty see pgs 73-82.

²⁰⁸ For recent comment see A Cygan, 'National Parliaments within the EU Polity - no Longer Losers but Hardly Victorious' [2012] ERA Forum 517.

²⁰⁹ For summary of change see M Dougan, 'The treaty of Lisbon: winning minds, not hearts' [2008] CML Rev 617. For more details on yellow card system see A Cygan, 'Collective' Subsidiarity Monitoring by National Parliaments after Lisbon – The Operation of the Early Warning Mechanism in Trybus and Rubini (eds) *After Lisbon: the Future of European Law and Policy* (Edward Elgar, 2012).

²¹⁰ See V Cuesta Lopez, 'The Lisbon treaty's provisions on democratic principles: a legal framework for participatory democracy' [2010] European Public Law 123.

EU democratic paradigm

This section outlines the legislative and treaty amendment processes and how the EU democratic legitimisation set out in Title II TEU operates in practice, to provide a characterisation of the dual EU democratic paradigm that the ECI and EUA have been introduced in to and which, to some degree, they challenge.²¹¹ As we will see below, one of the characteristics of the EU is the distinction between the way in which EU level decision making operates and is legitimised and the way in which the EU constitutional framework in the treaties is formed and legitimised. First, there is an outline of the largely intergovernmental approach to treaty amendment and its legitimisation.

The ordinary revision procedure to amend the treaties is set out in Art 48 TEU:

1. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, *inter alia*, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.
2. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph
3. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.
4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

This treaty amendment process means that the more supranational of the EU institutions, the European Parliament and the Commission, have only limited involvement in the treaty amendment

²¹¹ The extent to which the ECI and EUA fit within the EU democratic paradigm is discussed in chapter four.

process. Both can make proposals for the treaties to be amended but they have little influence, only being consulted, over whether proposals actually lead to the initiation of the revision procedure. The EU level institution that does influence the agenda and outcomes of the treaty amendment process is the European Council, which is made up of Member State heads of state or government. Other Member State representatives decide what amendments to the treaties will be made as a result of the recommendations from the Convention, and the final step is ratification at Member State level in accordance with their respective constitutional requirements. In the UK, following the enactment of the EUA, the ratification requirements will usually be an Act of Parliament and, where the criteria are met, approval by referendum of the proposed changes. The treaty amendment processes are therefore legitimised via Member State level democratic activity. The role of the European Council and the other Member State representatives is legitimised through the election of heads of state and the government in each Member State. In accordance with Art 48(4), ratification then specifically involves Member State level legitimisation, usually through Acts of Parliament or referenda.²¹²

There are also two simplified revision procedures set out in Art 48(6) and Art 48(7) TEU.²¹³ In terms of their intergovernmental character and the Member State control over the process there is little difference between the ordinary revision procedure and Art 48(6) TEU.²¹⁴ The European Council must act by unanimity when adopting a decision under Art 48(6) TEU and it will only enter into force once it is ratified in accordance with Member State constitutional requirements. Art 48(6) TEU though specifically applies to Part 3 of TFEU and it cannot be used to increase the competences of the EU. The provisions in s3 EUA would usually require a positive referendum result to approve a decision taken under Art 48(6) TEU. The European Council must also act by unanimity to adopt a decision under Art 48(7) TEU, but there is no provision for approval in line with Member State

²¹² On the Treaty amendment procedures, see G. Barrett, "Creation's Final Laws: The Impact of the Treaty of Lisbon on the 'Final Provisions' of Earlier Treaties" [2008] YEL 3, 7–27; and S Peers, 'The Future of EU Treaty Amendments' [2012] YEL 17.

²¹³ For detailed discussion of the simplified revision procedures see S Peers, 'The Future of EU Treaty Amendments' [2012] YEL 17, 31–47.

²¹⁴ Art 48(6) TEU: The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

constitutional requirements.²¹⁵ National parliaments are able to oppose an Art 48(7) TEU decision and stop it being adopted. The decisions in Art 48(7) TEU relate to changes in voting procedures during the legislative procedures that apply to a wide range of policy areas. S6 EUA requires a referendum to approve decisions taken in relation to most of these policy areas.

Since the Lisbon Treaty there have only been two legislative procedures, referred to in Art 289 TFEU as the Ordinary and special legislative procedure.²¹⁶ The ordinary legislative procedure, which is set out in detail in Art 294 TFEU, is initiated by the Commission by submitting a proposal to the Council and the European Parliament, and these two institutions jointly exercise legislative and budgetary functions in the Union. Supplementary to this, the European Parliament also exercises political control and consultation,²¹⁷ and the Council carries out policy making and coordinating functions.²¹⁸ The special legislative procedures, which are specified in the treaty articles relevant to the areas of law and policy where they are to be used, vary this process, usually according to the involvement of the EU institutions or the voting procedure to be followed.²¹⁹ In general, a critical difference between the OLP and an SLP is that the SLP provides Member States a veto in the Council, whereas OLP decisions are passed using a form of QMV.

A key difference between the treaty amendment process and the EU legislative process is that the latter is completed at EU level. Art 16(2) TEU states that “The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote”. There is also no provision for a second stage involving the respective constitutional provision of the Member State, except in a limited number of instances

²¹⁵ Art 48(7) TEU: Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

²¹⁶ Art 289(1) and (2) TFEU. For comment on the change to these legislative procedures see M Dougan, ‘The treaty of Lisbon: winning minds, not hearts’ [2008] CML Rev 617.

²¹⁷ Art 14(1) TEU.

²¹⁸ Art 16(1) TEU.

²¹⁹ For example the Art 22 TEU right for EU citizens to vote in municipal elections in their host Member State “shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament”.

as specified in the treaties.²²⁰ The other procedural exception is the oversight of the legislative process provided by the 'yellow card' system for national parliaments, which means that Member State level institutions can have some involvement in the otherwise EU level institutional legislative process.²²¹

EU legislative procedures and policy making are democratically legitimised through both supranational and Member State level means. The Members of the European Parliament are legitimised through direct European elections. The representatives in the Council and the European Council, which has a strong influence over the policy agenda of the EU institutions despite not having a direct role in the legislative process, are nominated by Member State Governments elected in Member State elections.²²² From a citizen perspective this means that EU citizens have the right to vote in European Parliament elections to democratically legitimise the selection of representatives at EU level and the European Parliament's role in EU level law making,²²³ and for UK citizens, as a Member State example, they have the right to vote in UK parliamentary elections, which provides some indirect democratic legitimacy for the UK's EU policy and representatives in the European Council and the Council of ministers.

The Commission, which has a virtual monopoly over legislative initiation, is something of an exception in legitimisation terms as its members are not elected and once nominated by a Member State they are expected to promote the 'general interests of the Union',²²⁴ which removes it from indirect legitimisation via Member State elections. The Commission though does derive some limited democratic legitimacy through its accountability to the European Parliament. Art 17(7) TEU establishes first that the list of members of the Commission adopted by the Council on the basis of Member State suggestions is subject to a vote of consent from the European Parliament; and secondly, the wording of Art 17(7) TEU was interpreted in 2014 as meaning that the Commission president candidate from the party grouping that gained the most seats at the European Parliamentary elections was expected to be proposed by the European Council, and then be selected as a Commission President subject to a vote of approval in the European Parliament. Supplementary to this legitimisation of its membership via a representative institution, the Commission is now potentially legitimised by the supranational, direct democratic instrument of the ECI. There is a

²²⁰ These are the so called organic laws, which are discussed in more detail in chapter 4.

²²¹ Art 12 TEU. Yellow card process established in the Protocol on the application of the principles of subsidiarity and proportionality.

²²² Art 15(2) establishes the composition of the European Council and Art 15(1) TEU states "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions."

²²³ Art 20(2) TFEU.

²²⁴ Art 17 TEU.

possibility that this may happen in the long run because the ECI gives citizens the chance to ask the Commission to propose a legal act of the Union selected by the ECI organisers. If the Commission responds to the indication of citizen preferences, it could lead to a closer alignment between citizen choices and EU policy, thus enhancing popular sovereignty and therefore EU democracy. As we will see in later chapters, however, the potential to legitimise Commission decision-making is not likely to be strongly realised.

It is almost exclusively EU institutions that are involved in the political process of EU law and policy decision-making and these are legitimised through both supranational and Member State level democracy, whereas there are both Member State and EU institutions involved in the more intergovernmental political process of amending the treaties, but these are only legitimised through Member State democratic processes. To fit within the standard paradigm it would be expected that the ECI is used to legitimise EU level legislative and policy decision making, and the EUA is used to legitimise treaty amendment. They both do this to a large degree, but it will be seen in the subsequent chapters that they also pose some questions to the democratic paradigm in terms of EU citizens being able to influence treaty amendment through the ECI and the use of Member State level referenda triggered by the EUA to approve decisions taken in supranational institutions.

Conclusion

The EU is an emerging democracy beyond the state that has developed the unusual political framework described in this chapter as part of a piecemeal, dual democratisation process over a number of years.²²⁵ I argued in this chapter that further EU democratic legitimacy should be strived for and is needed at supranational as well as Member State level; the EU is not just a regulatory or intergovernmental organisation that can rely on indirect democratic legitimisation alone.²²⁶ Democratic strengthening of the EU's predominantly representational democratic framework remains an important part of the EU's democratisation process,²²⁷ but on its own may no longer be sufficient.²²⁸ The ECI and EUA are recent direct democratic instruments that have institutionalised the turn towards more participatory forms of democracy, at EU and Member State level, and which

²²⁵ M Shu, 'Referendums and Political Constitutionalisation of the EU' [2008] *ELJ* 423.

²²⁶ In relation to striving for democratic legitimacy at EU level see G de Búrca 'Developing Democracy Beyond the State', [2008] *Columbia Journal of Transnational Law* 221.

²²⁷ P Ehin, 'Competing Models of EU Legitimacy: the Test of Popular Expectations' [2008] *JCMS* 619, 624: "solving the EU's legitimacy deficit therefore requires strengthening representative mechanisms capable of delivering public control and political equality".

²²⁸ Maurer discussed the European Parliament policy making role, but within a conception of the European Parliament "as one among many essential tools for building a legitimate European order" in 'The European Parliament between policy making and control' 76, in B Kohler-Koch and B Rittberger (eds) *Debating the Democratic legitimacy of the EU*, (Rowman & Littlefield 2007).

possibly move EU democracy towards a form of what I have called directly mediated representative government.²²⁹ The democratic potential of the ECI and EUA referenda to achieve such an outcome is assessed, in subsequent chapters, through analysing their legislative design and early implementation experience in light of the democratic criteria described in this chapter of '*effective participation*', '*citizen agenda influence*', and '*citizen outcome influence*'. Two important factors in addressing this issue of the ECI and EUA democratic potential are the degree of institutional mediation that is possible and exerted, and how strongly citizens are able to use these instruments to challenge established policy preferences. Next the legislative design of the ECI and EUA are examined in chapters two and three, respectively, and then the final chapter of the thesis examines their impact together on EU democracy and the challenges they present to the current democratic paradigm.

²²⁹ See pg 53.

Chapter Two

Democratic Potential of the European Citizens Initiative

The ECI is a major democratic innovation that could set an example for all transnational organisations struggling with criticisms of their democratic legitimacy.¹ The potential, theoretical significance of the European Citizens' Initiative for the democratic legitimacy of the EU is widely recognised,² and the Commission has stated that it will be 'a significant step forward in the democratic life of the Union' that adds a 'whole new dimension of participatory democracy'.³ As well as being the first use of direct democracy at a supranational level, the ECI is also part of a step change towards a more participatory approach to democratic legitimacy in the EU that could bring the EU 'closer to its citizens' and significantly increase the level of democratic engagement with the EU.⁴ However, despite these high expectations, the legislative design of the ECI was strongly criticised early on for potential limits to its democratic impact, and the instrument itself could turn out to be little more than a democratic totem.⁵ This chapter analyses the treaty and Regulation provisions of the ECI and its early implementation to assess its potential to meet the democratic criteria outlined in the previous chapter, the extent that this potential is limited by the control of the European Commission, and the degree to which it is able to facilitate a citizen challenge to established policy preferences. The chapter starts with comment on the three criteria of '*effective participative opportunity*', '*citizen agenda influence*', and '*citizen outcome influence*' as they specifically relate to the ECI.⁶

Direct democratic instruments are the institutionalisation of participatory democracy and therefore, by definition, it is increased and more effective participation that is expected to strengthen the

¹ See G de Búrca 'Developing Democracy Beyond the State', [2008] Columbia Journal of Transnational Law 221 for analysis of democratic legitimacy of transnational organisations.

² See, for example, A Warleigh, 'On the Path to Legitimacy? The EU Citizens Initiative Right from a Critical Deliberativist Perspective', in C. Ruzza and V. Della Sala (eds), *Governance and civil society in the European Union*, (Manchester University Press 2007) 55.

³ Quoted from speech by Vice President of the European Commission Maros Sefcovic, 'The Lisbon Treaty: Enhancing Democracy' on Sept 30th 2010, pg 2. Available at <europa.eu/rapid/press-release_SPEECH-10-502_en.htm> accessed 12 Apr 2015.

⁴ Art 11 TEU contains the EU's treaty provisions on participatory democracy.

⁵ M Dougan, 'What are we to make of the Citizens' Initiative?' [2011] CML Rev 1807; B Kaufmann, 'Transnational Babystep: The European Citizens Initiative' in M Setala and T Schiller (eds) *Citizen's initiatives in Europe; procedures and consequences of agenda-setting by citizens*, (Palgrave Macmillan 2012) 229.

⁶ See pgs 36-38, chapter 1, for further discussion of the democratic criteria used in this thesis. For the use of similar criteria to assess direct democracy instruments see G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009).

democratic legitimacy of a polity.⁷ If the legislative design of the ECI fails to provide a framework that enables effective participative opportunities for EU citizens then the influence of the ECI on the democratic legitimacy of the EU will be minimal; however well the regulation fulfils other democratic criteria. Effective participation for the ECI means first that the burden and barriers in terms of procedural complexity and resources that it imposes on citizens as both organisers and supporters, such as funding and time, numerical thresholds etc, are kept to a minimum and do not excessively impact on the ability to take up this democratic opportunity;⁸ and secondly that direct democratic instruments, although not introduced specifically to increase the equality and inclusiveness of democratic systems, must nevertheless be assessed against these democratic standards and, if found wanting, criticised.

The second criterion is that citizens are able to influence what is put on the agenda, otherwise participative opportunities for citizens become token gestures controlled by those institutions that control the agenda. In the case of the ECI this agenda influence would be exerted through the Commission's role of EU legislative initiative, over which it has a virtual monopoly.⁹ The legislative design of the ECI should provide the potential, therefore, for an increase in popular sovereignty and democratic legitimacy by providing EU citizens with the opportunity to influence the issues that are discussed in relation to proposing a legal act. The ECI can potentially facilitate this influence by providing citizens with a new formal means of raising the profile of issues with EU institutions and also, more indirectly, by generating public, cross border debate that can influence decision making in the longer term.

The third criterion for a democratic instrument is that the legislative design enables citizens to have an influence over the policy and legislative outcomes. The ECI is not a 'full scale initiative' that obliges a further vote, usually in a referendum, but an 'agenda initiative' that is addressed to another political institution.¹⁰ The ECI does not guarantee the initiation of the legislative process, as some popular initiatives do; it only guarantees that the Commission will consider starting the process that will lead to a tangible outcome. Furthermore, the legislative process of the EU means that there is an extra step, when compared to an initiative at state level, in the move from citizen

⁷ Dahl defines effective participation in the following way: "Before a policy is adopted by the association, all the members must have equal and effective opportunities for making their view known to the other members as to what the policy should be" in R Dahl, *On Democracy*, (YUP 2000) 37.

⁸ Smith cites lack of impact and the heavy burden placed on citizens and institutions as two issues with direct democracy in G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009).

⁹ Art 17(2) TEU.

¹⁰ M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 1 for explanation of this distinction between full scale and agenda initiative, and pg 9 for a description of the ECI as an agenda initiative.

proposal to legal or policy outcome because the Commission must decide to initiate the legislative process and then the European Parliament and Council will decide the form that any legal act ultimately takes. The potential strength and frequency of outcomes from the use of the ECI procedure is reduced as a result. It is likely therefore that the political pressure generated by public debate, and the deliberative opportunities of engagement with the EU institutions at the end of the process, are likely to be more important to its impact on citizen led outcomes than the relatively weak legal obligations in its design.

The institutional mediation by the Commission, which is a key factor in how strongly the ECI process can facilitate genuine citizen-led participation and influence over the policy agenda, is built in to the legislative design of the ECI and also the Commission's role in its implementation.¹¹ This mediation is particularly evident through the Commission's interpretation of the registration criteria for ECI proposals. The significance of this institutional control is reflected in the extent to which a democratic instrument facilitates citizen ability to challenge established policy preferences. The analysis in this chapter will show that the Commission's control over the scope of the ECI and also any resulting legal outcomes has significantly limited citizen challenge to the Commission's policy preferences.

The assessment of the ECI's democratic potential is carried out in two parts. First, there is an analysis of the legislative design of the ECI in Art 11(4) TEU and Reg. 211/2011, which is organised according to the key decisions taken in the legislation that impact on the ECI design: Support thresholds, legal obligation of the ECI, subject limitations, process complexity, and citizen eligibility. This analysis starts with some introductory comments on the provisions in Art 11(4) TEU, which established the ECI in the Treaties, and the regulation that implemented the ECI, Reg. 211/2011. Secondly, there is an outline of the mechanics of the ECI process and comment on areas of procedural complexity that impact on the ECI's potential to increase effective democratic participation. Thirdly, there is comment on the legislative design of the ECI, which focuses on complexity, equality, support thresholds, legal obligation, and subject limitations.

The second part of the chapter is a critical analysis of the Commission's decision-making in relation to the registration of ECI proposals, particularly the requirement that no ECI proposal be manifestly outside the powers of the Commission and for the purpose of implementing the treaties, which 40%

¹¹ See for example A Gross, 'The Design determines the quality – some criteria for determining the design and quality of direct democracy' in Z T Pallinger et al. (eds), *Direct Democracy in Europe: Developments and Prospects*, (VS Verlag für Sozialwissenschaften 2007); G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009). S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012).

of ECIs have failed.¹² First, I categorise the initiatives that campaigners have asked the Commission to register. Secondly, there is a review of the Commission's interpretation of the first part of the admissibility test that initiatives not be manifestly outside their powers, and thirdly, there is a review of the second part of the admissibility test that initiatives be for the purpose of implementing the treaties. The concluding remarks then return to the question of the democratic potential of the ECI and the impact institutional mediation has had.

Analysis of the European Citizen Initiative's legislative design

Treaty provision for ECI – Art 11(4) TEU

One of the striking innovations in the new Democratic Provisions in Title II TEU was Art 11(4) which introduces the ECI; the first supranational instrument of direct democracy and the latest EU level democratic instrument in the dual democratisation of the EU.¹³ Article 11(4) TEU is distinct from the other three clauses in Art 11 TEU, which are standards against which citizens can assess Union activity. Art 11(4) TEU has the citizen as its subject, rather than the institutions, and establishes the legal basis for a new democratic instrument that can be instigated by citizens themselves. In other words, the ECI provides a new, proactive opportunity for democratic engagement by EU citizens and the potential to influence EU policy, outside the usual control of the existing political institutions. Any shift towards popular government though should not be overstated, and Art 10(1) TEU reminds us that the EU remains founded on representative democracy.¹⁴ The ECI is only a supplement to the existing representational democratic processes, and one which the EU institutions, particularly the Commission, still retain a degree of legal and political control over.

Art 11(4) TEU establishes the opportunity for citizens to invite the Commission to make a proposal for a legal act, once they have reached the requisite level of citizen support for their proposal in a significant number of Member States. Art 11(4) TEU states:

Not less than one million citizens who are nationals of **a significant number of Member States** may take the initiative of **inviting the European Commission**, within the **framework**

¹² Art 4(2)(b) Reg 211/2011.

¹³ The Lisbon Treaty introduced a number of other changes with democratic implications, such as the extension of the ordinary legislative process to make the European Parliament co legislator and the extension of the role of national parliaments. For an overview of the changes introduced by the Lisbon Treaty see M Dougan, 'The treaty of Lisbon: winning minds, not hearts' [2008] CML Rev 617.

¹⁴ Art 10(1) TEU: 'The functioning of the Union shall be founded on representative democracy'.

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**.¹⁵

Art 11(4) TEU establishes the ECI within the broad category of direct democracy instruments usually referred to as a popular or citizen initiative.¹⁶ These instruments enable citizen influence over the political agenda through obliging a legal response once a pre-defined, representative, level of support for a legal or policy proposal has been collected.¹⁷ The phrases highlighted above in Art 11(4) establish the treaty basis for the support thresholds, the strength of legal obligation imposed by the ECI, and the limits on the subject matter of the ECI.¹⁸ These provisions define the type of popular initiative that is introduced and the scope of the democratic instrument.¹⁹

The legal obligation established in Art 11(4) is that citizens are given the opportunity of ‘inviting the European Commission’ to submit a legislative proposal. There is no obligation on the Commission to act, therefore, and this provision puts the ECI at the weaker end of the scale of legal obligations that are imposed by a popular initiatives.²⁰ These initiatives are usually referred to as agenda initiatives because they places items on the agenda for debate, but outcomes are at the discretion of the political institutions. The ECI imposes little extra legal obligation than a petition; the main distinction between the two is that an ECI is presented in the form of a legal proposal and obliges a formal response from the institution that receives it, whereas a petition does not.²¹

¹⁵ Art 11(4) TEU.

¹⁶ M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 1.

¹⁷ Schiller and Setala, for example, define popular initiatives as “procedures that allow citizens to bring new issues to the political agenda ... through collecting a certain number of signatures in support of a policy proposal”, in M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 1. Similarly Uleri in P Uleri ‘Le forme di consultazione diretta. Uno Schema di classificazione per l’analisi comparata’ [1981] *Rivista Italiana di Scienza Politica* 47 described popular initiatives as “a procedure enabling a predetermined number of registered electors to submit a political demand”, cited in V Cuesta Lopez ‘A Comparative approach to the regulation on the European Citizens Initiative’ [2012] *Perspectives on European Politics and Society* 257, 258.

For an outline of different forms of direct democracy instruments see B Kaufmann and J Pichler (eds) *The European Citizens’Initiatives – Into new democratic territory*, (Intersentia 2010) 33-42.

¹⁸ These important characteristics are defined more precisely in Regulation 211/2011, which implemented the ECI and is discussed further below.

¹⁹ For further comment on the type of democratic instrument that the ECI is defined as see A Auer, ‘European Citizens Initiative’ [2005] *EU Const* 79. One point of disagreement is over the use of the term Popular Initiative, which Auer limits to instruments that “grant the right to a number of citizens to submit a draft constitutional or legislative provision to the voters, with no possibility of it being blocked by Parliament”. I refer to these instruments as full-scale initiatives.

²⁰ ‘Full scale initiatives’ are at the other end of the scale in terms of legal response. The strong full scale initiative could, for example, lead to a referendum whose result would be binding on the government, such as in California and Switzerland.

²¹ Compare the UK’s e-petition system which, despite its name, does in fact lead to a specific, albeit weak, legal requirement; one of the characteristics of a popular initiative. The UK’s e-petition system obliges a debate to

Art 11(4) also sets two of the ECI's threshold requirements: a proposal must be supported by "not less than one million citizens" and "a significant number of Member States". Another defining characteristic of a popular initiative is setting a numerical target for support, which is included to provide a degree of representativeness. The participation of individual citizens, which for practical reasons is only ever a small percentage of total citizens, will only be able to become effective in influencing the legislative and policy agenda once a level of support is reached that is considered to be sufficiently representative. The setting of two thresholds in Art 11(4) TEU reflects the duality of citizenship in an EU polity that is legitimised via institutions that represent EU citizens as a whole and others that represent a subset of these citizens within the Member States.²² To be sufficiently representative in the EU, therefore, an ECI must be supported by both a representative number of EU citizens, and also by a representative number of Member States.

The two phrases in Art 11(4) that have had a particularly strong impact on the scope of the subject matter of the ECI are "within the framework of [the Commission's] powers" and "for the purpose of implementing the treaties". The first phrase is a requirement that ECI proposals are limited to the competences allocated to the Commission by the treaties. . It is inevitable that the legal and political power of the institution receiving the proposal is a limiting factor for the scope of the outcomes from an instrument such as the ECI, but this restriction is particularly significant for the ECI because it is implemented at a supranational level that has limited competences derived from other polities, and has had an impact on both the level of public debate generated and the scope of legal and policy outcomes. As the findings later in the chapter indicate, the Commission's interpretation of these two phrases, as they are implemented in Reg 211/2011, has led to a higher number of ECI proposals being refused registration than can be explained just by the need to fit within the EU's competences. Furthermore, the second phrase highlighted in Art 11(4) TEU, above, has been interpreted as excluding any ECI proposal that requires or proposes treaty amendment. Both of these phrases are discussed in more detail in the later section of the chapter that contains the analysis of the implementation of the ECI legislation. Next we turn to ECI Regulation 211/2011 that implemented the provisions of Art 11(4) TEU.²³

be held on the issue proposed, but it is not presented in the form of a legislative or policy proposal, which distinguishes it from a popular initiative.

²² "The Union rests on a dual structure of democratic legitimation: the totality of the Union's citizens *and* the peoples in the European Union as organized by their respective Member States' constitutions." A von Bogdandy 'The European Lesson for International Democracy: The significance of Articles 9-12 EU Treaty for international organisations'. [2012] EJIL 315, 322.

²³ Art 11(4) TEU: "The procedures and conditions required for such a citizens initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union".

ECI Regulation No. 211/2011

The drafting of the Regulation (EU) No 211/2011 that implements the ECI was started quickly after the ratification of the Lisbon Treaty. Following publication of a green paper and consultation from Nov 11 2009 to Jan 1st 2010, the Commission put forward its proposal for a regulation on March 31st 2010.²⁴ The European Parliament and Council made a number of suggestions for alterations, most of which were accepted, and Regulation (EU) No 211/2011 was adopted by the European Parliament and the Council on 16th Feb 2011.²⁵ In accordance with Art 24 TFEU the regulation established the ‘procedures and conditions required for a citizens’ initiative within the meaning of Article 11 of the Treaty on European Union’. In the initial proposal the Commission described the Citizens Initiative as “a significant step forward in the democratic life of the Union [that] provides a singular opportunity to bring the Union closer to the citizens and to foster greater cross-border debate about EU policy issues”.²⁶ It is noteworthy that, despite the apparent support for the ECI, two of the key democratic criteria that citizen initiatives have the potential to impact, increased citizen participation and influence over the EU policy agenda, were not mentioned as objectives of the ECI’ introduction.²⁷ The Commission emphasised in the regulation proposal that its right of legislative initiative remains intact and that their obligation is only “to give serious consideration to the requests made by Citizens’ Initiatives”, there is no obligation on them to propose a legal act in response to a successful ECI.²⁸

The European Parliament sought to strengthen the Citizens Initiative’s potential during the drafting process by reducing practical rather than legal barriers to the participative opportunity it provides, and by introducing the idea of a ‘right to sign’.²⁹ The guiding principles for the initial regulation

²⁴ The green paper on the ECI is available at

<http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/com_2009_622_en.pdf>. The Commission’s proposal for a regulation on the ECI, Brussels, 31.3.2010 COM(2010) 119 final 2010/0074 (COD), available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0119:FIN:EN:PDF> accessed 12 Apr 2015.

²⁵ For a detailed overview of the progress of the ECI regulation through drafting see S Aloisio etc. ‘The European Citizens Initiative: Perspectives and Challenges’ ch 3 in R Matarazzo (ed.), *Democracy in the EU after the Lisbon Treaty* (Edizioni Nuova Cultura, 2011) available at <http://pubblicazioni.iai.it/pdf/Quaderni/iairp_02.pdf> accessed 12 Apr 2015.

²⁶ Commission proposal for a regulation on the European Citizens Initiative - Brussels, 31.3.2010 COM(2010) 119 final 2010/0074 (COD) pg 3.

²⁷ Clause 2 of the Recital of Reg. 211/2011 included the first direct reference to participation as an objective of the ECI when it stated that the regulation ‘should be clear, simple, user friendly ... so as to encourage participation by citizens and to make the Union more accessible’.

²⁸ European Commission proposal for a regulation of the European Parliament and the Council on the European Citizens Initiative - Brussels, 31.3.2010 COM(2010) 119 final 2010/0074 (COD) pg 1.

²⁹ For a summary of the European Parliament’s position in relation to the ECI see S Aloisio etc. ‘The European Citizens Initiative: Perspectives and Challenges’ 81-85 in R Matarazzo (ed.), *Democracy in the EU after the*

proposal indicated that the aim was to make the ECI easy to use, but it needed to represent a Union interest, prevent fraud or abuse and not impose unnecessary burden on the Member States.³⁰ Minimising practical complexity for organisers and increasing ease of accessibility for supporters is essential to open up the democratic potential of the ECI, but it will need to be more than just 'easy to use' to increase the democratic legitimacy of the EU.

Analysis of the provisions of Art 11(4) TEU and Reg. 211/2011 in relation to the democratic criteria of citizen agenda influence and citizen outcome influence is presented in more detail later in the chapter. Before this we first look at the mechanics of the ECI as established by Reg. 211/2011, from the perspective of those wishing to organise an initiative and also of those wishing to support one. It was intended that the ECI regulation would minimise the practical difficulties of organising and supporting a Citizens Initiative.³¹ However, as will be seen below, there are some areas of the ECI procedure that contain a degree of complexity that may potentially limit democratic participation through the ECI. The following section contains a description of and comment on the practical aspects of each of the 5 phases that an ECI needs to complete.³²

ECI process step one - citizens committee

The first task for ECI organisers is to set up a committee with 7 members, one of whom acts as the official representative for the campaign and lead contact with the EU institutions. The committee must be composed of seven EU citizens, who are resident in seven different Member States, but not necessarily of different nationalities, and who are of European Parliament voting age.³³ The organisers are required to supply their full name, postal addresses, nationalities, dates of birth and email addresses to the Commission when seeking to register an ECI proposal.³⁴ There is no requirement for an identification number. MEPs may not be counted as a member of an organising committee for a Citizens Initiative,³⁵ and the organisers must be natural persons.³⁶ The committee members are the data controllers of the information collected within the statements of support and

Lisbon Treaty (Edizioni Nuova Cultura, 2011) at <http://pubblicazioni.iai.it/pdf/Quaderni/iairp_02.pdf> accessed 12 Apr 2015.

³⁰ European Commission proposal for a regulation of the European Parliament and the Council on the European Citizens Initiative - Brussels, 31.3.2010 COM(2010) 119 final 2010/0074 (COD) pg 3.

³¹ The Commission refers to ease of use twice in the guiding principles in the Regulation proposal. European Commission proposal for a regulation of the European Parliament and the Council on the European Citizens Initiative - Brussels, 31.3.2010 COM(2010) 119 final 2010/0074 (COD) pg 2.

³² For a diagram that summarises each of the 5 phases of the ECI processes step by step go to <http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/eci_flowchart_en.pdf> accessed 8 July 2015.

³³ Article 3(1) and 3(2) Reg. 211/2011.

³⁴ Annex II section 5 of Reg. 211/2011.

³⁵ Art 3(2) Reg. 211/2011.

³⁶ Art 2(3) Reg. 211/2011.

therefore legally responsible for the security of the data.³⁷ Committee members are also responsible for the publication of information about any funding received. This is required to be publicised on the register and regularly updated as a means of ensuring transparency about the organisations supporting an initiative.³⁸ Forming a Committee also indicates a degree of commitment from organisers that should mean there is less chance of Commission resources being spent on assessing or supporting initiatives that wither through lack of organisation.

Not present in the Commission's original proposal, the committee was introduced in to the regulation by the European Parliament to facilitate communication and to establish an organisational structure, to increase the European nature of an ECI proposal, and to reduce, through the natural persons requirement, the degree to which existing civil society organisations dominate the use of the ECI.³⁹ In the words of the European Parliament the committee was introduced because "a minimum organised structure is needed in order to carry through a citizens initiative ... and to encourage the emergence of European-wide issues and to foster reflection on those issues."⁴⁰ Nominating a lead person from the committee to liaise with the EU institutions is "for the sake of transparency and smooth and efficient communication".⁴¹

This committee phase does not appear to have been an obstruction as 27 committees were formed to launch initiatives in the first year of the ECI alone. There are, however, two specific procedural issues in relation to the committee phase of the ECI that may limit participation: the committee's legal responsibilities, and the resources required. The most significant legal responsibility for committee members is derived from their status as data controllers of the information collected as part of the statements of support.⁴² It is unclear though whether the committee is jointly responsible or just the committee's lead representative for any legal infringements; whether the jurisdiction any infringement would fall under is based on the person's residency or where the data is stored; and what the extent of the liability of the committee members is, which potentially could be very high. This level of uncertainty increases the legal risk for the organisers and may act as a barrier to citizens deciding to launch an initiative. The best funded initiative in the first six months after the ECI was launched, which was seeking an EU Directive on Dairy Cow Welfare, decided to withdraw their

³⁷ Art 12 Reg. 211/2011.

³⁸ Art 4(1) Reg. 211/2011.

³⁹ S Aloisio etc. 'The European Citizens Initiative: Perspectives and Challenges' ch 3 in R Matarazzo (ed.), *Democracy in the EU after the Lisbon Treaty* (Edizioni Nuova Cultura, 2011). Available at <http://pubblicazioni.iai.it/pdf/Quaderni/iairp_02.pdf 93> accessed 12 Apr 2015. See also amendments 8, 24 and 26 of EP report.

⁴⁰ Recital 8 Reg. 211/2011 and also in Amendment 23 justification European Parliament report.

⁴¹ Recital 8 Reg. 211/2011.

⁴² Art 12 Reg. 211/2011.

initiative two months after having it registered because of the uncertainty and potential extent of the legal liability for their committee members.⁴³

One means of mitigating the legal risk and reducing any reluctance to participate in a Citizens Initiative committee would have been to nominate a limited company as the committee 'member' on whom liability would fall in the event of any legal problems, thus allowing some form of insurance and limitation of liability that is not possible for an individual citizen. The natural person requirement, however, means that ordinary citizens are being asked to take legal responsibility in relation to their initiative.

ECI process step 2 – initiative registration and admissibility check

Within 2 months of receiving a request for registration the Commission will register an ECI that meets the conditions set out in Art 4(2) Reg. 211/2011 and publish its decision on the public ECI website. If the Commission refuses registration, it will communicate its reasons for doing so to the initiative organisers. This is a combined registration and legal admissibility check at the outset of an initiative that is intended to provide certainty to the organisers about the legality of their proposal at an early stage and, through the open publication of acceptance and refusal, to promote transparency. Once their initiative has been registered the organisers can begin the process of collecting statements of support. The means of redress open to organisers of an initiative refused registration are to bring proceedings before the General Court, in accordance with Art 263 TFEU, or to make a complaint of maladministration to the European Ombudsman, in accordance with Art 228 TFEU.

Art 4(2) of Reg. 211/2011 states the criteria that an initiative must meet to be registered:

“the Commission shall register a proposed Citizens Initiative ..., provided that the following conditions are fulfilled:

- (a) The citizens committee has been formed and the contact person designated in accordance with Article 3(2);
- (b) The proposed Citizens Initiative does not fall manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties;

⁴³ Organisers Dairy Cow Welfare initiative stated that "the ECI as it stands today does not seem ready to collect one million signatures safely or at a reasonable cost for organisers." Quoted from C Carlson 'European Union: participants assess first year of the European Citizens' Initiative - Regulation 211/2011', [2013] Public Law 669.

- (c) The proposed Citizens Initiative is not manifestly abusive, frivolous or vexatious; and
- (d) The proposed Citizens Initiative is not manifestly contrary to the values of the Union as set out in Article 2 TEU.

Art 4(2)(a) is simply a procedural requirement that the first step in the ECI process has been completed.

Art 4(2)(b) is included so that ECI proposals are not outside the legal powers of the Commission and therefore have the potential to lead to a legal act. This clause, which is not uncommon in the legislative design of direct democracy, should ensure that a proposal is addressed to the appropriate authority. The phrase for ‘the purpose of implementing the Treaties’ has been interpreted by the Commission as meaning that an ECI proposal that requests or requires treaty change will be refused registration.⁴⁴ It will be shown later that the application of this clause by the Commission as a legal admissibility test of initiatives at registration has been particularly challenging for ECI organisers and significant in restricting the democratic potential of the ECI.

Art 4(2)(c) allows the Commission to refuse registration of a Citizens Initiative that they perceive to be manifestly abusive, frivolous or vexatious. This is another common provision in the regulations for popular initiatives that allows authorities to block initiatives that are considered to be too far from mainstream democratic engagement, or are lacking a serious intention to engage with the policy making process.

Art 4(2)(d), requires that an initiative is not manifestly outside the values of the Union. Again the Union is setting an outer boundary for ECI proposals. The content of the proposal is judged against the broad qualitative criteria of the principles in Article 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

In summary, these registration conditions mean that an ECI proposal must first pass the test of Art 4(2)(c) by not being considered abusive, frivolous or vexatious; then it must be judged to not be against the founding principles of the Union as set out in Art 2 TEU and as interpreted by the Commission; and finally, to be registered, to just be given the go ahead to start testing the democratic credentials of the proposal, the Commission must believe that it is a proposal for a legal act that is not manifestly outside the framework of the Commission’s powers. The limitation on the

⁴⁴ The issue of treaty amendment is discussed in more detail below on pgs 111-115.

democratic potential of the ECI as a result of these provisions is discussed in detail in the second part of this chapter through a critical review of the Commission's decision-making.

ECI process step three – signature collection and support thresholds

Having a threshold for collection of support that triggers action is a defining characteristic of a citizen initiative. The ECI, though, is unusual in having three numerical thresholds as part of its process:

- i) The collection of 1 million absolute statements of support, which was established by Art 11(4) TEU;⁴⁵
- ii) That statements of support must come from a quarter of Member States, currently seven, according to Art 7(1) Reg. 211/2011, which defines the 'significant number of Member States' required by Art 11(4);
- iii) The number of statements of support from each of these seven Member States must be at least 750 times the number of MEPs for that Member State.⁴⁶

The EU institutions accepted the need for an initiative to be supported by citizens from several Member States, but they disagreed during drafting over what number of Member States was 'significant' enough for a proposal to be considered European. The European Parliament wanted a lower number of Member States for practical reasons, "to allow for a simpler and less cumbersome procedure, it is appropriate to set a lower threshold", whereas the Commission prioritised the strengthening of the cross border character of an initiative.⁴⁷ The Commission proposed that support should come from one third of member states, the European Parliament recommended one fifth, but the Council's proposal of one quarter, currently 7 states, was finally settled on as an appropriate compromise. The requirement of a minimum number of statements of support from a Member State for it to count towards the seven needed is degressively proportional and strengthens the degree of geographic representativeness. This reflects the importance of indirect legitimacy via its Member States, despite the ECI being a supranational democratic instrument that aims to engage citizens directly with the EU legislative and policy agenda.

The European Parliament recognised the practical difficulties and potential costs of reaching the support thresholds for an ECI in a polity such as the EU and proposed a number of mitigating

⁴⁵ Art 5(5) Reg. 211/2011.

⁴⁶ Art 7(2) Reg. 211/2011. See Annex 1 Reg. 211/2011 for exact numbers of statements of support needed from each Member State.

⁴⁷ S Aloisio etc. 'The European Citizens Initiative: Perspectives and Challenges' ch 3 in R Matarazzo (ed.), *Democracy in the EU after the Lisbon Treaty* (Edizioni Nuova Cultura, 2011) 99 available at <http://pubblicazioni.iai.it/pdf/Quaderni/iairp_02.pdf> accessed 12 Apr 2105.

measures.⁴⁸ To this end they requested the provision by the Commission of an online system for the collection of signatures,⁴⁹ a comprehensive user guide and a help desk for providing advice.⁵⁰ These requirements were met in part: a set of guidelines and recommendations for the practical implementation of the ECI, intended for the use of competent national authorities and organisers was introduced in April 2013, and there is a partial online system and informal advice provided by the Commission.⁵¹ An EU data server has also been made available to organisers. More could be done at EU level, however, to support the organisers of an ECI during their campaign. One significant gap is the provision of legal advice to ECI organisers at the point of seeking the registration of an initiative. The formal provision of legal advice may have gone some way to reducing the number of ECIs that have not been registered because they failed the legal admissibility test.

The ECI campaign organisers have 12 months to meet the collection thresholds for statements of support. It has proved possible to collect sufficient statements of support within 12 months and the Commission were flexible in applying the deadline when data storage and other technical issues stopped the first wave of initiatives from collecting support for some months. The Right to Water initiative was the first to begin collecting statements of support, on 4 Sept 2012. The Right to Water initiative was successful in finding a private host for their data partly because of funding of 100,000 Euros from the European Federation of Public Service Unions. The Commission gave a 7 month extension to the time limit for collection of statements of support for the first nine ECIs. This type of exceptional measure, however, was not foreseen in the regulation and the Commission was not explicitly given the power to take such a step.⁵²

ECI process step four - verification of statements of support

Once the organisers think the necessary number of signatures has been collected or at the point that the 12 months for collection is complete, the statements of support collected are submitted to the relevant authorities for approval in accordance with Art 8 Reg. 211/2011. No EU administrative body is used to verify statements of support so verification is a Member State based exercise. Each Member State is expected to “designate one competent authority responsible for coordinating the

⁴⁸ Draft report on the proposal for a regulation of the European Parliament and of the Council on the citizens' initiative, Committee of Constitutional Affairs - COM(2010)0119 – C7-0089/2010 – 2010/0074(COD).

⁴⁹ Ibid Amendment 33.

⁵⁰ Ibid Amendment 61.

⁵¹ This is available on the ECI website at <<http://ec.europa.eu/citizens-initiative/public/welcome>> accessed 8 July 2015.

⁵² Austria questioned this decision and was the final Member State to accept the legality of a time limit extension after a debate in their national parliament and a vote to approve the change. The Austrian administration did not believe that it could act in accordance with a time limit extension before this vote had taken place in their national Parliament; they can only follow EU rules if approved by their national parliament.

process of verification of statements of support”.⁵³ Initiative organisers are responsible for identifying which Member State statements of support have been allocated to and for submitting them to the relevant Member State authority. One reason for this process of allocating statements of support to a particular Member State is the need to show that the minimum threshold of support has been reached in sufficient numbers of Member States. The Member State authorities then have three months to verify the statements of support.⁵⁴

The Spanish presidency of the Council of ministers proposed that there be a common approach to verification of statements of support, and most respondents to the Green Paper on the ECI also wanted to see a common set of requirements across Europe to avoid having to comply with different rules in different countries.⁵⁵ Agreement was reached that the authentication of signatures should not be required for ECIs,⁵⁶ but there was disagreement between Member States about the appropriate method of verification of statements of support to ensure the fair operation of the ECI. The UK sat at one end of the spectrum with an approach that favoured accessibility over administrative certainty, wanting only sample based verification of residency information on statements of support.⁵⁷ Austria sat at the other end of the spectrum favouring verification of signatures and identity on every statement of support.

On the one hand, it could be argued that because the ECI is an electoral right that imposes weak legal obligations on existing institutions and any attempt to use it to subvert public policy is relatively easy to control, the risk of fraudulent use of the ECI is low and a light touch verification process is justified. On the other hand, it could equally be argued that all electoral rights are constitutionally important and should be strongly protected through a rigorous verification process. However, perhaps inevitably in a confederation of states, the decision taken was that ECI statements of support will be verified “on the basis of appropriate checks, in accordance with national law and practice, as appropriate”.⁵⁸ The Commission stated that this decision was to limit the administrative

⁵³ Art 15(2) Reg. 211/2011.

⁵⁴ Art 8(2) Reg. 211/2011.

⁵⁵ European Commission proposal for a regulation of the European Parliament and the Council on the European Citizens Initiative - Brussels, 31.3.2010 COM(2010) 119 final 2010/0074 (COD) pg 3.

⁵⁶ Art 8(2) Reg. 211/2011.

⁵⁷ Minister’s letter July 13th 2010 responding to Commission regulation proposal: “the proposal remains over-bureaucratic and burdensome on both Member States and citizens; the Government wishes the Regulation to be amended to give Member States greater discretion about how to verify statements of support and, indeed, whether to verify them at all”. Letter available at <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428/428i05.htm#n13> accessed 8 July 2015.

The UK simply sends an email to a sample of the citizens that have supported an ECI requesting a reply if this is incorrect.

⁵⁸ Art 8(2) Reg. 211/2011.

burden for Member States.⁵⁹ This may have been achieved for some Member States, but the trade off is likely to be an increase in the administrative burden for initiative organisers needing to understand and communicate with a wide range of administrative regimes.⁶⁰ Establishing an EU administrative body for the purpose of administering the ECI, thus providing a single point of communication and set of verification regulations, could have been one means of avoiding the complexity of the verification process for ECI organisers.

ECI process step five – submission and examination of successful initiative

The final phase for an ECI proposal is submission to the Commission for examination and for a decision on whether and which legal acts are to be proposed as a result. As part of this process the Commission will receive the initiative organisers to explain the issues raised by their proposal,⁶¹ and the organisers will also get the chance to present their proposal at a public hearing at the European Parliament in front of representatives of the EU institutions.⁶² The Commission will set out, within 3 months, its legal and political conclusions and explain any actions it intends to take.⁶³

This phase was fundamentally rewritten by the European Parliament. The public hearing, the receipt of organisers by the Commission, the reduction to 3 months for a Commission response, and the requirement for both legal and political reasoning to be explained were all included in the final regulation as a result of European Parliament proposals.⁶⁴ This is an indication of the European Parliament's enthusiasm for the ECI to facilitate full and timely engagement and communications between the EU institutions and the supporters of an ECI proposal. The European Parliament said that the justification for action from the Commission should show that "the citizen's voice is heard and the possible action to be taken is seriously and thoroughly thought out".⁶⁵ Although these changes did not go as far as to oblige a legal response from the Commission, they have potentially

⁵⁹ E.g. "With a view to limiting the administrative burden for Member States, the proposal leaves it up to them to decide on the checks to be carried out in order to verify the validity of statements of support collected for an initiative which has been declared admissible". Commission statement in European Commission proposal for a regulation of the European Parliament and the Council on the European Citizens Initiative - Brussels, 31.3.2010 COM(2010) 119 final 2010/0074 (COD) pg 6.

⁶⁰ The Stop Vivisection ECI has taken over a year after its collection of a million statements of support to present its verified support to the Commission, which would seem to indicate that complexity of verification is an issue for ECI organisers.

⁶¹ Art 10(1b) Reg. 211/2011.

⁶² Art 11 Reg. 211/2011.

⁶³ Art 10(1c) Reg. 211/2011.

⁶⁴ See the European Parliament recommendations included in their request for the Commission to submit a proposal for a Regulation implementing the ECI, OJ C 212E , 5.8.2010, p. 99–105.

⁶⁵ Justification for amendment 14 in Draft report on the proposal for a regulation of the European Parliament and of the Council on the citizens' initiative, Committee of Constitutional Affairs - COM(2010)0119 – C7-0089/2010 – 2010/0074(COD).

increased the political pressure felt as a result of a successful initiative and therefore the chance that the Commission will choose to make a proposal for a legal act.

Barriers for ECI campaign organisers

The high level of resources needed for an ECI campaign in terms of time and money because of the size of the collection area, languages, the triple numerical threshold and other complexities in the ECI process means that it is likely there will be a correlation between those that have access to these resources and those that manage to gather one million statements of support. It comes as little surprise that the two ECIs that have presented over a million statements of support to the Commission were both backed by strong existing civil society organisations: the Right to Water initiative was backed by Trade Unions from across Europe, and the One of Us initiative was backed by the Roman Catholic church. The greater the level of resources needed for an ECI campaign, the greater the risk that the ECI will be captured by existing civil society organisations and turned in to a tool for lobbying groups and their specific agendas, rather than an opportunity for natural persons to directly participate in the democratic process in any area of popular interest.⁶⁶

Technology may prove to be crucial in reducing the impact of some of the complexities for ECI organisers and issues associated with campaigning across the EU, and be a catalyst for an increase in participation.⁶⁷ For example, by enabling ECI campaigners to collect statements of support remotely and facilitating their ability to disseminate their proposal. The use of technology, however, brings its own particular issues in terms of resources and implementation. Data storage set back the start of the first ECI campaigns by 7 months, and there were a wide range of teething troubles in the first years of the ECI.⁶⁸ The data storage issue has only been resolved with the Commission offering its own server centre in Luxembourg to host data for ECI organisers as an exceptional measure.⁶⁹ Many

⁶⁶ On the potential for civil society capture of the ECI see M Dougan, 'What are we to make of the Citizens' Initiative?' [2011] CML Rev 1807, and J Greenwood, 'The European Citizens Initiative and EU Civil society organisations' [2012] Perspectives on European Politics and Society 325.

⁶⁷ Smith discusses e-democracy as a category in G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009); as does Schiller in T Schiller, 'Direct Democracy and Theories of Participatory Democracy – Some Observations' 52-63 in Palinger, Kaufmann, Marxer, Schiller (eds) *Direct democracy in Europe* (VS Verlag für Sozialwissenschaften 2007). There appears to be a tendency in the literature to treat technology as a type of participation, rather than just a catalyst for participation to occur as a new communication tool.

⁶⁸ For example, registration of support for a proposal was blocked by the software but without an explanation to the supporter, and the Right to Water initiative had thousands of registered statements of support not approved by the software.

⁶⁹ "To help get the first European citizens' initiatives off the ground, the Commission has, as an exceptional measure, offered its own servers ... and is assisting in preparing for the certification of their online collection system", http://ec.europa.eu/commission_2010-2014/sefcovic/headlines/press-releases/2012/07/2012_07_18_eci_en.htm accessed 8 July 2015. This offer was extended at least until 2015. Minutes of meeting at which provision of data storage was agreed available at

technical issues remain for ECI campaigners, particularly with the Online Collection System, and there will continue to be resource implications for organisers unless there is improvement and increase in the services provided centrally.⁷⁰ Technology could, therefore, both enhance the opportunity for direct democracy across large polities such as the EU by facilitating the collection of support, but also restrict the ability of ordinary citizens to initiate direct democratic instruments because of the cost and complexity of technological solutions.

Procedural complexity for supporters of ECI proposals

Next we look at the legislative design of the ECI as it applies to those citizens that wish to support an ECI proposal, in particular the eligibility rules and the identification requirements. The eligibility rules for supporting an ECI proposal are that 'signatories shall be citizens of the Union and shall be of the age to be entitled to vote in elections to the European Parliament'.⁷¹ This citizenship requirement excludes TCNs and sets the age to support an initiative at 18 except in Austria, where the age for voting in European Parliament elections is 16. There was some support, mainly from sections of the European Parliament, for reducing the age at which you can support an ECI proposal to 16 and for allowing third country nationals resident in a Member State to support a Citizens Initiative.⁷² It was argued by the European Parliament that supporting an ECI was of a different order to voting for elected representatives and the opportunity should be taken to encourage participation at a younger age than usual.⁷³ Allowing 16 year olds to support an ECI would have increased the scope to broaden European democratic participation and give the European public space a wider and new audience.⁷⁴ This argument was rejected by the Council, which supported mirroring the age limit for voting in the European Parliament, which is decided by each Member State. Member State rules, therefore, set the conditions for supporting an ECI proposal and an EU citizens right to democratic participation through the ECI varies according to their nationality.

<<https://joinup.ec.europa.eu/software/ocs/news/meeting-hosting-eci-online-collection-systems-european-commission>> accessed 8 July 2015.

⁷⁰ <http://ecithatworks.org/wp-content/uploads/2014/04/AN-ECI-That-Works-Back-To-The-Drawing-Board.pdf> accessed 8 July 2015.

⁷¹ Art 3(4) Reg. 211/2011.

⁷² S Aloisio etc. 'The European Citizens Initiative: Perspectives and Challenges' ch 3 in R Matarazzo (ed.), *Democracy in the EU after the Lisbon Treaty* (Edizioni Nuova Cultura, 2011). Available at http://pubblicazioni.iai.it/pdf/Quaderni/iairp_02.pdf accessed 12 Apr 2015.

⁷³ Particularly supported by the Committee on Petitions in the European Parliament See comment by its chairwoman Erminia Mazzoni at <<http://blogs.lse.ac.uk/euoppblog/2012/05/31/european-citizens-initiative-improvements>> accessed 8 July 2015.

⁷⁴ M Dougan, 'What are we to make of the Citizens' Initiative?' [2011] CML Rev 1807, 1820.

The other specific group of citizens excluded from the ECI are third country nationals (TCNs). Those supporting an Initiative must be EU citizens and therefore citizens of a Member State, which means that TCNs are not eligible to support ECI proposals. Residency in the EU is not sufficient to qualify. This means that TCNs resident in the EU will continue to have little avenue for democratic engagement at the EU level unless they have acquired citizenship of a Member State. The ECI therefore maintains the status quo and does not take the opportunity to extend the franchise within the EU. The prevailing approach to the democratic franchise in Member States is one based on nationality rather than residence, and it is perhaps unsurprising that the ECI took this approach.⁷⁵ It must be remembered, of course, that if the ECI franchise was only based on residency then EU citizens living outside of the EU would be excluded from supporting an ECI proposal. The only way to include non resident EU citizens and also TCNs would be for eligibility to be based on both nationality and residency.

For the purposes of counting the level of support from any given Member State “Signatories shall be considered as coming from the Member State which is responsible for the verification of their statement of support”, and Member States decide what citizens they are responsible for verifying.⁷⁶ As we will see in the following paragraphs, a variety of different approaches have been taken to establish the set of citizens a Member State is responsible for verifying. The franchise definition regarding EU citizens is based on whether someone is a citizen of the EU through holding nationality of a Member State. In contrast to this, residence is also used by some Member States to define the set of citizens that they are responsible for verifying as valid to support an ECI proposal; the UK for example will verify all EU citizens that are resident in the UK, but not UK citizens living abroad.⁷⁷ The issue of allocation of statements of support is closely linked to the issue of citizen identification for the purposes of supporting an ECI proposal because the identity document in many cases ties that citizen to verification by the state that issues the document. This adds further to the complexity of this aspect of the ECI process.

The subsequent paragraphs set out the rules relating to the allocation of citizens for the purposes of verification and the identification rules that apply to citizens wishing to support an initiative.⁷⁸ Member States can be categorised in to those that require an identification document number to support an initiative (category 1) and those Member States that only require residency information

⁷⁵ There are exceptions to basing voting rights on nationality, for example in the UK Irish and some commonwealth country nationals are able to vote in UK elections when resident in the UK, and conversely UK nationals who have not been resident in the UK for 10 years can no longer vote in UK elections.

⁷⁶ Art 7(4) Reg. 211/2011.

⁷⁷ Annex 3, Part C Reg. 211/2011.

⁷⁸ Annex 3, Part C of Reg. 211/2011 lists which allocation rules apply and which identification requirements for each Member State.

(category 2). This second category can be further subdivided into those Member States, the UK, Ireland and Netherlands, that allow their citizens to allocate their statement of support to their home Member State, based on their nationality, only if permanently resident there, (category 2a) and those Member States, Belgium, Denmark, Germany, Estonia, Slovakia and Finland, that allow their citizens to allocate their statement of support to their home Member State when resident in another Member State, if the authorities have been notified (category 2b). If a citizen resides in their home Member State then their statement of support will be allocated to that Member State, as long as they have an appropriate identification document, where one is required, or the necessary residency information.

It gets complicated if a citizen lives in another Member State as their options will vary according to the Member State citizenship they hold and also the Member State they are residing in. Citizens from a Member State that requires an identification document (category 1) and who live in another Member State that requires identification have the option of allocating their statement of support to either their home Member State or host Member State, assuming of course that they have identification documents for both. If they live in a Member State that bases allocation of support on residency, then they can allocate their support either to their home Member State, if they still have the necessary identification, or their host Member State if they are permanent residents.

If you are a UK, Ireland or Netherlands national (category 2a) residing in another EU Member State that requires an identification document (category 1), then you must possess the relevant identification document of the host Member State to be able to sign up to a Citizens Initiative and your support will be allocated to the host Member State. If residing in another Member State that requires residency information (category 2) then their statement of support can be allocated to the host Member State through their residency there. A UK, Ireland or Netherlands national does not get the option of allocating their statement of support to their home Member State if living in another Member State.

If you are a Belgium, Denmark, Germany, Estonia, Slovakia or Finland national (category 2b) residing in another Member State that requires an identification document (category 1), then you have the option of using a host Member State identification document to allocate your statement of support to your host Member State. If residing in another Member State that requires residency information (category 2) then the statement of support can be allocated to the host Member State through their residency there. These nationals (category 2b) also have the option of allocating their statement of support, whichever host Member State they are residing in, to their home Member State if they have informed the authorities of their address abroad.

The complexity of these identification and allocation rules has a number of implications for both citizens wishing to support an initiative and also for ECI organisers. First, for organisers of an ECI, extra resources are likely to be needed to manage the collection process, particularly if they collect a million statements of support and need to submit to the relevant Member States for verification. This extra resource and complexity in managing the verification process is also likely to increase the chances of the ECI being a tool for well resourced existing civil society organisations.⁷⁹ Secondly, organisers may need to collect in excess of the required support thresholds to be able to submit their proposal to the Commission because the greater the complexity of the identification, allocation and verification of statements of support, the greater the chance that errors will be made by citizens supporting or organising an initiative. For example, the more identification information that is asked of an initiative supporter, the more chance there is that they will make a simple inputting error. This issue is exacerbated by the reliance of the ECI on technology and the rigidity of information collection this implies, coupled with the inability of the ECI systems to gather email addresses that could be used to ask supporters to correct an error. Thirdly, ECI campaigners believe that the extensive identification requirements are making people reluctant to support initiatives.⁸⁰ The issue of identification was one of the most discussed issues in the Council during the drafting of the ECI regulation, but no agreement could be reached and so, as we have seen, each Member State set its own rules.⁸¹ Fourthly, the identification and verification rules have combined to exclude a number of citizens from being able to support an initiative. This question of equality is central to democratic legitimisation and is probably the most significant of the issues thrown up by the ECI rules in relation to identification and verification, and as a result this issue is discussed in more detail below.

Substantive issues arising from ECI legislative design

Equality

Art 9 TEU states that, “the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions” and Art 10(3) confirms that “Every citizen shall have the right to participate in the democratic life of the Union”. The ECI rules for identifying citizens and for allocating and verifying statements of support mean that some EU citizens are excluded from supporting an ECI proposal, either because of where they live or because of a lack of an appropriate

⁷⁹ On the potential for civil society capture of the ECI see M Dougan, ‘What are we to make of the Citizens’ Initiative?’ [2011] CML Rev 1807, and J Greenwood, ‘The European Citizens Initiative and EU Civil society organisations’ [2012] Perspectives on European Politics and Society 325.

⁸⁰ Comment from campaigners can be found in C Berg and J Thompson (eds) *An ECI that Works: Learning from the first two years of the ECI* (2014). Available at <<http://ecithatworks.org/>> accessed 8 July 2015.

⁸¹ Annex 3, Part C Reg. 211/2011.

document, or a combination of both. For example, if an Irish, Dutch or UK national lives in one of the countries that require an identity document or number they do not or are not able to possess, then they will not be able to support an ECI proposal because they do not qualify on the grounds of residency or possess an identity number or document for the country where they are resident.⁸² Although direct democratic instruments are not introduced specifically to increase the equality and inclusiveness of democratic systems, and the numbers disenfranchised by the ECI rules are likely to be relatively small as a percentage of the EU population, they are nevertheless democratic standards against which these instruments should be assessed and, if found wanting, criticised.

The duality of Member State and EU citizenship and the differing electoral and administrative cultures in the Member States have led to the difficulties in the ECI regarding equality. Member States could have avoided the equality issues if they had reached agreement on standard rules for the identification of citizens and on the allocation of statements of support, which would probably have required agreement on whether to base the franchise for supporting an initiative on residence or nationality, or both. Given that the elections for the European Parliament are still not standardised across the EU,⁸³ and that there is no common identification document for EU citizens, it was perhaps always going to be unlikely that the ECI would have standardised or centralised electoral rules or administration. That this is a policy area of which Member States are reluctant to relinquish control is reflected in the treaties, for example the legal basis in the treaties for amending the electoral basis of MEPs, Art 223(1) TFEU, is one of the organic laws, which means that approval of a decision under this legal base is strongly intergovernmental, similar to the process followed for treaty amendment.⁸⁴

The ECI voting and franchise rules and administration relate to EU citizenship and the opportunity to influence a supranational agenda that the Member States have already agreed to centralise, therefore it could be argued that these rules should not be based on Member State citizenship and decentralised administration. EU law, however, does not make it clear where the ECI stands in this respect. The opening paragraph of the regulation recital states that the Citizens Initiative 'reinforces citizenship of the Union and enhances further the democratic functioning of the Union', and Art 3(4) states that 'signatories shall be citizens of the Union', which could support a supranational reading of

⁸² Belgium, Denmark, Germany, Estonia, Slovakia, and Finland base on residency but nationals of these Member States living in another Member State are able to support Citizens Initiative if they have identified their home state authorities of their place of residence.

⁸³ For example, the voting system used to elect MEPs and the polling days for the European Parliament elections vary from Member State to Member State. Legal basis for European Parliament elections are Art 20, 22 and 223 TFEU.

⁸⁴ Art 223(1) TFEU requires that provisions for the election of MEPs must 'enter in to force following their approval by the Member States in accordance with their respective constitutional requirements'.

the ECI and a call for centralised EU level franchise rules and administration. This seems to be contradicted, though, by Art 11(4) TEU which states that it is Member State nationals who are inviting the Commission to act, not EU citizens.⁸⁵ Furthermore the ECI is not described as a facet of EU citizenship or included in the list of Union rights in Art 20(2) TFEU. It is perhaps surprising that the ECI is not included in this treaty article, which includes the right to petition the European Parliament and to apply to the Ombudsman.⁸⁶ There is also some administrative justification for administering the ECI at Member State level because they already have systems in place to verify, identity and manage democratic processes, although in the long run it may prove a more effective use of resources to manage this centrally and not repeat tasks across the EU.

There may be some arguments in favour of a more clearly supranational ECI, but it is perhaps inevitable in dual EU democracy that there are EU and Member State level influences on its franchise rules and administration, and therefore some inequality between EU citizens. The level of standardisation of rules and centralisation of administration should match the democratic purpose of the democratic instrument and its status should be reflected in the treaties, but Member States retain control over this policy area. There is already some Member State movement to reduce inequalities in the ECI, such as through Spain including the identity card for foreigners on its list of eligible identification means for verifying statements of support, but more would need to be done to remove the difficulties for the ECI in relation to democratic equality. It may be unrealistic, however, to expect centralised verification to be set up in a polity with such limited statehood to eliminate a few instances of inequality arising in a minor democratic instrument like the ECI. Increased standardisation of the franchise rules is possible and would eliminate the majority of the inequalities that exist in the legislative design of the ECI, but they are perhaps inevitable in a dual democracy such as the EU and any moves to increase standardisation rely on the willingness of Member States to compromise in this important policy area.

Support thresholds in a dual EU democracy

To ensure that an initiative is pan-European in nature, representative of the number of citizens and also of the number of Member States, the ECI has three numerical thresholds. The absolute requirement of one million was set by Art 11(4) TEU and adopted by Reg. 211/2011; the second threshold of one quarter of Member States, currently 7, was an interpretation of the phrase 'significant number of Member States' in Art 11(4); and the third threshold, which is the minimum

⁸⁵ Art 11(4) TEU starts, 'Not less than one million citizens who are nationals of a significant number of Member States...'

⁸⁶ Art 20(2) TFEU.

number of statements of support required from each of the seven Member States, was an addition in Art 7(2) Reg. 211/2011. The support threshold for ECI organisers to be able to present their proposal needs to be high enough to indicate a sufficient degree of representativeness from the wider population that any subsequent legal act will apply to, but it also needs to be practically attainable.⁸⁷ This is true of both the absolute level of citizens and the number of Member States. This need for the legislative design of an agenda initiative to try to avoid allowing an unrepresentative minority to excessively influence the policy or legislative agenda goes to the heart of the debate about whether democracy should always be a process that enables the popular sovereignty of the majority of citizens, or whether it is appropriate to facilitate the promotion of minority interests.⁸⁸

The total number of citizens required to support an ECI proposal is a relatively low percentage of EU citizens.⁸⁹ This could raise questions about the representativeness of an ECI proposal that meets the support thresholds, but the wide geographic area of the EU means that, even at this low percentage level, the collection of such a high absolute figure of support may present practical difficulties due to the associated cost and organisational implications. The second and third requirements that the one million statements of support must be from ‘a significant number of member states’ with a sufficient level of support from each Member State also need to strike a similar balance between representativeness, in this case of Member State interests, and practical feasibility. This point was recognised by the Commission in its Green paper prior to drafting the regulation: “Whilst a high threshold would indeed ensure that the initiative is sufficiently representative [of Member States], it would nevertheless make the procedure more burdensome. On the other hand a low threshold would render the initiative more accessible, but less representative”.⁹⁰ The indication so far is that well organised and well resourced ECI campaigns do have the ability to reach the support thresholds; the two ECIs that have reached a million statements of support so far have been backed by the Roman Catholic church and Trade Unions. However, a far higher number of ECIs, totalling 19, mainly

⁸⁷ Included as a guiding principle of the proposal for Citizens Initiative regulation: “The conditions should ensure that citizens’ initiatives are representative of a Union interest, whilst ensuring that the instrument remains easy to use” – Commission proposal March 2010, pg 2. Also included in recital 5 of Reg. 211/2011.

⁸⁸ For discussion of referendums and the will of the majority see M Setala, *Referendums and Democratic Government: Normative Theory and Analysis of institutions* (Macmillan 1999) ch 2.

⁸⁹ “Of the nine national constitutions of old and new EU member states which provide for citizens initiatives only the Italian constitution has a lower relative number of required signatures”, M Efler, ‘European Citizens Initiative, Legal nature and criteria for implementation’, in B Kaufmann and J Pichler (eds) *The European Citizens’Initiatives – Into new democratic territory*, (Intersentia 2010) 51. See also table comparing Member State initiative population requirements in V Cuesta Lopez ‘A Comparative approach to the regulation on the European Citizens Initiative’ [2012] *Perspectives on European Politics and Society* 257, 261.

⁹⁰ European Commission’s Green Paper - 11.11.2009 COM(2009) 622 available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/com_2009_622_en.pdf accessed 8 July 2015.

organised by groups of citizens, have failed to reach the level of support needed, with only two passing 100,000.

The multiple ECI support thresholds are unusual for an agenda initiative, but not unheard of in federal states,⁹¹ and reflect the fact the EU is legitimised both by European citizens and more strongly via its Member State governments, and that in terms of both population and Member States the minority asking for action by the EU institutions needs to be sufficiently representative. As well as the equilibrium between representativeness and practicality, therefore, there is also a second equilibrium in the EU between EU citizen and Member State representativeness. This raises the hypothetical question of whether the Member States requirement is a legitimate protection against policy imposition by a minority of Member States or whether it is an unjustified barrier to effective participation by EU citizens. Would the impact of reducing the second and third thresholds make the ECI unrepresentative of the members of the Union or would it be a legitimate way to increase the supranational participative opportunities of EU citizens?

Reducing the number of Member States needed would benefit those initiatives that have their support drawn disproportionately from a specific European area or Member State; in an extreme case an initiative that reaches one million statements of support from just one Member State. Direct democracy relies on the acceptance by the majority, or representatives of the majority, of the value of the opinion of a significant minority. An initiative that only has support from one Member State would be problematic in these terms due to the dual nature of EU legitimisation. The EU is not a unitary state where it may be acceptable for locally supported initiatives to have national impact because of the association with a single demos. Accepting an initiative that draws its support from just one Member States is unlikely, but it is possible to imagine scenarios where support may come from just two or three Member States that have a particular interest in a specific policy area, for example environmental issues that affect a specific geographic area or single market issues that affect industries based in a relatively small number of Member States, such as the fishing industry. There may be an argument, therefore, that the 7 Member State requirement blocks legitimate democratic participation, even in the EU polity that requires representativeness of its Member States and EU citizens. Furthermore, the Member State requirement for initiative organisers appears to be pushing up the number of statements of support that are going to be needed for an initiative to meet its thresholds. For example, the Right to Water initiative, as at 12 March 2013, had collected 1.2 million statements of support but still needed two more quorate countries to make up the 7.

⁹¹ Austria is an example of a federal state that has this type of double requirement.

An alternative to having a fixed numerical requirement might be to leave the number of Member States required as 'significant'. Leaving the number of Member States as a 'significant number' might increase the opportunity for democratic participation through the ECI, but it would also increase the level of discretion of the Commission and the control they have over the effectiveness of participation, and increase the uncertainty of success for organisers. There is no guarantee that the Commission would use its discretion to increase the number of ECIs that are able to propose a legal act of the Union; the opposite may occur and the use of the term 'significant number' may actually reduce citizen participation as a result. As we will see below, where the Commission has discretion over the application of the ECI registration criteria, it has used it to limit the scope of ECI proposals and reduced the ECI's democratic potential. On the other hand, requiring a 'significant number of Member States' to support an ECI would allow greater flexibility and give citizens grounds for a legal challenge to a refusal by the Commission to propose a legal act. If there are acceptable reasons for the lower number of Member States and there are good reasons for the Union to act even if the issue is of relevance in a relatively localized area, then citizens have a basis to challenge any decision not to act. It is questionable though whether more legal challenges would be beneficial or whether courts should be defining an acceptable number of Member States for each policy area. A further speculative debate is whether the number of Member States and EU citizens needed in support of an ECI could be set according to subject matter, in line with the subsidiarity principle or competence arrangements. Initiatives related to exclusive competence, for example, could have a lower Member State requirement and initiatives that require treaty amendment, which is a more intergovernmental process, could require a higher number of Member States to be considered representative.

The third threshold which indicates whether a Member State can be counted or not is logical, if the rationale for a minimum number of states is accepted. The criteria set by Reg. 211/2011 are degressively proportional in line with MEP allocation, to take in to account both Member State political significance and population significance. This reflects a third equilibrium that needs to be considered in the thresholds of the ECI, as a result of the specific nature of the EU, between the population of each Member State and their status as a single political entity amongst 27. This creates an issue of the equal effectiveness of Member State citizens when acting as EU citizens.⁹² Citizens would be equal if treated as a single signature that counts towards an absolute total irrespective of their nationality, but the ECI requirements mean that in certain situations the vote, for example, of a Cyprus national will be more valuable than a German national because it is a higher percentage of the total needed for Cyprus to count as one of the seven Member States required.

⁹² M Dougan, 'What are we to make of the Citizens' Initiative?' [2011] CML Rev 1807.

Alternatively, the regulation could have been drafted with a nominal minimum of say 5,000 citizens before a Member State can count towards the seven needed, but this would mean that each Member State was equal in value irrespective of its population size. Unsurprisingly the regulation follows the example set for MEP allocation to strike a compromise between these two positions. On the one hand it might be argued that a supranational democratic instrument such as the ECI should focus more strongly on ensuring equality between EU citizens, but on the other hand it might equally be argued that Member State representativeness should be strengthened to limit the dominance of larger Member State populations in the support totals for ECI proposals. Whichever position you take, the duality of the EU is having an impact on the democratic potential of the ECI.

The two numerical requirements of an absolute number of citizens and a number of Member States are inconsistently established in Art 11(4) TEU. A number is used for the total support needed, rather than a general phrase such as a “representative and accessible number of citizens”, which would leave the specific number to be determined in the regulation. On the other hand, the requirement for the number of Member States is that it be ‘significant’; no precise number is used. It is unclear why a specific number of citizens required to support an ECI proposal was included in the Treaties and the number of Member States was left to be decided during the drafting of the ECI Regulation. Given the potential for the EU to increase or decrease in size a definition on which to base a figure, rather than a number itself, would allow for flexibility in the ECI process and avoid the need to amend the treaties to maintain an appropriate level of representativeness. A definitional approach of this sort though would also leave most decision-making about this aspect of the ECI design to secondary legislation and the EU institutions, which raises the question of the extent that a democratic instrument of this type should be defined by Treaty or by secondary legislation; and therefore whether it should be defined by EU institutions or by Member States during a treaty convention involving other civil society actors. The greater the significance of a treaty Article the more certainty might be expected in the constitutional order of the EU rather than its legislative framework. A fixed figure included in the Treaties would provide certainty and secure the ECI more strongly within the EU, but reduce the ability of the legislation to be adapted to changes. Whatever the decision taken in relation to the level of detail included at Treaty level, it would seem appropriate for both the number of citizens and Member States to be either a specific number in the treaties or specified in the regulation based on a treaty definition.

Much of the discussion during drafting about the collection conditions focused on the need to reduce the difficulty of collecting statements of support across a wide geographic area, but having three thresholds to meet will always make collection complex, more expensive and less able to

succeed. The three equilibriums that the thresholds try to take account of reflect the position of an EU that contains aspects of an intergovernmental organisation and a federal state and that needs to accommodate EU and Member State interests, which makes multiple thresholds and issues with democratic equality almost inevitable.

Strength of legal obligation imposed by successful initiative

Despite any political and democratic pressures it is possible for an ECI to reach its triple thresholds and have its proposal presented to the Commission, but lead to no legal impact. Art 2(1) Reg. 211/2011 states that an ECI is only able to invite the Commission to submit any appropriate proposal for a legal act; there is no obligation imposed on the Commission other than to hold a hearing in the European Parliament, and set out within 3 months its conclusions and explain its reasons for the action, if any, that it intends to take.⁹³ Not only is there no obligation on the Commission to propose a legal act, but when it does make a proposal there is no guarantee over the final outcome once the proposal has gone through the legislative process in the European Parliament and Council.

The legal obligation imposed on decision makers is a distinguishing feature of citizens initiatives. At one extreme Poland provides detailed instructions for Parliament starting with a requirement that first reading of an initiative proposal needs to be within 3 months of its submission, making an initiative akin to the initiation of the legislative process; and at the other end of the spectrum in Italy there is no obligation on Parliament to even discuss an agenda initiative proposal, which makes it little more than a petition in the form of a legislative proposal.⁹⁴ Austria sits somewhere in between these extremes with its requirements that a proposal be given formal consideration and representatives from the initiative being given the opportunity to speak in parliament and is similar to the type of political obligations imposed by the legislative design of the ECI.⁹⁵ The ECI is a form of agenda initiative which provides citizens with the opportunity to influence the legislative agenda but not to demand action, such as the drafting of legislation or a referendum on the subject. The ECI is not an opportunity to directly make a legislative proposal to a Parliament that initiates the legislative process, as is the case for most agenda initiatives. It is just an opportunity to invite the Commission

⁹³ Art 10 (1)(c) Reg. 211/2011.

⁹⁴ For discussion of the citizens initiative in Poland and Italy see A Rytel-Warzocho, 'Popular Initiatives in Poland: Citizens Empowerment or Keeping up Appearances', and P Uleri, 'Institutions of Citizens' Political Participation in Italy: Crooked Forms, Hindered Institutionalisation', in M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 212 and 71.

⁹⁵ Although the citizens' initiative in Austria requires relatively weak obligation the proposal is given priority on the parliamentary agenda, considerations are required to start promptly and representatives from the initiative must be heard in parliament. For discussion of the citizens initiative in Austria see K Giese, 'The Austrian Agenda Initiative: An Instrument Dominated by Opposition Parties', in M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 175.

to make a proposal for a legal act on behalf of the organisers, thus maintaining the Commission's formal monopoly on initiating the legislative process, and which then needs to go through the EU legislative process. The discretionary role of the Commission in the ECI process is therefore an extra step when compared to the procedures of most other agenda initiatives and reduces the formal ability of an ECI proposal to influence the policy agenda and its outcomes as a result.⁹⁶

The evidence so far is that the Commission will be cautious in its response to successful ECI proposals and it will use its discretion to protect its established policy preferences. The response to both the successful initiatives, the One of Us and Right to Water initiatives, has been limited.⁹⁷ The One of Us initiative led to no action by the Commission because the Commission decided that as 'EU primary legislation explicitly enshrines human dignity, the right to life, and the right to the integrity of the person', which sufficiently met the aims of the initiative. The One of Us campaign response strongly rejected the Commission's reasoning and they have brought an action against the Commission in the CJEU claiming, inter alia, that the democratic process has been violated by the Commission's reasoning and non conformity with Reg. 211/2011.⁹⁸ The Right to Water initiative received a number of promises to support the aims of the initiative, but the only concrete action promised was a consultation on the Drinking Water Directive, there was no legal act proposed. The response of the Commission has been to state support for the aims of the initiatives presented to them, but to defend its current policy in both areas and not identify any legal acts that might be proposed in support of the initiatives' aims.

According to clause 1 of the regulation recital, the ECI should raise citizens to a level that is intended to be on a par with the rights of the European Parliament and Council in terms of proposing EU legislation.⁹⁹ Michael Efler argues that if compared with the rights of the European Parliament and Council to request a legal act, as they were set out in ex-Article 192.2 TEC at the time of the drafting of Art 11(4) TEU, then the Commission is obliged to take some legislative action on the topic of the proposal once the criteria for submission are met.¹⁰⁰ However, there is no specific mention of the comparison with the other institutions right to initiate legislation in Art 11(4) TEU or the Reg.

⁹⁶ M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 9.

⁹⁷ The formal Commission response to these initiatives and the associated press releases are available at <<http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/answered>> accessed 8 July 2015. The third successful initiative on Anti Vivisection was responded to by the Commission on 3 June 2015.

⁹⁸ The campaign response to the Commission can be seen at <<http://www.oneofus.eu/the-commission-vetos-the-citizens-initiative-one-of-us/>> accessed 8 July 2015. Case T-561/14: Action brought on 25 July 2014 — One of Us and Others v Parliament and Others.

⁹⁹ Articles 225 and 241 TFEU set out these rights for European Parliament and Council respectively.

¹⁰⁰ M Efler, 'European Citizens Initiative, Legal nature and criteria for implementation', in B. Kaufmann and J. Pichler (eds) *The European Citizens' Initiatives – Into new democratic territory*, (Intersentia 2010) 49-51.

211/2011. Art 11(4) TEU has been drafted to closely follow the wording of Art 225 TFEU, which establishes the European Parliament right to request a legal act,¹⁰¹ but Art 11(4) establishes a lower legal obligation. An ECI proposal leads to an ‘invitation’ to the Commission ‘to propose a legal act’, whereas the European Parliament can ‘request’ the Commission to submit a proposal.¹⁰² Furthermore, Art 225 TFEU goes on to stipulate that despite the stronger legal obligation on the Commission in relation to a request from the European Parliament, the Commission can still decide to take no action. Therefore, if the Commission can respond to the European Parliament by doing nothing, then it can presumably also do nothing in response to a Citizens’ proposal for a legal act, which is contrary to the argument put forward by Efler. One democratically interesting impact of obliging the Commission to propose a legal act following a successful ECI would have been to pass decision-making on the outcome of an ECI proposal more strongly to the democratically legitimised institutions of the European Parliament and the Council; and reduce the discretion of the non-democratically legitimised Commission.

Despite the weak legal obligation included in the ECI legislation it is still possible for a successful ECI to have an influence on the EU policy or legislation agenda and its outcomes,¹⁰³ for example as a result of the procedural obligations at the end of the ECI process that allow organisers to promote their proposal to the Commission and the European Parliament and try to increase the political pressure for action. The number of legal outcomes from agenda initiatives used in Europe are not high, commonly 10-15% of proposals made, but this is not the only measure of the impact of direct democracy,¹⁰⁴ and counter intuitively there is evidence that agenda initiatives with formally weak legal obligations lead to a comparably higher number of policy or legislative acts than agenda initiatives designed with greater legal obligations on institutions to act.¹⁰⁵ These outcomes are the result of softer forms of power, of political pressure rather than the hard legal obligations included

¹⁰¹ Article 225 TFEU (ex Article 192, second subparagraph, TEC): ‘The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons’.

¹⁰² Similarly in Art 241 TFEU the Council can request action by the Commission although the wording is less in line with Art 11(4) TEU.

¹⁰³ For outline of outcome rates of agenda initiatives in Europe see table in M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 248-9.

¹⁰⁴ G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 120 “Simply counting the number of successful initiatives in particular policy areas does not give us a fair representation of the effect of direct legislation mechanisms”. Smith summarises studies in to indirect effect more generally on pgs 119-120 of *Democratic Innovations*.

¹⁰⁵ Matts Qvortrup at the conference ‘*The EU Citizens’ Initiative: Normative, Legal and Policy Perspectives*’, (University of Liverpool, 6th May 2011). M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 11 “success rate of agenda initiative is not much lower than the success rate of Swiss popular initiative”.

in the legislative design of an instrument of direct democracy.¹⁰⁶ Examples of this type of pressure are: the reluctance to frustrate a rare initiative that has managed to overcome the complexity of the process and gather the level of formal support needed, and the democratic value it represents; the political pressure that may be generated as a result of the public debate generated by the ECI campaign; the desire on the Commission's part to be seen to be supporting democratic legitimacy; and the risk to the Commission's reputation if a high number of Citizens Initiatives lead to nothing.

The relative weakness of the legal obligations imposed on the EU institutions at the end of the ECI process could be turned in to a democratic benefit, if the removal of the perception of a threat to existing policy and existing representative means of democratic legitimisation, at both Member State and EU level, were recognised and it led to the Commission allowing a wider public debate and greater engagement with the EU policy agenda as a result. If this happened then the increase in the extent of effective participation and the participation of citizens in the policy agenda could compensate for the lack of hard legislative obligations that give direct citizen influence over agenda outcomes.¹⁰⁷ Moreover, the weakness of the legal obligations removes one of the main risks of introducing direct democracy: that EU policy might veer unexpectedly and lead to the introduction of policies that are irrational or with long term negative effects. These type of outcomes are rare, but they have been seen with the use of the full-scale initiative in California, where an initiative can oblige the holding of a binding referendum whose result can only be overturned by another initiative and referendum.¹⁰⁸ The ECI is far from having the type of legislative design with binding implications that direct democracy has in California. It is important therefore to recognise that the ECI is not a full scale initiative, as used in California, but an agenda initiative, when designing how extensive participation should be, and deciding how cautious institutions should be in protecting existing policy preferences, as Schiller and Setala put it: "Agenda initiatives do not seem to represent such a strong challenge for the legal or constitutional system since the legislature will, anyway, have the final decision on contents".¹⁰⁹ It will be interesting to see whether the Commission will continue to be cautious about proposing legal acts subsequent to successful initiatives or whether the ECI starts to lead to legal outcomes despite the weakness of the legal obligations its legislative design imposes.

¹⁰⁶ M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 11 "it can thus be argued that softer forms of power are involved in agenda initiatives; that is powers to influence the political agenda and citizens' and legislators' policy preferences".

¹⁰⁷ See Thomas Cronin quoted in G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 125.

¹⁰⁸ On this point in relation to full scale initiatives and California see G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 123-4 and J Mathews, 'California's troubles, Europe's Future - and the need for a more direct representative democracy' in B Kaufmann and J Pichler (eds) *The European Citizens' Initiatives – Into new democratic territory*, (Intersentia 2010) 79.

¹⁰⁹ M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 246.

The question of whether the legislative design of the ECI allows for wide and potentially critical democratic participation during the deliberative phase of the ECI process, prior to submission of successful ECIs, is considered next in the context of ECI registration.

Scope of subject matter of ECI proposals

One way of categorising agenda initiatives is between those that can make proposals that address constitutional matters,¹¹⁰ and those that are limited to 'ordinary' legislation.¹¹¹ This distinction is significant because the inclusion of constitutional issues increases the range and salience of the influence that citizens can have on the policy agenda through an agenda initiative. For the ECI to be a constitutional initiative it would need to be able to make proposals that require or request changes to the treaties. The Commission has indicated that it will limit the ECI to legislative matters, making the ECI a legislative agenda initiative, such as in Poland where constitutional and budgetary issues are excluded.¹¹² The other limitation on the scope of subject matter that the ECI can lead to public debate on is the result of the competences of the EU and the limitations to the powers of the Commission. The narrower the scope of the subject matter of an agenda initiative, the less influence that citizens will be able to exert over the policy agenda and the more limited the democratic potential of the instrument will be. The limitation on ECI subject matter is the result, in part, of its legislative design, but more significantly the result of the Commission interpretation of this legislation. The legislation is analysed in this section of the chapter. The application of these legislative provisions is discussed later in the chapter.

Art 11(4) TEU stated that citizens 'may take the initiative of inviting the European Commission, *within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties*'. The provisions in Art 11(4) TEU could have been interpreted as allowing citizens to choose the subject matter of and seek popular support for proposals in relation to almost any issues that the citizens themselves, not the Commission, believe need some sort of legal action taken to implement the

¹¹⁰ For example Switzerland where there is almost no restriction on subject matter for a popular initiative. For discussion of the use of citizens initiative in Switzerland see G Lutz, 'Switzerland: Citizens' Initiatives as a Measure to Control the Political Agenda' in M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 17.

¹¹¹ See comment on this point in V Cuesta Lopez 'A Comparative approach to the regulation on the European Citizens Initiative' [2012] *Perspectives on European Politics and Society* 257, 259. Poland is an example of a country that excludes constitutional amendments and issues relating to the budget, see A Rytel-Warzocha, 'Popular Initiatives in Poland: Citizens Empowerment or Keeping up Appearances' in M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012).

¹¹² Early in the life of the ECI the Commission stated in its refusal to register the Anti-nuclear power initiative that treaty amendment was not permissible. See further discussion below on pgs 107-111.

treaty principles, with the legal test of the proposals only taking place once they were submitted to the Commission.¹¹³ However, Reg. 211/2011 adopted a more restrictive approach than this by establishing a legal admissibility test for the registration of initiatives, removing the reference to it being the citizen's opinion that legal action is required for implementing the Treaties, and removing the reference to citizens being able to make 'any appropriate proposal'.

Reg. 211/21011 includes a four-part admissibility test that the Commission assesses each initiative against at registration. Arts 4(2)(b), (c) and (d) of Reg. 211/2011 are the three substantive parts to the admissibility test. Arts 4(2)(c) and (d) of Reg 211/2011 require, respectively, that the proposed initiative is not 'manifestly abusive, frivolous or vexatious' and 'not manifestly contrary to the values of the Union as set out in Art 2 TEU'. The second part of Art 11(4) TEU became Art 4(2)(b) in Reg. 211/2011 and requires that the proposed initiative does not 'manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties'.

Art 4(2)(c) is a common provision in regulations for agenda initiatives that allows authorities to block initiatives that are considered to be irrelevant and/or malicious, too far from mainstream democratic engagement and without any serious intent to engage with EU policy; for example because the proposal relates to a personal issue or a private legal dispute, or is being used as a vehicle for expressing views widely considered to be offensive, bizarre or superficial. An agenda initiative derives democratic benefit from allowing as wide a range of proposals to be raised as possible and allowing citizens themselves to set the limit, but inclusion of this type of clause is justified in the interests of providing a legal means of ensuring the integrity of the ECI process, and is likely to have little democratic impact given how unlikely it is that this clause is not met by an initiative.¹¹⁴ Furthermore, the Commission would not want to be seen to be endorsing these types of proposals by registering them or want to allow them to use the (scarce) resources made available to ECIs.

Art 4(2)(d) is a similarly broad provision that means an ECI proposal is assessed by the Commission against the qualitative criteria of the principles in Article 2 TEU. All the ECI proposals so far have met this condition and given the universality and broad nature of the principles in Art 2 it seems unlikely that this condition will not be met. However, if Citizens Initiatives are rejected on this basis, it will be interesting to see where the Commission draws the line as to what is manifestly against Union

¹¹³ Art 4(2)(c) and (d) limit European Citizens' Initiative proposals to those that are within the principles of the EU.

¹¹⁴ No ECI proposal has been refused registration on this basis in the first three years of the ECI process.

values and to what extent it appears to be a political decision not to allow a challenge to the Commission's own policy agenda.

Neither of these two criteria for admissibility that test the 'appropriateness' of an initiative limit to any great extent the opportunity for citizens to exert influence over the EU legislative and policy agenda. The outer boundaries that these criteria establish are closely aligned and broadly defined, and provide plenty of scope to make proposals for legal acts that can develop or challenge EU policies. Clauses to set outer limits an initiative would only rarely exceed, based on generally agreed principles and standards of behaviour, are easily justifiable and appropriate for the Commission's decision-making powers. The fact that no initiative has yet failed Art 4(2)(c) and (d) indicates that they are not stifling the democratic potential of the ECI.

Art 4(2)(b) is different in nature to the other two registration criteria and has had the most significant impact on the democratic potential of the ECI. Both parts of the admissibility criteria of Art 4(2)(b) – 'not manifestly outside the framework of the Commission's powers' and 'for the purpose of implementing the Treaties' – allow for discretion in the Commission's application of the legal admissibility test at registration. The requirement for an initiative proposal to not be manifestly outside the framework of the Commission's powers could be interpreted as suggesting that it will only be refused registration if there is clearly no available legal act that can be taken that would contribute to the implementation of its objectives.¹¹⁵ This broad interpretation would mean that organisers of an initiative only need to propose objectives for registration purposes consonant with the broad system of competences set out in the Treaties. The Commission, as opposed to the initiative organisers, would then have to decide, once the support thresholds had been reached, precisely what sort of legal act to propose. A narrower interpretation of this first part of the admissibility criteria in Art 4(2)(b) would be to require organisers at the outset to clearly identify a legal base within the Treaties, for all aspects of their proposal, that would allow the Commission to propose a legal act of the Union at the end of the process. This interpretation would require a formal test of an initiative at registration as if it were initiating the legislative process, and would increase the burden on organisers to discharge the legal admissibility requirements.¹¹⁶ The Commission themselves have stated recently, in seeming contradiction of the ECI registration experience so far,

¹¹⁵ M Dougan, 'What are we to make of the Citizens' Initiative?' [2011] CML Rev 1807.

¹¹⁶ For comment on the expectation that the use of 'manifestly outside' could leave legal admissibility decisions to be finalised at the end of the process see D Szeligowska and E Mincheva, 'The European Citizens' Initiative – Empowering European Citizens within the institutional triangle: A legal and political analysis', [2012] Perspectives on European Politics and Society 270, 277.

that in the case of doubt an initiative should be registered, and that an initiative can be registered without identifying a legal basis for their proposal.¹¹⁷

For the second part of Art 4(2)(b), ‘for the purpose of implementing the Treaties’, a broad interpretation would mean that initiatives could be registered that had proposed legal acts for the purpose of implementing the principles of the Treaties, as set out in Arts 2 and 3 TEU, and which would not necessarily exclude treaty amendment. However, before the implementing regulation came in to force the Commission stated that treaty amendment would be outside the scope of the ECI and a narrower interpretation of this second part of the criteria in Art 4(2)(b) Reg. 211/2011 would be applied.¹¹⁸ This was stated despite the fact that this is not explicitly required by Art 11(4) TEU,¹¹⁹ and there are treaty articles that could provide a legal base for the Commission to propose treaty amendment.¹²⁰

It is the interpretation and implementation by the Commission of the admissibility criteria in Art 4(2)(b) Reg. 211/2011 that have led to all refusals to register an initiative so far. The next section of the chapter analyses the registration decisions taken by the Commission focuses on the criteria in Art 4(2)(b) Reg. 211/2011.

Review and critical analysis of Commission registration decisions for ECI proposals

This second section of the chapter examines the extent to which the democratic potential of the ECI has been fulfilled in practice and whether this new facet of EU citizenship is a strong opportunity for citizen-led democratic participation in the EU or one that is throttled by institutional mediation. In the first 20 months after Reg. 211/2011 implementing the ECI came in to force on April 1st 2012, the Commission received requests to register 37 initiatives: 20 of these were registered,¹²¹ 15 were refused registration by the Commission, and two were withdrawn and not resubmitted. By the time of the first deadline for collection on Nov 1st 2013 about five million statements of support had been collected by the registered proposals and three initiatives,¹²² which account for approximately four

¹¹⁷ Ms C. Rive speaking at conference in Brussels on Dec 10th 2014 “ECI legal framework – Need for Reform”.

¹¹⁸ Jens Nymand-Christensen at the conference ‘*The EU Citizens’ Initiative: Normative, Legal and Policy Perspectives*’, (University of Liverpool, 6th May 2011).

¹¹⁹ Some commentators went further and said that it was never the intention of the drafters of the treaty provision to exclude treaty amendment, e.g. M Efler, ‘European Citizens Initiative, Legal nature and criteria for implementation’, in B Kaufmann and J Pichler (eds) *The European Citizens’Initiatives – Into new democratic territory*, (Intersentia 2010).

¹²⁰ For example Art 48(2) TEU and Art 20(5) TFEU that are discussed later in the context of the ECI.

¹²¹ Four initiatives were withdrawn and then resubmitted for registration. Although these proposals were registered twice they are counted here only once in the total of registered proposals. Commission figures count the number of times they have considered registration rather than the number of proposals that have been registered.

¹²² *Right to Water* initiative, *One of Us* initiative, and *Stop-vivisection* initiative.

million of these statements of support, had successfully reached the support thresholds needed to proceed to the final phases of the process. There is clearly interest in using this democratic instrument, but questions remain about how strongly this democratic engagement is being conditioned by institutional mediation. The potential democratic benefits of the ECI derive from increasing citizen influence over the policy agenda and over the outcomes from that agenda, an influence that should include the ability to challenge established policy preferences; and also, indirectly, through developing the political activity and debate of EU citizens. It will be argued, however, that the Commission has restrictively applied the rules relating to the admissibility of ECI proposals during the registration process and made a limited response to the two ECIs that have reached the thresholds of support. As a result the likelihood of the democratic benefits of the ECI being realised has been reduced.

Categorisation of European Citizens' Initiative proposals

The proposed categorisation of ECI proposals to support the subsequent discussion of the Commission's interpretation of the registration criteria relies on three factors: how specifically the subject matter is defined, the type of legal acts proposed, and the extent the proposal appears to challenge existing policy.

The first grouping is of initiatives that submitted proposals with specific subject matter and with specific legal acts included in the objectives of the proposal. For example, one proposal cites a previously used legal base to request a further restriction on speed limits to 30km/h in urban areas;¹²³ and another seeks to complete the move to ending mobile roaming fees, again citing a previously used legal base in relation to the proposed legal act;¹²⁴ and there is a proposal asking for an extension of the use of the Erasmus programme.¹²⁵ All the proposals in this group invite legal action from the Commission within an existing policy area and offer little challenge to the established policy preferences of the Commission. All the proposals in this group were registered.

The second grouping is of initiatives whose subject matter is more widely construed and more challenging to existing policy than those in the first group. The majority of the proposals in this group are supported by civil society organisations and have broad mission statements or campaign

¹²³ The initiative titled *30 km/h - making the streets livable*. For description go to <ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000014> accessed 26 Mar 2014.

¹²⁴ The *Single Communication Tariff Act* initiative. For description of proposal go to <ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000002> accessed 26 Mar 2014.

¹²⁵ The *Teach for Youth -- Upgrade to Erasmus 2.0* initiative. For description of proposal go to <ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2013/000005> accessed 3 Feb 2014.

objectives associated with these organisations as their subject matter.¹²⁶ Within their broad campaign objectives, however, these initiatives all invite the Commission to propose specific legal acts for which their legal team has found a specific legal base in the Treaties.¹²⁷ For example, the *High Quality Education for All* initiative seeks to ‘establish a multi-stakeholder discussion/collaboration platform ... [to] debate and formulate a European policy for a quality, pluralistic and EU 2020-oriented educational model’.¹²⁸ This is typical of the ‘softer’ legal acts proposed by initiatives in this group, which appear more likely to be registered than harder legislative proposals such as those in the third group below.¹²⁹ The *Universal Basic Income* initiative originally proposed legislation they called a ‘legal rights act’. This was refused registration and the reason given was that the suggested treaty article, Art 153(2) TFEU, did not provide a legal base for legislation to be proposed that might introduce an act of this sort. However, the initiative was resubmitted and registered with the same subject matter and long term goal after the legislative proposal was replaced by softer legal action, based on Art 156 TFEU, of an examination of the issue through pilot studies. The only other initiative in this category refused registration was the Friends of the Earth backed *Anti Nuclear Power* initiative.¹³⁰

The third and largest group of initiatives are those that contain the proposals that are more novel and most strongly seek a new direction in EU policy, although the extent to which this is true varies from proposal to proposal. The subject matter of these initiatives tends to be reasonably specific, but not just an extension of existing EU policy as is the case for those in the first group; and the

¹²⁶ For example, The *One of Us* initiative that is supported by church backed right to life groups and whose subject matter is stated as the ‘juridical protection of the dignity, the right to life and of the integrity of every human being from conception’: ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000005 accessed 13 Apr 2015. Two other examples are the *Stop Vivisection* initiative that is ‘proposing a European legislative framework aimed at phasing out animal experiments’ and the *Right to Water* initiative, titled ‘Water and sanitation are a human right! Water is a public good, not a commodity!’ who want legislation to implement ‘the human right to water and sanitation’. For description of these initiatives go to ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000007 accessed 13 Apr 2015 and ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003 accessed 13 Apr 2015.

¹²⁷ Two of the initiatives in this group, the *education spending* initiative and the *EU climate and energy package* initiative have been presented slightly differently. They both have specific legal acts that they wish to invite the Commission to propose, but these are presented as the subject matter of the initiative rather than the objectives.

¹²⁸ For description of the *High Quality European Education for All* initiative go to ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000008 accessed 13 Apr 2015. Other examples include the *anti vivisection* initiative that invites the ‘Commission to abrogate directive 2010/63/EU on the protection of animals used for scientific purposes’ and the *One of Us* initiative asks the EU not to finance activities which presuppose the destruction of human embryos.

¹²⁹ One exception is the *stop vivisection* initiative which is seeking the abrogation of Directive 2010/63/EU on the protection of animals used for scientific purposes.

¹³⁰ The refusal though was on the basis that the initiative was seeking treaty change, which is discussed further below. For initiative details see ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/429 accessed 13 Apr 2015.

objectives tend to be more ambitious in the sense of being new or extensive legal acts, which distinguishes these proposals from those in group two. The subject matter in this group is wide-ranging: to create a social, ecological and solidarity European bank,¹³¹ to sing a European anthem in Esperanto¹³², to end legalised prostitution,¹³³ and to guarantee EU citizenship for citizens of newly independent regions, amongst others.¹³⁴ The initiatives in this group have all been refused registration either because of a lack of a legal basis for action or because they propose treaty change, which relate to the two-part criteria in Art 4(2)(b) and are discussed in more detail next.

First part of admissibility criteria: manifestly outside the framework of the Commission's powers

Restrictive interpretation of treaty articles due to uncertain legal base for action

The first part of the criteria in Art 4(2)(b) states that the legal acts proposed by initiatives must not be 'manifestly outside the framework of the Commission's powers'. There is no requirement in Reg. 211/2011 that uncertainty about the final legal outcome of a proposal should be reason alone for refusing registration. However, the Commission has strictly applied the requirement that a proposal must not be 'manifestly outside' the framework of their powers. The *Cohesion Policy* initiative, for example, invites the Commission to propose a legal act within an EU policy area of equality between regions and indicates specific legal bases to support the action proposed.¹³⁵ Three specific actions were set out that the organisers of this initiative wished to have implemented; two of which are relatively soft legal acts that are not manifestly outside the framework of the Commission's powers: 'defining the concept of "national" regions' and 'identifying the "national" regions by name'.¹³⁶ The basis of the registration refusal was that 'promoting the conditions of national minorities cannot be understood as helping to reduce the 'disparities as to the level of development between regions' and underdevelopment of certain regions'. This aim of reducing disparities between regions is required by Art 174 TFEU to trigger Art 177 TFEU, which is the legal base that was suggested as relevant to the proposal. It is far from certain that the proposal in relation to national minorities

¹³¹ For details of the initiative proposal and the letter informing organisers that registration has been refused go to <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/539> accessed 13 Apr 2015.

¹³² For details of the initiative proposal and the letter informing organisers that registration has been refused go to <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/449> accessed 13 Apr 2015.

¹³³ For details of the initiative proposal and the letter informing organisers that registration has been refused go to <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1486> accessed 13 Apr 2015.

¹³⁴ For details of the initiative proposal and the letter informing organisers that registration has been refused go to <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/469> accessed 13 Apr 2015.

¹³⁵ For details of the initiative go to <<http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1488>> accessed 13 Apr 2015.

¹³⁶ The first objective of 'ensuring that Member States entirely fulfil their international commitments regarding national minorities' is manifestly outside the Commission's powers.

meets the criteria of Art 174 TFEU, but it is at least arguable. For instance, in areas where there is a correlation between minority groups and poor economic performance actions that are taken to increase the understanding and definition of minority groups may well help to improve economic performance through enabling better targeting of funds and project development. Art 167(2) TFEU was also indicated as a possible legal base by the *Cohesion Policy* initiative: 'Action shall be aimed at encouraging cooperation between member states and, if necessary, supporting their action in the following areas: improvement of the knowledge and dissemination of the culture and history of the European peoples ...'. Although defining the concept of national minorities in an EU context and identifying them could be considered to meet this aim in relation to European peoples and be a basis for registering the proposal, Art 167 TFEU was simply dismissed as not providing a legal base for the objectives proposed by the initiative without further explanation.¹³⁷ Despite the possibility of meeting the Art 174 TFEU criteria and Art 167 TFEU, and the relatively 'soft' nature of the legal outcome invited of a reprioritisation of funds, the Commission took the decision not to register the initiative. This strict interpretation of Art 4(2)(b) implies that rather than just needing to avoid being manifestly outside the framework of the Commission's powers, an initiative will only be registered if the legal acts proposed by the organisers meet the more stringent test of being clearly inside the framework of the Commission's powers.

Refusal when criteria for admissibility partially met

The Commission has refused to register initiatives unless they meet the criteria for admissibility for all aspects of their proposal, despite there being no provision in the Regulation that states that an initiative cannot be registered in part or that resubmission without the offending part(s) cannot be suggested. This was clearest in the *Minority SafePack* initiative¹³⁸ which proposed a range of measures to achieve progress towards its overall goal of improving the protection of persons belonging to national and linguistic minorities and strengthening cultural and linguistic diversity. The Commission response stated that although some measures were within their powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties the 'Regulation on the citizens' initiative does not provide for the registration of parts of a proposed initiative'. It appears problematic for the registration of an initiative if it invites the Commission to propose a number of legal acts, and when an initiative do so then all the actions need to have an applicable

¹³⁷ The implication of the lack of explanation when refusing registration of initiatives is discussed further below.

¹³⁸ See information about initiative at ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1507 accessed 13 Apr 2015.

legal base, which reduces the scope of proposals and limits public debate generated by an initiative in relation to its overall subject matter.

Inconsistency in registration decisions

The *No Legalised Prostitution* initiative¹³⁹ sought to use Art 83 TFEU to invite the Commission to propose legal acts that would lead to the criminalisation of issues related to prostitution. Even though it was accepted that aspects of this proposal could be covered by EU level legislation, it was decided by the Commission that the initiative could not be registered as it was not specific enough about the types of prostitution related issues it was trying to address, and that it was not clear whether there was a legal base for the Commission to propose a legal act or not; even though Art 83 TFEU specifically mentions sexual exploitation of women. Not only did the response to this initiative reiterate the Commission's restrictive approach indicated in the previous paragraphs, it is also unclear from the explanation provided by the Commission why the *No Legalised Prostitution* initiative should have received a different registration decision from the *Ecocide* initiative, which supports its proposal to criminalise ecocide using the same treaty article, Art 83 TFEU, and which was accepted as a relevant legal base despite environmental crime not being specifically mentioned.¹⁴⁰ One possible explanation is that the environment is an established EU policy area and there is case law that supports the possibility of the EU criminalising environmental damage.¹⁴¹ This would mean, though, that the *No Legalised Prostitution* initiative has failed the admissibility test not because criminalisation per se is not a competence of the EU, but because sexual exploitation is not a subject area that has already been dealt with by the EU, which is not a registration requirement.

Another initiative related to environmental issues, the *Anti-incinerator* initiative, would also appear to have been dealt with more leniently than the *No Legalised Prostitution* initiative with respect to the need for a legal base to be clearly and specifically linked to all aspects of the proposal. The *Anti-incinerator* initiative¹⁴² suggested 'Maastrich (JO 29.07.1992) / Art 3 - alinéa k ' politique dans le domaine de l'environnement' as their relevant treaty article, which does not provide a legal base for the proposed legal acts. This initiative stated seven wide-ranging framework principles as the legal action to be invited and the Commission considered there to be a sufficient legal base for the

¹³⁹ See information about initiative at ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1486 accessed 26 Mar 2014.

¹⁴⁰ See <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000012> accessed 13 Apr 2015, for information on the *Ecocide* initiative.

¹⁴¹ ECJ 13 Sept 2005, Case C176/03, *Commission v Council*; ECJ 23 Oct 2007, Case C440/05, *Commission v Council (Ship Source Pollution)*.

¹⁴² See ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000009 accessed 13 Apr 2015, for information on initiative.

proposal of a legal act and for the initiative to be registered even though a legal base is not clearly linked to each of the seven objectives. This seems to be a more lenient interpretation of the admissibility criteria than when applied to the *Solidarity Bank* initiative which also only indicated Art 3 TEU as a supporting treaty article relevant to its proposal, but was refused registration.¹⁴³

The decision to reject the TTIP initiative in October 2014 is one of the highest profile registration refusals by the Commission.¹⁴⁴ The unsatisfactory justification for this refusal and the attitude of the Commission it reflects has significant implications for the democratic potential of the ECI. The Commission refused to register the *Stop TTIP* initiative, in seeming contradiction of the previously registered *Swissout* initiative, for two reasons.¹⁴⁵ The first is that the Commission considers that an ECI cannot be used to ask the Commission to make a proposal in relation to a 'preparatory act', such as a Council decision authorising negotiations. Although the decision taken by the Council to start negotiations is a legal act of the Union,¹⁴⁶ the Commission believes that it is not an 'appropriate proposal' for an ECI because it does not directly modify EU law. The ECI Regulation, however, does not exclude proposals that only deploy legal effects between EU institutions and do not directly modify EU law. The regulatory requirement is just that the Commission be invited to make any appropriate proposal '*on matters where citizens consider that a legal act of the Union is required*'; there is no specific requirement that it be to modify EU law. Furthermore, the Commission has registered ECI proposals previously that did not directly modify EU law; for example the *High Quality Education for All* initiative and the *Universal Basic Income* initiative; and the Commission have deemed policy consultation as an appropriate response to a successful ECI through their response to the *Right to Water* initiative.

If this exclusion of preparatory acts from ECI proposals is maintained, it will mean that citizens are excluded from using the ECI process to try to influence the agenda of any external treaty, such as the TTIP, that is being negotiated by the EU. This excludes the ECI from one of the most important roles of the EU, one where it is acting almost as a form of federal state, and is a significant restriction on the scope and democratic potential of the ECI to try to influence the wider EU policy agenda.

The second reason the Commission gives for refusing to register the *Stop TTIP* initiative is that a proposal that invites the Commission to not act or to stop something from occurring, in this case to

¹⁴³ See <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/539> accessed 13 Apr 2015, for information on initiative.

¹⁴⁴ Refusal letter can be found at <<http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041>> accessed 13 Apr 2015.

¹⁴⁵ For comment on contradiction with this previous registration decision see legal opinion of Bernhard Kempen pgs 17-19 at <<http://stop-ttip.org/legal-opinion/>> accessed 13 Apr 2015.

¹⁴⁶ On this point see legal opinion of Bernhard Kempen pgs 11-14 at <<http://stop-ttip.org/legal-opinion/>>.

repeal the mandate for the TTIP negotiations and not to conclude CETA, is not admissible under the ECI Regulation. Again, there is no express exclusion of legal acts of this sort in the ECI Regulation. This exclusion is asserted in the registration refusal as a corollary of the positive requirement stated in the Regulation that an ECI ‘*may only invite the Commission to submit an[y] appropriate proposal for a legal act considered necessary by the citizens*’. However, for an initiative to be refused registration it should be on the basis that it fails to meet one of the four criteria in Art 4(2) of the ECI Regulation. The refusal to register the *Stop TTIP* initiative only refers to the criterion of Art 4(2)(b) Reg 211/2011 to support its decision.¹⁴⁷ This states that for an ECI proposal to be refused registration it must ‘*manifestly fall outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union*’. Given that it is within the Commission’s powers to propose a termination of negotiations to the Council and it is a legal act of the Union, it is difficult to see how this criterion is met and the decision to refuse to register the *Stop TTIP* initiative justified. Not only does the refusal mean that ECI proposals must be *clearly inside* the framework of the Commission’s powers to be registered, instead of *manifestly outside* to not be registered, it also means that even when clearly inside the framework of the Commission’s powers there will be times when the Commission will decide not to register an ECI proposal.

The decision to reject an ECI that invites the Commission to not propose a legal act or to not take a legal action also has significant democratic implications. It restricts citizen influence only to confirming support for an external treaty that the EU has negotiated and implies that in the future the Commission will refuse to register all ECI proposals that invite the Commission to recommend stopping or reversing any EU policy decision. This strongly conditions the ability of citizens to be able to use the ECI to challenge established policy preferences, and reduces its value in democratic terms.¹⁴⁸

The Commission has again decided to choose an interpretation of the legislation that restricts the ECI’s democratic potential by limiting the subject range of citizen participation. There is enough interpretative scope in the ECI legislation for the Commission to be able to register the *Stop TTIP* initiative, and it almost feels like the Commission first decided it did not want public debate unsettling the TTIP and CETA process, and then worked back from there to try to find a legal justification for this decision.¹⁴⁹ It should also be remembered that registering an ECI is only to allow

¹⁴⁷ The other criteria, which are clearly met and not at issue here, are that an organising committee must be properly formed, that the ECI proposal must not be manifestly abusive, frivolous or vexatious; and that it must not be manifestly contrary to the values of the Union; Art 4(2)(a), 4(2)(c) and 4(2)(d) respectively.

¹⁴⁸ R Blaug, ‘Engineering Democracy’[2002] Political Studies 102.

¹⁴⁹ There was comment by TTIP organiser at conference in Brussels on Dec 10th “ECI legal framework – Need for Reform” that there are emails to this effect that were released after request by ECI organisers.

public debate. It does not impose a legal obligation on the Commission to take any legal action proposed, and they have shown with the *One Of Us* initiative that they are prepared to take no action at all in response to ECI proposals, even when they are supported by a large number of EU citizens as is the case for the TTIP.¹⁵⁰

The ECI registration process places a burden of proof on the Commission to show that one of the criterion for non-registration is met; in this case it is that the ECI proposal is *manifestly* outside the framework of the Commission's powers. It is not the ECI organisers that need to prove that an ECI should be registered, and if there is doubt as to whether an initiative should be registered then the wording of the Regulation implies that registration should be favoured. In the case of the *Stop TTIP* initiative the Commission has not discharged this burden of proof beyond reasonable doubt, and in the process has taken a stance that significantly limits democratic participation and is difficult to justify.

Increased legal burden on European Citizens' Initiative organisers

Organisers are only required to provide limited information to register an initiative, such as the legal outcomes that are being sought and the relevant treaty articles.¹⁵¹ A draft legal act and further detailed information can also be provided but are not required. On the face of it therefore the registration of an initiative is not complex and should not impose a strong legal burden on organisers. The Commission decisions though have increased this burden by confirming that it is not enough to be within the general principles of the Union or an existing area of EU policy to be registered; and that an initiative will only be registered if a suitable legal base is identified for the specific legal act(s) the organisers are inviting the Commission to propose. Furthermore, the increased burden of meeting this higher threshold of legal admissibility has been reversed on to the organisers who must demonstrate that their initiative is clearly inside the framework of the Commission's powers, rather than the Commission being required to establish that the initiative is manifestly outside the framework of its powers before refusing registration.

The legal burden placed on the initiative organisers could have been mitigated if the Commission had taken a more facilitative approach to the registration process; an approach perhaps that checked the appropriateness of a proposal in an EU context and then assisted organisers to identify a legal base or to frame objectives that had a chance of achieving a legal outcome at the end of the

¹⁵⁰ The TTIP organisers have since launched an unofficial ECI campaign and as of 13 April 2015 they had online support from 1,662,108 citizens. Information available at <<https://stop-ttip.org/>>

¹⁵¹ In summary organisers must provide Committee and funding details; a title and subject matter, which usually set out the broad aims of the proposal; the objectives of the proposal in less than 500 words. For complete list of registration requirements see Annex 1 of Regulation 211/2011.

process. The Commission's role at registration so far though has been a passive one limited to formally confirming whether or not the organisers have been successful in framing their proposal so as to meet the strict test of legal admissibility resulting from the Commission's interpretation of Art 4(2)(b). The letter informing organisers that their initiative has been refused registration usually provides limited information about the reasoning behind the decision taken, offers no further support to organisers, does not indicate resubmission as an option, and simply tells organisers that the General Court or the Ombudsman are the avenues for challenging a decision without inviting any further discussion with the Commission.

Despite this formally unsupportive position, the Commission has actually provided further information and assistance for organisers to be able to resubmit an initiative when requested, which, if continued, could indicate a move towards being more supportive of registering initiatives.¹⁵² Furthermore, all the refusal letters include a statement that the Commission has carried out an 'in depth examination ... of all other possible legal bases',¹⁵³ which is not required by the Regulation and would also appear to indicate some willingness on the part of the Commission to assist organisers in bringing their proposal within the framework of the Commission's powers. However, no alternative legal bases have yet been suggested by the Commission that would allow a legal act of the Union to be proposed in relation to any of the objectives of any of the initiatives, which makes it seem rather more like a phrase by rote that discourages resubmission.¹⁵⁴

The burden on organisers is also increased by applying the admissibility test at the start of the ECI process. If it had been applied at the end of the process then this legal burden would have been more likely to fall to the Commission when exercising their responsibility to make the legal and political decisions about whether and how an initiative that has gathered the necessary support will be responded to.¹⁵⁵ If the Commission were to initiate the legislative process in response to an initiative then it would fall to them to find a legal base to do so. Having the admissibility of the possible legal outcomes of a proposal tested at registration brings legal decisions, such as whether there is an applicable legal base, to the start of the process where the burden can more easily fall on the citizens proposing the initiative.

¹⁵² The *Universal Basic Income* initiative was resubmitted at the second attempt following discussion with the Commission about its objectives. The organisers of the *Anti Nuclear power* initiative were eventually given a ten page document that provided information regarding the Commission's decision to refuse to register their initiative.

¹⁵³ All refusal letters available at <ec.europa.eu/citizens-initiative/public/initiatives/non-registered> accessed 13 April 2015.

¹⁵⁴ The Commission could, for example, have suggested Art 25 TFEU, which was accepted for the *Let Me Vote* initiative with a similar objective, as the legal base for the proposal that sought to guarantee that citizens of a newly independent state would maintain their status as EU citizens.

¹⁵⁵ Art 10 Reg. 211/2011 sets out the requirements at the end of the ECI process.

Front loading the admissibility test in the process also denies organisers the chance to put their case for action and to receive a comprehensive explanation of why their proposal does not fit in the Treaties, both of which are formally provided for at the end of the process.¹⁵⁶ This significantly reduces input from organisers in to the decision-making about possible legal bases and outcomes and also allows for an increase in political factors influencing the registration of initiatives. There is some early indication that certain subject areas, such as the environment, may be more likely to be registered.¹⁵⁷ If this were the case, and it is certainly not proven yet, then political decisions that should be part of the final phase of the European Citizens' Initiative process, after the opportunity for democratic participation, are being taken in a closed manner without public deliberation.¹⁵⁸

Second part of admissibility test: for the purpose of implementing the treaties

The second part of the legal admissibility criteria in Art 4(2)(b) Reg. 211/2011 is that the legal act the Commission is invited to propose must be 'for the purpose of implementing the Treaties'. Three initiatives - the *Anti-Nuclear Power* initiative,¹⁵⁹ the *Self-Determination Human Right* initiative,¹⁶⁰ and the *Let Me Vote* initiative¹⁶¹ - have required its interpretation and application by the Commission. The first two were refused registration, but the *Let Me Vote* initiative was registered despite the fact that it seeks an amendment to primary law: Art 20(2) TFEU.

The Commission stated prior to the regulation coming in to force that the European Citizens' Initiative cannot be used to propose treaty change.¹⁶² The Commission tried to confirm this principle when refusing the registration of the *Anti-Nuclear Power* initiative; notwithstanding the fact that the principle reason for refusal was that its subject was the Euratom Treaty.¹⁶³ Nevertheless, and despite the fact that amendment to the Treaties was also not specifically invited by the initiative or intended by the organisers, the Commission took this early opportunity to assert, for the first time, that an

¹⁵⁶ Art 10 and Art 11 of Reg 211/2011.

¹⁵⁷ See comment above on *Anti-incinerator* and *Ecocide* initiatives.

¹⁵⁸ M. Dougan, 'What are we to make of the Citizens' Initiative?' 48 *CML Rev* (2011), p. 1807.

¹⁵⁹ <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/429> accessed 13 Apr 2015, for further details.

¹⁶⁰ <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1175> accessed 13 Apr 2015, for further details.

¹⁶¹ <ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000006> accessed 13 Apr 2015, for further details.

¹⁶² Jens Nymand-Christensen at the conference '*The EU Citizens' Initiative: Normative, Legal and Policy Perspectives*', (University of Liverpool, 6th May 2011).

¹⁶³ A legal challenge to the Commission's refusal to register this initiative was considered by the organisers on the grounds that their proposal was for the purpose of implementing the TEU or TFEU not the Euratom treaty, but this did not happen. The organisers also decided not to resubmit their proposal. Information provided at Conference 'European Citizens Initiative: Early Experience' in Austria Nov 2012 by Klaus Kastenhofer from the organising committee of this initiative. Report from conference available at <www.ecas-citizens.eu/content/view/416/> accessed 13 Apr 2015.

initiative cannot seek treaty change, and registration of this initiative would have been refused on this ground as well. The Commission stated in the registration refusal that ‘the legal bases of the TEU and TFEU cannot be interpreted as giving the Commission the possibility to propose a legal act that would have the effect of modifying or repealing provisions of primary law’.¹⁶⁴ This assertive statement is not strictly correct as there are treaty articles that give the Commission the possibility to propose a legal act that could lead to the modification of provisions of primary law. Two such treaty articles, Art 48(2) TEU and Art 25 TFEU, have been cited as relevant treaty articles in the *Self-Determination Human Right* initiative, and the *Let Me Vote* initiative respectively. The different registration decisions for these initiatives are discussed next.

The refusal letter sent to the organisers of the *Self-Determination Human Right* initiative stated that, ‘amending the Treaties, as implicitly suggested by your reference to Art 48(2) TEU, falls outside the scope of the ECI, as the latter may only be used to request the Commission to submit a proposal for the purpose of implementing the Treaties’. Despite this clear legal base for a Commission proposal of the sort envisaged by the *Self-Determination Human Right* initiative, it was decided that this type of proposal did not meet the requirement that an initiative must be for the purpose of implementing the Treaties. Art 48(2) TEU provides that the Commission may ‘submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties’. As a result of the Commission’s rejection of the use of Art 48(2) TEU to support an ECI proposal, the EU is in a position where the Commission can propose changes to the Treaties using Art 48(2) TEU, but a body of EU citizens cannot use this treaty provision to ask the Commission to make such a proposal. As democratically unappealing as this position may appear, legally it is arguable that Art 48(2) TEU, as it provides a basis for amendment rather than implementation of the Treaties, should fall outside the scope of the ECI because Art 11(4) TEU and Art 4(2)(b) both refer specifically to implementation. However, this explanation of the Commission’s stance is challenged by the decision to register the *Let Me Vote* initiative discussed next.

The *Let Me Vote* initiative invites the Commission to propose that EU citizens can vote in all elections in the Member State in which they are resident. Art 25 TFEU, which is a passerelle clause that provides for strengthening or adding to the rights listed in Art 20(2) TFEU, is submitted as the legal base for this proposal. This initiative was registered despite inviting a proposal from the Commission that would lead to a change in primary law. This means that in some circumstances Treaty amendment can fall within the scope of the ECI and meet the requirement that a proposal must be

¹⁶⁴ Quote is from page 2 of letter refusing registration, which can be found at ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/429 accessed 13 Apr 2015.

‘for the purpose of implementing the Treaties’, and begs the question of what might exclude Art 48(2) TEU from its scope but not Art 25 TFEU.

One distinction between the two proposals that could explain the Commission’s approach, other than that the *Let Me Vote* proposal might be a more attractive proposition for the EU, is that the legal base for this initiative is a passerelle clause in the Treaties specifically related to the article in question, Art 20(2) TFEU. Whereas the *Self-Determination Human Right* initiative suggested a legal base that was not linked to a specific topic and would invite a proposal that would feed in to the ordinary revision procedure instead. Another distinction that might go some way to explaining the Commission’s approach is that the *Let Me Vote* initiative proposal, based on Art 25 TFEU, does not require a new competence to be introduced in to the Treaties for the legal act to be proposed by the Commission, whereas the *Self-Determination Human Right* initiative requires an amendment to the Treaties that introduces a new legal base before its objectives can be realised. It might be argued therefore that the structure of the legal basis for Union legislative action is not in itself being amended by an Art 25 TFEU action, but it would be if an Art 48(2) TEU proposal led to a legal act of the Union.

However, neither of these distinctions avoid the fact that they are both treaty articles that provide for a legal proposal from the Commission that could lead to the amendment of the Treaties, albeit of differing character. The decision to register the *Let Me Vote* initiative means that amendment of the Treaties, broadly speaking, is possible through use of the ECI process. An amendment that creates a new legal base in the Treaties might be excluded, but left open are the questions of how the other passerelle clauses and the special revision procedure might be treated if they are indicated as relevant treaty articles in future initiatives and, more broadly, precisely when treaty amendment is acceptable as part of the ECI process and when it is not.

This fine distinction between legal bases of the Treaties that are within the scope of the ECI does not feel like a very satisfactory basis on which to justify the variation in application of the admissibility criteria or particularly sustainable if one examines the relevant legal framework. Art 48(2) TEU is not clearly excluded by the wording of Art 11(4) TEU that the Commission can make ‘any appropriate proposal within its powers’ or by the requirement that it not be manifestly outside the powers of the Commission, and if treaty amendment is considered to fall within the Commission’s understanding of ‘for the purpose of implementing the Treaties’ in other situations then why not for Art 48(2) TEU as well? Without an explicit statement in either the primary or secondary law that treaty

amendment is excluded from the scope of the ECI it may leave any decision to reject the admissibility of an initiative on this basis open to legal challenge.¹⁶⁵

Allowing the ECI to be used to invite proposals for treaty change, whether using Art 48(2) as a legal base or using a differentiated process for ECI proposals of this nature, would provide a common institutional opportunity for all EU citizens to have some direct influence on the treaty change agenda, albeit with its impact formally weak and reliant on cooperation from the EU institutions. The Member States would still have the leading role in treaty change and control decision-making, and the mere agenda setting right of the ECI would not undermine the ability of the institutions to decide on the outcomes of any treaty change process. Potentially, though, it could enhance the democratic legitimacy of the process through increased citizen participation and through enabling opinion formation for citizens thinking in a cross border mode that can feed in to the topics placed on the agenda.

In summary, the review of the Commission's application of the admissibility criteria in Art 4(2)(b) highlight a number of lessons for potential initiative organisers, but also a degree of uncertainty about their application. In practical terms an initiative's chances of registration are increased if it invites specific proposals for legal action from the Commission and does not just promote a general policy objective. A legal base needs to be indicated that directly authorises the legal acts that the Commission is being invited to propose, although this requirement is not always stringently applied.¹⁶⁶ An initiative will not be registered if the admissibility criteria are not met for all legal acts in the proposal. The legal actions invited can be wide-ranging, from proposing or abrogating legislation to writing a report, but the more strongly the initiative challenges established policy the 'softer' the legal acts tend to be. Generally, if there is doubt about whether a legal base authorises the legal acts invited by the initiative, it is likely to be refused registration, but there does seem to be variation in how strongly an initiative must demonstrate it meets the criteria.¹⁶⁷ The Commission

¹⁶⁵ No legal challenge has reached the Court yet. The first case submitted was ECJ 11 Oct 2012, Case T-450/12, *Anagnostakis v Commission*. The initiative was refused registration because the Commission stated that there was no legal basis for the legal acts proposed in the initiative and therefore manifestly outside the framework of the Commission's powers. The case asks the Court to review whether this decision is correct. The decision was not made on the basis that treaty amendment should be excluded from the ECI, but the court has been asked to consider this question. The hearing is scheduled for 5 May 2015. 6 other cases have been submitted to the CJEU since then. A list of the pending cases is available at <<http://www.citizens-initiative.eu/legal-section>>.

¹⁶⁶ The Commission have recently stated that it is not necessary for an ECI to include a legal base in its registration application, Ms C Rive speaking on 10 Dec 2014 at "ECI legal framework – Need for Reform" conference in Brussels.

¹⁶⁷ The European Ombudsman's own report in to the ECI identified inconsistency as an issue in the decision making relating to initiative registration. The report closing the Ombudsman's enquiry is available at

have imposed a number of specific restrictions on ECI proposals: a non-binding legal act, a delegated or implementing act, and an autonomous act cannot be part of a proposal; an ECI cannot ask for something not to be done; an ECI cannot request action that is not a legal act, such as a debate in Parliament; and most significantly a proposal for treaty amendment will not be registered by the Commission, although there has already been one exception to this general rule.¹⁶⁸ Organisers can informally discuss changes for resubmission with the Commission if they request it, but this option is not formally promoted and no other support is offered when refusing the registration of an initiative. The burden of discharging the requirements imposed by the Commission's interpretation and application of the legal admissibility criteria therefore fall almost entirely on the initiative organisers. The Commission plays almost no proactive role in assisting organisers in the sometimes complex task of putting together a proposal that satisfies the admissibility test.

Concluding remarks - institutional mediation or direct democracy?

So what, finally, does the analysis above tell us about the potential for enhancing the EU's democratic legitimacy, through increasing citizen influence over the EU's policy and legislative agenda and the ability to challenge established preferences? Early comment on the legal framework identified the potential for institutional mediation at the end of the ECI process due to the relatively weak legal obligation imposed on the Commission when responding to a successful initiative, their virtual monopoly over initiating legislation, and the legislative process involving other EU institutions.¹⁶⁹ Less obvious was the extent to which Reg. 211/2011 provided for institutional mediation during the registration phase at the start of the process as a result of the Commission's control over the legal admissibility test. The Commission's narrow interpretation of the admissibility criteria in Art 4(2)(b), highlighted in the review above, has influenced, and possibly reduced,¹⁷⁰ the number of initiatives refused registration, with the range, constitutional significance and critical capability of subject matter affected in a number of ways as a result. First, the need to specifically locate any proposal in the treaty framework and identify a particular legal base means that ECI proposals will tend to be in areas of competence already within the EU legislative agenda. Secondly, although there has been some scope for the proposals in the initiatives registered to have added new aspects to or invite redirection in existing policy areas, usually a proposal will only be suggesting

<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/59205/html.bookmark#_ftn6> accessed 13 Apr 2015.

¹⁶⁸ These exclusions confirmed by Commission representative Ms C Rive speaking on 10 Dec 2014 at "ECI legal framework – Need for Reform" conference in Brussels.

¹⁶⁹ See M Dougan, 'What are we to make of the Citizens' Initiative?' [2011] CML Rev 1807, 1482.

¹⁷⁰ It is recognised that this cannot be empirically demonstrated, but there are a number of borderline initiatives that may have been registered, if a more generous interpretation of the admissibility criteria had been adopted.

a modification of, not directly challenging, existing policy preferences. The *One of Us* initiative showed that even if a proposal that challenges current policy is registered and supported by EU citizens, the Commission is prepared to not propose a legal act. Thirdly, the exclusion of Art 48(2) TEU as a legal base that can be used to invite the Commission to pass on a proposal from citizens for Treaty amendment is significant. This exclusion limits the ability of citizens to critically influence not only current policy preferences, but also the framework of the EU itself, with fundamental issues, such as the increase or reduction of the competences of the EU, not able to be the subject of an initiative as a result. This all means that the likelihood of legal acts selected by citizens being enacted is reduced and the ability of citizens to influence the subject matter of the policy and legislative agenda is limited.

The Commission's legalistic approach to registration might also have increased the likelihood of judicial involvement in the ECI process.¹⁷¹ The Commission's binary approach of refusing registration or not, and of indicating judicial review as the next step to challenge the decision without support offered to reformulate an initiative, gives those initiatives with borderline grounds for registration little option other than recourse to the courts. It is also possible that the converse is true: that the likelihood of recourse to the courts has influenced the legalistic nature of the Commission's approach. The Commission may have decided that if the registration of an initiative could end in a legal situation, then a legalistic approach from the outset would be appropriate and more suited to defending their decision-making if required. Whatever the reason for the approach taken by the Commission, it appears to be at odds with the Commission's willingness to enter in to informal discussions about registration refusals with those initiative organisers that insist on it.

The other source of mediation for the ECI is through civil society organizations. Increasingly the ECI looks like an instrument for existing civil society organizations to use rather than individual citizens because of its cost and complexity.¹⁷² The only initiatives to reach, or even come close, to the support thresholds necessary for verification and then submission to the Commission are strongly linked to civil society organizations: the *One of Us* initiative is linked to the Roman Catholic Church, the *Right to Water* initiative to Trade Unions, and the *Stop Vivisection* initiative to animal rights groups.¹⁷³ In placing such a heavy burden on the organisers of initiatives, the Commission's interpretation and application of the admissibility test is likely to accentuate the degree of civil

¹⁷¹ 7 court cases relating to the ECI registration or Commission decision at the end of the process are currently pending. List is available at <<http://www.citizens-initiative.eu/legal-section>> accessed 13 Apr 2015.

¹⁷² On this distinction between direct democracy for citizens and direct democracy for civil society organisations see G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation*, (CUP 2009).

¹⁷³ These three campaigns reached over one million statements of support. No other initiative had reached more than 100,000 statements of support as of Nov 1st 2013.

society involvement because of the need for existing knowledge, research capability or resources to just get their proposal registered; let alone to embark on the resource hungry process of collecting statements of support.¹⁷⁴

The Commission has reinforced its existing control over the legislative output from the ECI by additionally making registration an ex ante limitation on the subject matter that can seek to reach the support thresholds. Although this means that little formal influence over the role of legislative initiative has been passed to citizens, this is not to say that there is no potential impact on the Commission's role of initiating legislation in the Union. First, the principle of direct citizen participation in initiating EU legislation has been established, which in the long term may lead to further developments in direct democracy. Secondly, there is an increase in the avenues of accountability for the Commission's legislative decision-making through obliging the Commission to account directly to citizens for the first time and making recourse available to the courts for the first time for decisions that relate to a legislative proposal. Thirdly, although the character of the ECI is of a legally reinforced petition because it only invites the initiation of the legislative process by other institutional actors, the collection of over a million statements of support from citizens is likely to have some indirect, political influence over the Commission's legislative decision-making. Taken together this means that there is a possibility that the ECI, if widely used, comes to be viewed retrospectively as a significant step towards an EU agenda that more closely responds to citizen preferences.¹⁷⁵

The Commission's approach to legal admissibility has also blocked the amount and variety of democratic deliberation that initiatives can generate, which some commentators place a great deal of emphasis on when discussing the democratic potential of direct democratic institutions.¹⁷⁶ This is

¹⁷⁴ On issues relating to civil society and the ECI see for example J Greenwood, 'The European Citizens Initiative and European Union Civil Society Organisations', [2012] *Perspectives on European Politics and Society* 325 and De Clerck-Sachsse 'Civil Society and Democracy in the EU: The Paradox of the European Citizens Initiative', [2012] *Perspectives on European Politics and Society* 299. More widely on the prevalence of elite citizens in EU political participation see P Magnette, 'European Governance and civic participation: Beyond elitist citizenship?' [2003] *Political Studies* 144.

¹⁷⁵ B Kaufmann, 'Transnational 'Babystep': The European Citizens Initiative' in M Setala and T Schiller (eds) *Citizen's initiatives in Europe; procedures and consequences of agenda-setting by citizens*, (Palgrave Macmillan 2012)

¹⁷⁶ On this point in relation to the European Citizens' Initiative see G Smith, 'The European Citizens' Initiative: A new Institution for Empowering Europe's Citizens?' in M Dougan, N Shuibhne and E Spaventa (eds) *Empowerment and Disempowerment of the European Citizen*, (Hart 2012) 286-289. More generally on deliberative democracy see for example, J Steiner, *The Foundations of Deliberative Democracy*, (CUP 2012); J Fishkin and P Laslett (eds), *Debating Deliberative Democracy*, (Wiley 2008); for a different perspective on deliberative democracy see J Dryzek, *Discursive Democracy: Politics, Policy and Political Science*, (CUP 1990).

despite the fact that the Commission themselves recognised public debate as a major objective.¹⁷⁷ Even when there is little chance that an initiative can lead to a legal outcome the deliberation generated can have a positive influence on the legitimacy of the policy agenda; for example through proposals for alternative policy preferences not receiving popular support, or policy being adapted in the long term following support for proposals that can only have limited or no legal impact in the short term. This type of citizen-led deliberation underpins the direct participation in the policy and legislative agenda resulting from instruments of direct democracy and would strengthen democratic legitimacy more broadly in the EU.¹⁷⁸ The Commission's approach to legal admissibility at registration means that the potential for democratic deliberation is strongly conditioned by institutional involvement, at the expense of control by citizens.

In short, the institutional mediation by the Commission at the start of the ECI process, which limits the opportunity for citizens to test their proposals democratically and generate public debate, restricts the possibility of influencing the legislative and policy agenda, and has also almost entirely removed the ability of citizens to challenge established policy preferences. The Commission have expressed their enthusiasm for the ECI and their desire for it to succeed,¹⁷⁹ but the formalistic, restrictive and sometimes selective approach taken, combined with the high number of proposals refused registration, leaves the Commission open to criticism in relation to their willingness to accept popular influence over the legislative agenda and a Union based on democracy.¹⁸⁰

A senior Commission official chairing a meeting about the ECI expressed regret that a high number of requests for registration had to be refused despite the Commission's efforts to explain the rules.¹⁸¹ This exemplifies the Commission's attitude of seeing initiative organisers as fully responsible for framing a proposal so that it can seek citizen support, and gives no acknowledgement of the Commission's influential role in interpreting and applying the legal admissibility criteria, or of the impact this has on the registration of initiative proposals and their variety and critical capacity.

¹⁷⁷ The Commission described the European Citizens' Initiative as providing 'a singular opportunity ... to foster greater cross border debate'. Explanatory memorandum in its proposal for a Regulation on the European Citizens' Initiative at p.2. COM(2010) 119, available at <eur-lex.europa.eu/legal-content/EN/TXT/?qid=1395848793436&uri=CELEX:52010PC0119> accessed 26 Mar 2014.

¹⁷⁸ See V Cuesta Lopez, 'The Lisbon treaty's provisions on democratic principles: a legal framework for participatory democracy' [2010] European Public Law 123.

¹⁷⁹ For example see speech by Vice President of the European Commission Maros Sefcovic, 'The Lisbon Treaty: Enhancing Democracy' on Sept 30th 2010, pg 2, available at <europa.eu/rapid/press-release_SPEECH-10-502_en.htm> and speech by EESC president Staffan Nilsson at <www.eesc.europa.eu/?i=portal.en.former-eesc-presidents-staffan-nilsson-speeches.27471> accessed 26 Mar 2014.

¹⁸⁰ This issue of the Commission's reputation is raised in the explanatory memorandum in the European Citizens' Initiative Regulation Proposal, available at <eur-lex.europa.eu/legal-content/EN/TXT/?qid=1395848793436&uri=CELEX:52010PC0119> accessed 26 Mar 2014.

¹⁸¹ Minutes of meeting available at <hec.europa.eu/citizens-initiative/files/summary-report-meeting-september-2013.doc> accessed 26 Mar 2014.

Commission mediation is directly limiting the capacity of citizens to use the ECI process to augment their influence over the legislative and policy agenda of the EU, and therefore reducing the potential impact on the EU's democratic legitimacy of introducing direct democracy. It is early days though for this new democratic instrument. The Commission could still adapt its approach to legal admissibility at registration and facilitate greater scope for democratic participation and deliberation; and intervention by the Courts and the 2015 review of the ECI regulation¹⁸² may yet reduce the strength of institutional control provided by the legal admissibility test at registration, broaden the potential scope of initiatives, and increase its ability to challenge established policy preferences. For the present, however, the analysis of the first round of ECI registration decisions provides little cause to cheer the variety or critical debate of the proposals, or much expectation that in the short term it will lead to the strengthening of democracy's central virtues of participation, citizenship and political activity for EU citizens.¹⁸³

Conclusion

The ECI has been described as "unparalleled in the history of international organisations and thus of potentially enormous significance".¹⁸⁴ The ECI may be the first of its kind at supranational level,¹⁸⁵ and there is the potential that in the long term it may come to be viewed as a symbolic moment that led to EU democracy reducing its reliance on the representative democracy of the past. However, with minimal impact on EU policy and legislation, and dwindling numbers of proposals, the ECI does not currently feel like a ground-breaking democratic development. Kaufmann was probably closer to the truth when he stated that "In terms of its potential as a truly democratizing force, the new instrument needs to be seen as a very small, preliminary reform – simply as a transnational 'baby-step'".¹⁸⁶ The analysis of the ECI legislation and its implementation by the Commission has indicated the capacity for institutional mediation and the limitations this could bring to the ECI democratic potential as a result. Without reform of the legislative design of the ECI and a change in attitude from the existing institutions, the ECI may struggle to even be a 'baby step' towards further

¹⁸² Art 22, regulation 211/2011 provides for a report to be presented to the European Parliament by April 1st 2015.

¹⁸³ For a summary of the importance of these democratic virtues see B Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984) 25.

¹⁸⁴ A Warleigh, 'On the Path to Legitimacy? The EU Citizens Initiative Right from a Critical Deliberativist Perspective', in C. Ruzza and V. Della Sala (eds), *Governance and civil society in the European Union*, (Manchester University Press 2007) 64- 65.

¹⁸⁵ For comment on the extent to which direct democratic instruments of the citizens initiative type can be viewed as innovative see G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009) 111-112, *Democratic Innovations*.

¹⁸⁶ B Kaufmann, 'Transnational 'Baby-step': The European Citizens Initiative' in M Setala and T Schiller (eds) *Citizen's initiatives in Europe; procedures and consequences of agenda-setting by citizens*, (Palgrave Macmillan 2012) 229.

democratic legitimisation of the EU through direct democracy, and be consigned to history instead as an interesting, but insignificant democratic experiment. The next chapter on the European Union Act takes the analysis of direct democracy from the supranational level of EU democracy to the Member State level and an assessment of the democratic potential of referenda in the UK.

Chapter Three

Democratic Potential of the European Union Act Referenda

The thesis now turns to direct democracy at the Member State level of the EU polity, to the outcome influencing referenda of the EUA, and to an examination of their potential to influence EU democratic legitimacy. The introduction of referenda in to UK legislation is part of an upward trend in the use of the referendum for EU related democratic legitimisation in recent years, particularly for EU membership decisions and to approve treaty amendment at Member State level.¹ The majority have been ad hoc referenda called by Member State governments because of the political salience of EU treaty amendments, but with the implementation of the European Union Act (EUA) the UK has joined the still relatively small group of Member States that have legislative or constitutional provisions obliging the holding of referenda to approve the ratification of an EU treaty.² The UK has also gone a step further and provided in legislation for mandatory referenda to legitimise EU policy, rather than treaty, decisions, for the first time in the EU.³ The intended entrenchment of a new legislative process containing referenda is also notable in the UK constitution because of the importance of parliamentary sovereignty, whose traditional understanding the EUA referenda provisions have challenged.⁴ The EUA, therefore, has the potential to increase citizen influence over policy outcomes and to be a landmark alteration in the legitimisation of the EU in the UK. I argue, however, that the legislative design of the EUA does not prioritise democratic participation and maintains the opportunity for institutional control, and as a result limits the frequency and impact of direct citizen influence over the UK's EU policy agenda.

¹ As of 2009 there had been 43 referenda in other European states on three types of EU related issues: membership, treaty ratification, and a small number of single policy issues. 21 of the referenda related to membership, 17 were to approve treaty ratification, and just 5 countries have held referenda about single policy issues: the adoption of the Euro in Sweden and Denmark; the Schengen agreement, free trade and bilateral agreements with EU in Switzerland; MEP mandate in Italy; and EC enlargement in France. For more details see S Hobolt, *Europe in Question: Referendums on European Integration* (OUP 2009) 9, table 1.1. Or for a list of all EU related referenda see F Mendez, M Mendez, V Triga, *Referendums and the European Union: a comparative enquiry* (CUP 2014) 24-25.

For comment on the wider increase in the use of referenda see for example L Morel, 'The rise of Government initiated referendums in consolidated democracies', in M Mendelsohn and A Parkin (eds) *Referendum Democracy: Citizens, elites and deliberation in referendum campaigns* (Macmillan 2001) 47-64.

² For the mapping of when referenda are required in the different Member States of the EU see F Mendez, M Mendez, V Triga, *Referendums and the European Union: a comparative enquiry* (CUP 2014) 30-69.

³ Five countries have held referenda on EU policy issues, particularly the Euro, but none have been constitutionally mandatory.

⁴ For analysis of the impact of the EUA on parliamentary sovereignty see M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015).

This chapter contains a legal analysis of the referenda provisions in the EUA to assess their potential impact on EU democracy. It does this in three stages. First, the rather complex mechanics of the EUA are described and the coherence of its legislative design is commented on.⁵ Secondly, the manner in which the EUA referenda provisions fit within existing EU and UK law is discussed. The third and final part of the chapter, which assesses the democratic potential of the EUA to indirectly legitimise the EU, is divided into two sections. The first section assesses the motivation behind the implementation of referenda in the EUA, the criteria that trigger them, their likely subject matter, and what the implications are for democratic participation. The second section assesses the democratic potential of the EUA referenda against the two democratic criteria of citizen agenda influence and citizen outcome influence, using the classification of referenda based on their initiation and the binding nature of the result. The conclusion drawn is that the apparently strong democratic impact of introducing a citizen veto over EU policy in the UK is more significantly qualified than might be expected at first glance.

The UK's first national referendum was held in 1975 on the subject of the UK's membership of the European Community.⁶ Since then UK membership of the EU, as it is now, has continued to be divisive for political parties and referenda have been promised a number of times to resolve uncertainty about public support for EU membership. In 2004, during the negotiations involving the Constitutional treaty, the then Prime Minister, Tony Blair, promised a UK public seemingly unsupportive of further integration a referendum to approve any UK government decision to sign such a treaty.⁷ However, following the Dutch and French referenda that voted 'no' to the constitutional treaty, the UK government stated in 2006 that a referendum was no longer appropriate because the treaty was as good as dead.⁸ Demands for a referendum remained during the Lisbon Treaty ratification process, but Gordon Brown decided that a referendum was not

⁵ Dougan and Gordon describe the EUA as a piece of legislation that is "rather difficult to decipher and navigate around", M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3, 10.

⁶ Up to Jan 2015 there had been nine referenda called by the national government, a number of other local referenda on issues such as whether to have elected local mayors and transport policy, and referenda provided for in legislation such as planning laws. Five referenda have been held on the devolution of power in relation to Scotland and Wales, one on an elected mayor of London, and one on establishing an elected regional assembly in the North East of England. Of the other two referenda, one was to gain support for multi party talks in Northern Ireland and the other was the UK's second nationwide referendum on a proposed change to the voting system for electing MPs.

For comment on referenda in the UK see, for example, M Qvortrup, 'Democracy by Delegation: The decision to hold referendums in the UK' [2006] Representation 59.

⁷ Report in to these proposals available at <<http://www.parliament.uk/briefing-papers/SN03064/proposals-for-a-referendum-on-the-new-european-constitution>> accessed 8 July 2015.

⁸ <http://news.bbc.co.uk/1/hi/uk_politics/6574411.stm> accessed 8 July 2015.

necessary because the Lisbon treaty was not a fundamental rewriting of the treaties.⁹ David Cameron promised a ‘cast iron guarantee’ of a referendum on the Lisbon treaty when in opposition, but at the end of 2009, prior to his election as Prime Minister, he announced that with ratification of the Lisbon Treaty completed, his promise to hold a referendum could no longer be fulfilled.¹⁰

In 2010, the Coalition Programme for Government promised a referendum lock for any proposed transfer in future parliaments and that there would be ‘no further transfer of sovereignty or powers over the course of the next Parliament’.¹¹ The Government promised to provide certainty about holding a referendum in relation to the UK’s EU policy: ‘We will amend the 1972 European Communities Act so that any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a ‘referendum lock’. We will amend the 1972 European Communities Act so that the use of any *passerelle* would require primary legislation.’¹² The Programme for Government also promised to ‘examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament’.¹³ These two promises led to the enactment of the EUA 2011, which sets out the situations where referendum approval is needed for policy decisions of the government in relation to the EU.¹⁴ Despite the promise of the ‘referendum locks’ in the EUA, political pressure to hold a referendum has continued to come from the general public, conservative backbenchers and the eurosceptic UKIP party.¹⁵ As a result, the Conservative Party have gone further than the coalition government and promised to hold another ‘in-out’ referendum on the subject of EU membership in the next parliament, if they are re-elected to Government.¹⁶

⁹ House of Commons debates 22 Oct 2007 : Column 19

<<http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm071022/debtext/71022-0003.htm#0710222000001>> accessed 8 July 2015

¹⁰ <<http://www.theguardian.com/politics/2009/nov/04/david-cameron-referendum-campaign-over>> accessed 8 July 2015.

¹¹ <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf> pg 19 accessed 8 July 2015.

¹² Ibid.

¹³ Ibid.

¹⁴ The EUA also provides for other approval mechanisms; for policy decisions that require an Act of Parliament before they can be approved and policy decisions that require something less than an Act of Parliament, such as parliamentary approval, before they can be implemented. This chapter only analyses the first category of decision making that requires a referendum and an Act of Parliament before the decision can be approved.

¹⁵ See pgs 9-10 for summary of opinion polls on whether a referendum should be held at <<http://www.parliament.uk/briefing-papers/SN05071.pdf>> accessed 8 July 2015.

¹⁶ <<http://www.bbc.co.uk/news/uk-politics-21148282>> accessed 8 July 2015.

The use of referenda has also increased in a number of other Member States as a result of EU membership.¹⁷ States such as the Netherlands and Portugal, with no previous experience of national referenda, held or promised a referendum during the constitutional treaty and Lisbon treaty ratification process; and there have been 53 referenda related to the EU in total.¹⁸ At Member State level the referendum appears to now be an integral part of EU democratic legitimacy, and there have even been calls for the referendum to be used at EU level.¹⁹ The next part of this introductory section provides a classification of referenda to support the analysis of the democratic potential of the legislative design of referenda in the EUA.

Referenda classification

A referendum is a democratic instrument that gives citizens influence over a policy decision through voting to choose between two (occasionally more) policy options, with an expectation that the referendum result will be implemented. The opportunity for citizens to vote in relation to a specific policy issue, rather than the more customary vote to select representatives, is the distinguishing characteristic of a referendum. At its core it is a majoritarian instrument that has a relatively direct impact within the confines of the issue that is put to citizens.²⁰ Even these narrowly construed core features, though, are able to be distorted, for example when referenda on a question of policy morph in to a vote on a political incumbent or institution,²¹ or when authoritarian regimes use a corrupt referenda process to provide a democratic façade to policy decisions that they have no intention of changing. Beyond these core features, referenda also vary greatly in the process followed and the type of issues they address, in the purpose for holding the referendum, and the potential impact on the policy agenda and legislation.²²

¹⁷ For a recent study of the use of referenda in relation to the EU see F Mendez, M Mendez, V Triga, *Referendums and the European Union: a comparative enquiry* (CUP 2014). For a summary of the range of political science and legal writing on referenda relating to European integration, and direct democracy more widely see this work pgs 7-19.

¹⁸ For a list of all EU related referenda see F Mendez, M Mendez, V Triga, *Referendums and the European Union: a comparative enquiry* (CUP 2014) 24-25.

¹⁹ On the growing importance of referenda to the EU see S Hobolt, *Europe in Question: Referendums on European Integration* (OUP 2009). She also comments on the possibility of an EU wide referendum in the same volume pgs 242-248. On the possibility of EU related referenda see J Habermas, 'A constitution for Europe?', [2001] *New Left Review* 5. P Schmitter *How to Democratise the EU – and why bother?* (Rowman 2000).

²⁰ G Smith, 'The Functional properties of the Referendum' [1976] *European Journal of Political Research* 4

²¹ One referendum for reinforcing power of the incumbent president is that held by De Gaulle in 1962. For comment on the specifics of referenda in France see L Morel, 'The Rise of "Politically Obligatory Referendums": The 2005 French Referendum in Comparative Context' [2007] *West European Politics* 1041.

²² For a theoretical account of referenda see Maija Setälä, *Referendums and Democratic Government. Normative Theory and the Analysis of Institutions* (Macmillan 1999).

There is no accepted, standard means of classifying referenda and a number of approaches, usually descriptive or functional, are taken in the political science literature.²³ The functional classification used in this chapter, which supports the analysis of the legislative design of referenda in the EUA, focuses on two of the democratic criteria outlined in chapter one for direct democratic instruments: increased citizen influence over the agenda content and increased citizen influence over the outcome of the agenda. The first vector for classifying referenda is the initiation process, which is critical for citizen influence over the agenda. This classifies referenda according to the degree of control that the three main political actors; government, parliament and the people exert over the initiation of referenda, particularly their subject matter and timing.²⁴ The second vector for classifying referenda is based on the degree of legal and political control over the referendum outcome that these political actors exert, which is largely governed by the extent to which the result is binding on the legislature and executive of a state, and impacts on the degree of citizen influence over agenda outcomes.²⁵

The classification of referenda used here focuses on the formal rules established in the legislative design of the EUA referenda provisions, and on the democratic potential that these formal rules provide or inhibit, rather than the actual outcomes from the referenda.²⁶ Whether or not the outcome from the referendum result is actually pro or anti-hegemonic can only be viewed retrospectively once the effects of a vote are seen. Therefore, although the extent to which the status quo is challenged is an important factor in determining the impact of a referendum, this functional approach is not a satisfactory basis for an a priori legal analysis of the democratic potential of the legislative design of referenda, which is the purpose of this chapter in relation to the EUA. For a referendum to be a strong instrument of direct democracy it needs to have the potential to be anti-hegemonic, but referendum that appear to offer the potential to provide strong citizen influence over the status quo may still have this democratic potential nullified by factors largely outside the scope of the legislative design and its formal rules; for example as a result of a corrupted

²³ For a summary of classification approaches see M Setala, 'On the Problems of Responsibility and Accountability in Referenda.' [2006] *European Journal of Political Research*, 699, 705-707 and in M Setala, *Referendums and Democratic Government: Normative Theory and Analysis of institutions* (Macmillan 1999). The classification used in this chapter is specific to the purpose here of a legal analysis of the EUA referendum provisions.

²⁴ 'the precise effect of the use of referendums depends very much on who has the ability to determine when a vote will be held and on what issue', in introduction in M Mendelsohn and A Parkin (eds) *Referendum Democracy: Citizens, elites and deliberation in referendum campaigns* (Macmillan 2001) 5.

²⁵ For an example of a functional approach to referendum classification that uses similar categorisation see G Smith, 'The Functional properties of the Referendum' [1976] *European Journal of Political Research* 4.

²⁶ G Smith, for example discusses the hegemonic effect of the actual outcome of a referendum as a second variant in his functional approach to categorising referenda, in G Smith, 'The Functional properties of the Referendum' [1976] *European Journal of Political Research* 4.

voting process or control over the supply of information. Rather than a descriptive approach based on the subject matter of the referendum, or a functional approach that focuses on the empirical outcomes of the referendum process, the analytical framework used here therefore contains a theoretical classification based on the process and criteria for the initiation of a referendum and on the legal obligation imposed by the referendum result.²⁷

The initiation of referenda, which is the first vector of classification for referenda, can be distinguished as either mandatory or non-mandatory.²⁸ 'Mandatory' is used to describe referenda that are triggered by constitutional or legislative provisions.²⁹ 'Non-mandatory' is used to refer to ad hoc or optional referenda that are called by political actors, but are not obliged by legislation. All national referenda to date in the UK have been optional, non-mandatory referenda initiated by the Government. However, the phraseology of mandatory/non mandatory is an overly stark means of describing the classification of referenda. On the one hand, holding legally mandatory referenda can be avoided through political strategy, legal interpretation of discretionary clauses, or ultimately through legislative change; and on the other hand the holding of 'non-mandatory' referenda can be forced by political pressures, as appears to be the case for the in/out EU referendum promised by the Conservative party. An alternative approach is to distinguish between those referenda that are provided for by legislation and those that are held as a result of a political decision, usually by the Government of the day, and that are not legally prescribed. Within the category of referenda provided for by legislation that the EUA fits in to there are a number of ways to distinguish further between different means of establishing a legal requirement to hold a referendum, such as those referenda obliged to be held once a citizens initiative reaches the necessary support thresholds or by provisions in a constitution.³⁰ The approach taken by the EUA is to legally prescribe certain subject areas and also certain situational criteria that will trigger a referendum within ordinary legislation, which is a significant change in the UK from the ad hoc initiation of the past.³¹

²⁷ Setala uses a similar starting point for classifying referenda in 'M Setala, 'On the Problems of Responsibility and Accountability in Referenda.' [2006] *European Journal of Political Research* 699, 705. Tierney takes a theoretical approach to referenda based on constitutional theory. His is a systematic analysis of referenda used to change and to form constitutions in S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012).

²⁸ For discussion of the distinction between mandatory and non-mandatory referenda see M Setala, *Referendums and Democratic Government* (Macmillan 1999) 87-96.

²⁹ For comment on the relatively unusual mandatory referenda see T Schiller, 'Conclusions' in M Setala and T Schiller (eds) *Referendums and Representative Democracy: Responsiveness, Accountability and Deliberation* (Routledge 2009) 209-213.

³⁰ Switzerland, for example, provides for referenda to be held when an initiative is sufficiently supported. Ireland is an example of a Member State that has to hold referenda due to provisions in its constitution.

³¹ The criteria for triggering referenda that are established in the EUA are described in the next section of this chapter.

The second vector of classification for referenda is the legal obligation imposed by the referendum result and who controls the subsequent legislative or policy outcome. Does the Government have discretion in how it responds to the result, have the people merely been consulted or have they cast a legally binding vote?³² The degree of legal obligation on the existing institutions that is imposed by the legislative design of referenda has a significant impact on their democratic potential.³³ A binding referendum result provides a relatively direct link between public preferences and policy decisions. The stronger the obligation on existing institutions to implement the result of the referendum, the greater the potential for democratic impact on legislative and policy outcomes of citizen participation through voting in a referendum is likely to be. As with the use of the term 'mandatory', the description of a referendum as 'binding' is a stark one that does not reflect the political reality of using referenda, and that the degree of control over the outcome from a referendum result is not only dependent on the formal rules provided for in legislation, but also on the political environment in which the referendum is used.

The legislative design of referenda provisions can therefore be classified according to the potential for institutions or citizens to influence the initiation of a referendum, and the degree of influence passed to citizens over policy and legal outcomes due to the referendum result. Finally, before examining the specifics of the EU referenda provisions there is comment on the two key factors for the democratic potential of the EUA: institutional mediation and the ability to challenge established policy preferences.

Institutional mediation and challenging established policy preferences

In terms of the criteria established in chapter one, the democratic potential of a referendum depends on the extent to which the referendum facilitates an opportunity for effective citizen participation that gives citizens influence over the content of the policy agenda, and over the legislative and policy outcomes of that agenda. The extent to which these criteria are met, and the democratic potential of referenda realised, depends to a large degree on the design of the referendum instrument and the degree of control that remains with existing institutions. Despite the seemingly direct impact on the policy of government that a referendum provides to citizens,³⁴ institutional mediation is possible through control over when and on what subject the referendum is

³² For discussion of the differences between binding and advisory referenda See M Setala, 'On the Problems of Responsibility and Accountability in Referenda.' [2006] *European Journal of Political Research*, 699.

³³ For a discussion of the different impact of advisory and binding referenda in a UK context see House of Lords Select Committee on the Constitution, 2009-10. *Referendums in the United Kingdom* para 190-197. Available at <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>> accessed 8 July 2015.

³⁴ See for example, G Smith, 'The Functional properties of the Referendum' [1976] *European Journal of Political Research* 4.

initiated, through administering the referendum process, and also to some degree through control over the implementation of the referendum result.³⁵ Some degree of involvement of institutions in the referendum process is expected, however, because direct democracy is not replacing the existing legitimisation processes.³⁶ The issue is therefore the extent of institutional control, rather than the fact that it exists.

As with all democratic instruments there is the potential for corruption or such tight institutional control over referenda that they serve the ends of those with political power rather than the voting citizens. Referenda have been held by authoritarian leaders such as Hitler to give a democratic veneer to their position and policies,³⁷ but they should not be rejected as a democratic instrument because of past abuses, anymore than representative elections should stop being held because of their ongoing abuse and corruption in some parts of the world.³⁸ Although the political manipulation of referenda in western liberal democracies is not comparable to the plebiscitary uses of referenda by past authoritarian regimes, criticism remains that referenda are both 'controlled' by Government and 'pro hegemonic'.³⁹ Lipjhart states that referenda are controlled and pro hegemonic 'weapons of government', emphasizing governmental ability to control when referendum might be initiated, potentially only when their policy preference will be endorsed.⁴⁰

Matt Qvortrup, however, questions the extent to which referenda initiation is controlled and pro hegemonic.⁴¹ His empirical analysis of referenda results concludes that "the majority of referenda held have been uncontrolled referenda, and that most of them have gone against the wishes of government".⁴² Of the referendum held that Qvortrup defines as 'controlled', the degree of control is argued based largely on political pressures and he acknowledges that the degree of control is a spectrum rather than two individual, opposing positions.⁴³ For example the devolution referendum of 1979 is defined as uncontrolled because it was held following pressure from opposition parties and Labour (Government) backbenchers. There were similar pressures in the 1975 EC referendum but Qvortrup defines this referendum as 'controlled', presumably because the pressures were less

³⁵ The issue of institutional mediation is explored in detail by S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012) 98-128 Ch. 4 Elite control.

³⁶ 'Referendums and initiatives are inextricably entwined with the institutions of representative democracy', stated in introduction in M Mendelsohn and A Parkin (eds) *Referendum Democracy: Citizens, elites and deliberation in referendum campaigns* (Macmillan 2001) 4.

³⁷ M Setala, *Referendums and Democratic Government: Normative Theory and Analysis of institutions* (Macmillan 1999) 3.

³⁸ G Smith, 'The Functional properties of the Referendum' [1976] *European Journal of Political Research* 7.

³⁹ *Ibid* 4.

⁴⁰ A Lipjhart, *Democracies: patterns of majoritarian and consensus government in 21 countries*, (YUP 1984)

⁴¹ M Qvortrup, 'Are Referenda Controlled and Pro hegemonic?' [2000] *Political Studies* 821.

⁴² *Ibid* 821.

⁴³ *Ibid*.

marked and the Government was in a stronger position, despite the formal legal position being the same. The analysis in this chapter is of the legal framework of the EUA rather than the political pressures that might come to bear on the government. Anti-hegemonic voting is possible but institutional control of referenda initiation limits what topics are put to the people to be voted on, and therefore limits the policy areas in which citizens have the opportunity to challenge established preferences. The extent to which the EUA passes this legal, rather than political, control over whether a referendum is held to citizens from the existing institutions is an important part of the analysis of the EUA in this chapter.

When the decision has been taken to hold a referendum, there is a further opportunity for institutional influence over the referendum outcome through the institutional administration of the referendum vote. Tierney breaks this phase of the referendum process in to 'the agenda setting stage ... and the campaign process itself', which take in issues such as defining the question and the provision of information, respectively.⁴⁴ Ranney and Butler also highlight the significance of the procedural control governments have over the ability to frame citizen choices as an important limitation on the democratic potential to challenge established policy preferences.⁴⁵ The greater the control governments have over the procedural aspects of referenda, the more likely it is that their policy preference will be supported in the referendum vote. The legislative design of referenda in the EUA does not specifically address these issues, other than to confirm that the Electoral Commission has an important role to play in decisions of this nature,⁴⁶ and it is therefore a limited part of the discussion below.

The implementation of the outcome of the referendum result is the third point at which there is the potential for institutional mediation. Graham Smith specifically refers to criticism of referenda for having little or no impact, and outcomes disconnected from the citizen participation that has taken place.⁴⁷ For referenda the ability to increase citizen influence over agenda outcomes is one of the strongest legitimising aspects of their use as a democratic instrument. Notwithstanding the decision to make a referendum decision binding or not, a citizen can usually see a direct impact from that vote; at least when compared to a vote to select representatives, where there is an extra step

⁴⁴ S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012) ch 4.

⁴⁵ D Butler and A Ranney, *Referendums Around the World: The Growing Use of Direct Democracy* (Macmillan 1994) 258-9 - cited in M Qvortrup, 'Are referenda controlled and pro-hegemonic' [2000] *Political studies* 281. For further discussion of distinction between where control lies over the decision to initiate a referendum and control over the referendum process in terms of question setting, timing and funding of referenda see S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012).

⁴⁶ s13 EUA.

⁴⁷ G Smith, *Democratic Innovations: Designing institutions for citizen participation* (CUP 2009) 17-18.

between the vote and the policy outcome.⁴⁸ If a referendum does not clearly lead to the implementation of citizen preferences, as expressed in a policy vote, then its democratic potential will be significantly reduced, particularly given its weakness in allowing citizens to influence the content of the policy agenda. As with the control over the initiation and process for referenda, the control over the outcome from the referendum result is dependent on the legislative design of the referendum and its implementation, and the control of institutions at both these points.

Whatever the empirical arguments about the degree of government political control over past referenda, Qvortrup, at the very least, makes the point that referenda can lead to a challenge to established policy preferences outside the full control of the existing institutions and that the claim by Lipjhart that all referenda are controlled and pro-hegemonic needs further investigation. This is confirmed by Tierney who stated that, ‘we need a much more nuanced account than the simple ‘controlled and pro hegemonic’ claim, ... taking account in full of the legal and political environment in which [the referendum] operates’.⁴⁹ It is also necessary to look beyond the political rhetoric, which for the EUA, sits at the other end of the spectrum from Lipjhart and claims that holding a referendum passes control to citizens: William Hague, Foreign secretary, stated that the EUA “marks a fundamental shift in power from Ministers of the Crown to parliament and the voters themselves on the most important decisions of all: who gets to decide what”.⁵⁰ The legal analysis of the EUA referenda provisions in this chapter, therefore, considers where the democratic potential of their legislative design is likely to sit between a fundamental shift in power towards citizens and institutions retaining hegemonic control over the initiation and outcomes of referenda, which would limit the possibility of a challenge to established policy preferences. The first stage in this analysis is to examine the mechanics of the EUA referenda provisions.

Mechanics of the EUA referendum clauses

The next section of this chapter describes the legislative design of the referenda for approval of EU treaty amendment and policy in the EUA.⁵¹ The four key sections of the legislation are sections 2, 3, 4 and 6 EUA. Treaty amendment through the Ordinary revision procedure and Special Revision

⁴⁸ G Smith, *Democratic Innovations: Designing institutions for citizen participation* (CUP 2009) 17 cites Barber, Offe and Preuss, and Phillips as theorists that discuss the distance between the act of voting and decisions taken by representatives in their name.

⁴⁹ S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012) 127.

⁵⁰ HC Debate 7 Dec 2010 vol 520 col 193. J Murkens, ‘The European Union Act: A Failed Statute’ [3/2013] LSE Working Papers 2, 3 “the intentions of the EUA are i) to boost the law-making authority (sovereign) of Parliament; ii) to boost the power of the people; iii) to curtail the powers of the courts”, available at <http://www.lse.ac.uk/collections/law/wps/WPS2013-03_Murkens.pdf> accessed 8 July 2015.

⁵¹ The EUA also provides for further situations where a parliamentary act or approval is required in s7-10 EUA. It is the introduction of direct democracy that is assessed here.

procedure are dealt with in s2 and s3 EUA, respectively. s6 EUA in conjunction with Annex A then list miscellaneous other EU policy and procedure changes that are not captured by s2 and 3, such as the extension of EU foreign policy. For s2 and s3 situations to require approval by referendum one of the criteria in s4, such as an increase in the competences of the EU institutions, must also be met. Sections 2, 3 and 4 EUA need to be read together in relation to the legitimisation of EU policy to understand whether a referendum is required by the legislation. This section explains in detail the expected operation and interaction of these provisions of the EUA that establish when approval by referendum is triggered.

s2 EUA – treaty Amendment - ordinary revision procedure

The first type of political event that might require approval by referendum comes under the heading ‘Treaties amending or replacing TEU or TFEU’. s2(1) EUA sets out the three requirements for a treaty of this nature to be ratified. First the details of a new EU treaty agreement must have been presented to parliament in accordance with s5 of the EUA, which states that the minister must present a proposed treaty amendment to parliament within 2 months of its agreement at the intergovernmental conference and state whether it falls under the criteria for triggering a referendum set out in s4 EUA.⁵² Secondly, the decision taken at the Council of Ministers must be approved by an Act of parliament.⁵³ Thirdly, the treaty change cannot be ratified unless the ‘referendum condition’ or the ‘exemption condition’ has been met.⁵⁴ The referendum condition is met once the treaty amendment has been the subject of a referendum and the majority of those voting in that referendum have voted in favour of ratifying the treaty change.⁵⁵ The exemption condition is met when “the Act providing for the approval of the treaty states that the treaty does not fall within section 4”.⁵⁶ Ratification of treaty amendment via the ordinary revision procedure, therefore, does not always require a referendum to be held. A referendum is only required when one of the criteria in Section 4 are also met.

s3 EUA – treaty amendment - simplified revision procedure

s3 EUA provides for the second type of policy decisions by the UK government that might lead to a referendum. These come under the heading ‘Amendment of TFEU under simplified revision procedure’, and relate to decisions adopted by the European Council under Art 48(6) TEU. The

⁵² s2(1)(a) EUA.

⁵³ s2(1)(b) EUA.

⁵⁴ s2(1)(c) EUA.

⁵⁵ s2(2) EUA.

⁵⁶ s2(3) EUA.

requirements for approving a UK government decision replicate those for ratifying treaty amendment that falls under s2 EUA, except for the inclusion of a significance condition.⁵⁷ As for s2 EUA, a statement must be put before Parliament by a government minister within two months of an Art 48(6) TEU decision being adopted by the European Council; secondly an Act of Parliament must approve this decision and thirdly the referendum, exemption or significance condition must be met. The referendum and exemption conditions are the same as for s2 EUA. The significance condition, which is only included in s3 EUA is defined as follows:

a) the decision falls within section 4 only because of provision of the kind mentioned in subsection (1)(i) or (j) of that section, and

(b) the effect of that provision in relation to the United Kingdom is not significant.

The two relevant subsections of s4 EUA that are relevant to the significance condition are:

s(4)(i) the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body;

s(4)(j) the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom;

If the Art 48(6) TEU decision applies only to these 2 sub sections of s4 and ‘the effect of the provision in relation to the UK is not significant’, then a referendum will not be required for the Government to approve the Art 48(6) TEU decision taken by the European Council. If the Art 48(6) TEU decision is deemed to be ‘significant’ then it must be approved by referendum before it can be approved by Government. If the decision is covered by any of the other criteria in s4 then it does not need to be significant to trigger a referendum. There is no further guidance in EUA on the criteria that might define ‘significance’; this is left to the discretion of the relevant minister.

Despite the similarities in the drafting of s2 and s3, s4 will apply quite differently to each of them because of the nature of Art 48(6) TEU. First, Art 48(6) TEU only relates to part three of the Treaty on the Functioning of the European Union, which relates to the internal policies and action of the Union; it is a much narrower range of topics than those that would be covered by full treaty amendment. Secondly, Art 48(6) TEU decisions are not allowed to increase the competence of the EU and therefore it is unlikely that the 8 clauses relating to competence in s4 will ever apply to

⁵⁷ s3(4) EUA.

them.⁵⁸ If the UK prime minister believed there would be an increase in competence as a result of an Art 48(6) TEU decision then the illegality of this position could simply be pointed out and the decision stopped, without recourse to a UK referendum being required. Thirdly there is the significance condition that applies to two of the clauses in s4 and further limits s3. It is incongruous that the significance clause has been included at all given the limitation of discretion throughout the rest of the legislation and the political rhetoric of ‘referendum locks’.⁵⁹ However, having decided to include significance for two clauses in s4 EUA it is surprising that the 3 other s4 articles, s4(1)(k), (l) and (m) that a 48(6) TEU decision might apply to do not also need to be ‘significant’; particularly given that these three subsections are process rather than subject based decisions and relatively technical in nature, which might not attract significant interest from the public.⁶⁰ Presumably the Government believes that all voting change is significant enough to attract a significant turnout, whereas the changes in s4(i) and (j), such as increased powers to impose sanctions on the UK are not.

In summary, s3 will only trigger a referendum if there is a ‘significant’ change in the ability to impose obligations or sanctions on the UK, or if there is a change in voting procedure, however significant the issue might be, whereas s2 treaty amendments will require a referendum for competence increase as well as changes in voting procedure, and future governments are not given discretion to decide that an issue that is part of the ordinary revision procedure is not significant enough for a referendum.

s4 EUA - situations that attract a referendum

s4 has been drafted to establish the specific situations that a treaty amendment event covered by s2 or s3 EUA would need to involve for a referendum to be triggered, notwithstanding the significance condition just discussed. The explanatory notes described s4 as making ‘provision for the criteria against which a treaty seeking to amend or replace TEU or TFEU, or an Art 48(6) decision ... would be assessed in order to determine whether a referendum should be held’.⁶¹ Not all treaty amendment will therefore trigger the requirement to hold a referendum. The clauses in s4(1), which list the

⁵⁸ P Craig, ‘The European Union Act 2011: Locks, Limits and Legality’ [2011] CMLRev 1915, 1926-7.

⁵⁹ For example, Mr Liddington, minister for Europe, HC Debate 7 Dec 2010 vol 520 col 273, who stated that they chose not to implement a test stated in general terms that the government of the day would then determine whether it had been met or not, “What we have done instead is to introduce a Bill that quite deliberately limits ministerial discretion by specifying those changes that would trigger a referendum and also those limited categories of treaty change that would be exempt from the referendum requirements”.

⁶⁰ M Gordon and M Dougan, ‘The United Kingdom’s European Union Act 2011: “Who won the bloody war anyway?”’ [2012] EL Rev 3.

⁶¹ Explanatory notes to the EUA 2011 para 49.

situations when a referendum is needed to approve a Government decision, fall in to two categories: those that are subject focussed, which address change in the competences of the EU, and those that are process focussed, which address change in voting or legislative procedures in the EU. In s4(1)(a) to (h) the conferring of a new or extension of an existing competence for each of the three types of competence of the EU is stated as triggering a referendum. It is these clauses that in practice s3 will not apply to. The increased ability of an EU institution to impose a requirement, obligation or sanction is stated as a trigger for a referendum in s4(1)(i) and (j), which relate to the significance clause of s3 described above. The final three clauses of s4(1) relate to the ability to vote to block an EU legislative act in the Council: (k) and (l) refer to the use of QMV and (m) relates to the suspension of the OLP. s4(2) and s4(3) provide clarification about the application of s4(1). s4(2) states that any removal of a limitation on a competence is treated as if it were an extension of competence and therefore also triggers a referendum. s4(3) states the three policy areas to which s4(1)(m) applies.

The final part of s4 then sets out three circumstances when a referendum would not be triggered by a treaty amendment, unless there is a possibility one of the other clauses in s4 may apply.⁶² The three situations that are exempt from the referendum condition are defined in the legislation as follows:

“A treaty amendment or Art 48(6) decision does not fall within this section merely because it involves one or more of the following –

- (a) the codification of practice under TEU or TFEU in relation to the previous exercise of an existing competence;
- (b) the making of any provision that applies only to Member States other than the UK;
- (c) in the case of a treaty, the accession of a new member State.”

The exemptions in s4(4)(b) and (c) raise some issues in relation to the general approach taken in s4 to defining when a referendum must be held. First, the possibility for an increase in competence without a referendum is allowed for, even though this is covered in detail in the rest of s4 and its avoidance was one of the key aims of the legislation. It is understandable that changes that do not apply to the UK would not lead to a referendum, but it leaves open the related question of what happens if the UK joins an enhanced cooperation group that has already effected changes to EU voting procedures or competences for that group. As the changes did not apply to the UK when the Member States in the enhanced cooperation group made the changes there would have been no

⁶² s4(4) EUA.

referendum.⁶³ Then when the UK joins the enhanced cooperation there would be no requirement for a referendum either as the changes would have already taken place.⁶⁴ This means that increased competences could apply to the UK and be approved by the UK government without a referendum. Given the approach of the EUA and its intention to cover all increases in competence it is surprising that this situation is allowed as an exception. Secondly, the accession of a new Member State will alter the voting arrangements of the EU, make decisions more difficult to block and have other significant impacts on the workings of the EU.⁶⁵ The exclusion of accession treaties from the referendum condition means that a UK minister can still approve significant changes to EU processes without a referendum. William Hague stated that accession treaties were not included because they do not extend the powers or competences of the EU.⁶⁶ Given that an extension of powers is possible, however, a more likely explanation for the exemption of accession treaties could be the political preference of successive UK governments, including the current coalition, for expanding the number of Member States in the EU, which the UK government did not want to give citizens the opportunity to veto.⁶⁷

The EUA could have been drafted without s4 so that all treaty amendments, including all those that increase EU competence, would have needed approval by referendum, especially given the wide range of situations that are captured by s4. However, the Government wished to restrict ministerial discretion over the holding of a referendum and was perhaps mindful of the repeated failures to hold referenda on treaty amendments in the past, such as Gordon Brown's decision that the Lisbon Treaty was not 'fundamental' enough to require referendum approval.⁶⁸ Another, albeit speculative, reason for the Conservative party wishing to specifically state that all competence increases require approval by referendum is that, rather than restricting ministerial discretion, they actually wished to allow discretion in relation to policy decisions that reduce EU competence, which otherwise would have also required a referendum if the EUA did not include the specific unidirectional criteria in s4. If this view were taken, s4 would be a limitation on the use of referenda, rather than a reinforcement of its use, as it ensures that referenda are only used to limit ministerial discretion over developments

⁶³ As stated by s4(4)(b) EUA.

⁶⁴ M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3, 17-18 with regard to this issue in relation to passerelle clauses.

⁶⁵ M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3, 17 for further comment on Member State accession.

⁶⁶ HC Debate 7 Dec 2010 vol 520 col 203.

⁶⁷

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf> pg 19 accessed 8 July 2015.

⁶⁸ HC Debate 22 Oct 2007 Vol 465 Col 19. Available at

<<http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm071022/debtext/71022-0003.htm#0710222000001>> accessed 8 July 2015.

of EU policy and actually allows freedom in relation to any, equally significant reduction in EU powers or competences.

s6 EUA - other decisions requiring approval by referendum

The final section of the EUA that deals with referenda, Section 6, groups together other decisions that now require approval by referendum in the UK, but which would not always be covered by the provisions in s2, s3 or s4 because they do not necessarily require treaty amendment. There are two categories of decisions: specific policy decisions and decisions that would change the voting process in relation to specified treaty articles and remove the UK's veto in the Council in that policy area.

The specific areas of policy considered to warrant an extended legitimisation process, including approval by referendum are a common EU defence,⁶⁹ a European Public Prosecutors office,⁷⁰ the Euro,⁷¹ and the Schengen Protocol.⁷² The explanatory notes state that these four subject based referendum triggers, which are of varying degrees of public salience, require legitimisation using a referendum because if implemented they would be “one-way, irreversible decisions which would transfer power or competence from the UK to the EU”.⁷³ These are policy areas, though, for which supranational decision-making processes have already been established that are not dependent on legitimisation via member state institutions; unlike the treaty amendment decisions of s2 and s3 that must be confirmed in line with the constitutional arrangements of the Member States before they can be ratified.⁷⁴ The exception to this in s6 is the adoption of a decision by the European Council under Art 42(2) TEU in relation to common EU defence, which has a two stage process that requires specific Member State approval ‘in line with their constitutional requirements’.⁷⁵ This is one of the five ‘organic laws’ in the Treaties, which already require the type of two stage ratification process established in s6 EUA, and that are dealt with inconsistently by the EUA.⁷⁶ Policy decisions can be adopted in the Council in relation to the other four ‘organic laws’ without prior approval in a referendum.⁷⁷ Given that the ‘organic laws’ have already been elevated by Member States, including the UK, to a position of requiring an intergovernmental approval process akin to that followed for

⁶⁹ s6 (2) EUA.

⁷⁰ s6 (3) EUA and s6(5)(c) EUA.

⁷¹ s6 (5)(e) EUA.

⁷² s6 (5)(k) EUA.

⁷³ Explanatory notes to the EUA 2011 para 71.

⁷⁴ Art 48(4) TEU and Art 48(6) TEU.

⁷⁵ Art 42(2) TEU.

⁷⁶ The five organic laws are Art 42(2) on common security and defence policy; Art. 25 TFEU on additional rights for Union citizens; Art. 223(1) TFEU on a uniform electoral procedure for the EP; Art. 262 TFEU on ECJ jurisdiction over European IPRs; Art. 311 TFEU, third para on the initial decision on Union own resources.

⁷⁷ s7 EUA requires their approval by an Act of Parliament instead.

amendment of fundamental EU law, which gives Member States some control over the approval of these laws, it is somewhat surprising in terms of consistency that the provisions of s6 EUA do not require referendum approval for the adoption of decisions in relation to all the 'organic laws'. Perhaps the UK government simply decided that a common EU defence was more salient and more significant than the other organic laws.⁷⁸

The other parts of s6 EUA relate to various changes in the voting procedure in the Council; some of which are specified in s6 itself and a number of others listed in Schedule 1 of the act. Ministerial approval of these changes in voting procedure, which would remove the UK government veto in relation to a wide range of policy areas, such as EU finance, social policy and the environment, also now require approval in a referendum first. This removal of a veto would not necessarily mean that there would be a transfer of competence to the EU or any change to EU policy, but they would mean that there is an increased possibility that a legislative proposal may be passed at EU level that the UK government does not agree with, but will have to comply with. It would be possible to have a referendum on the voting procedure for EU level decisions in relation to one of the issues in s6 or Schedule 1 EUA and then at a later date another referendum could be required by s2 or s3 EUA for approval of treaty amendment covering the same subject area. The provisions in s6 EUA also leave the incongruous situation that a UK minister can only adopt a change in voting procedure after approval in a UK referendum, but the minister can adopt a decision in Council about the substance of that policy area without needing referendum approval. There are no exceptions in either category of decisions in s6, and there is no significance condition.

Having described the mechanics of the EUA in terms of holding referenda, the rest of the chapter will proceed with an assessment of the democratic potential of the legislative design of referenda in the EUA. First, there is an assessment of the compatibility of the EUA provisions for referenda with EU law, and with UK law as far as it relates to the potential for indirect legitimisation of the EU. Secondly, there is comment on the political motivation behind the implementation of the EUA, how this is reflected in the criteria established and the potential referenda subject matter, and what this might mean in relation to its democratic potential. The chapter then concludes with specific comment on the potential influence of the EUA on EU democratic legitimacy.

⁷⁸ s6 EUA requires a referendum for a change to the legislative process that three of the organic laws specify, Arts 25, 223(1) and 311 TFEU, but not for adoption by a UK minister in Council of a policy decision to which they would apply. For the other organic law, Art 262 TFEU, a referendum is not required for adoption of a policy decision or for a voting procedure change in this policy area.

Legal compatibility of EUA referenda provisions

EU law compatibility

The EUA referenda provisions relating to treaty amendment do not give rise to any issues with EU law compatibility. s2 and s3 EUA require approval of EU treaty amendment in a referendum in the UK, when one of the provisions in s4 EUA is met, before that treaty amendment can be ratified by the UK government. The legality of s2 and s3 is not brought in to question because the use of referendum is accommodated in EU law: the ordinary and special revision procedures, as set out in Art 48 TEU, require ratification and approval, respectively, “in accordance with their respective constitutional requirements.”⁷⁹ The second stage of the ratification process in the ORP has included Member State level referenda in a number of countries, and there is no legal issue with adding the UK to those that require referendum approval prior to treaty ratification. This follows the standard EU democratic process of treaty legitimisation via Member State institutions.

However, the provisions in s6 EUA for the use of referenda to approve EU decisions that would not normally be referred to the Member State level before ratification in the EU institutions do give rise to issues in relation to EU law. The legality of the provisions in s6 EUA can be questioned because EU policy and legislative decisions do not ordinarily provide for this type of two stage approval process. The focus for the discussion here is whether the provisions in s6 EUA are in accordance with EU law and of the practical implications for this decision to require Member State level referendum approval for EU level decision-making. The wider impact that this might have on the overall EU democratic paradigm is discussed in more detail, together with the ECI, in the next chapter.

s6 EUA referenda are not triggered by treaty amendment. They are divided between those that are triggered by the policy area a decision is being taken in, such as to approve adopting the Euro,⁸⁰ or signing up to the Schengen Agreement;⁸¹ and secondly those referenda that would be triggered if the UK government wanted to approve the adoption of QMV or the OLP instead of a special legislative procedure in relation to the wide range of treaty articles listed in s6 EUA and Schedule 1 EUA. The EUA provisions require the UK minister representing the UK government in the Council of ministers to seek approval in a referendum in the UK before they can vote in favour of a decision covered by s6 EUA.⁸² The decision-making process in the EU Council of ministers must be followed by all Member States, but then, for the UK only, the draft decision must be approved by Act of

⁷⁹ ORP in Art 48(4) TEU and SRP in Art 48(6) TEU.

⁸⁰ s6(5)(e) EUA.

⁸¹ s6(5)(k) EUA.

⁸² s6(1) EUA.

Parliament, and by the UK citizens through a referendum vote.⁸³ This addition of direct Member State level institutional involvement in EU level decision-making is not accommodated by the treaties for any of the s6 decisions, except for a decision covered by s6(2) that relates to a Common EU defence and decision taken under Art 42(2) TEU. Craig put it this way: “There is a related objection to the section 6 strategy, which is that it makes the particular national parliament and the national electorate a formal part of the EU decision-making process where there is no warrant in the Treaty.”⁸⁴ In other words, the insertion of UK referendum approval by s6 in to EU decision making is of questionable legality because it changes the institutional mechanism agreed in the treaties for making EU law.

The s6 EUA provisions that introduce Member State level involvement in the legislative process are also of doubtful legality because they imply a unilateral, unapproved rewrite of the relevant treaty articles. The enactment of the EUA has, in effect, just for the UK, introduced a second Member State level stage to the decision-making process for the s6 decisions. In effect this has moved them in to the category of organic laws, which are an exception to standard EU legislative practice because they require that decisions are approved in accordance with the constitutional requirements of each Member State, as is the case for treaty ratification.⁸⁵ Amendment to the EU treaties is confirmed after unanimous ratification or approval in all Member States, but this implied change to the treaties through the s6 EUA provisions only applies to the UK and has not been approved by other Member States, and hence raise questions of its legality.

A further reason to question the legality of the provisions in s6 EUA is that UK ministers are no longer able to fulfil their obligation under Art 16(2) TEU.⁸⁶ The Member States have agreed in the treaties that the Member State representatives in the Council, once negotiations have been concluded and a sufficient level of consensus reached, will be able to approve the relevant decision: ‘The Council shall consist of a representative of each Member State at ministerial level, who may commit the Government of the Member State in question and cast its vote’.⁸⁷ However, the provisions of s6 EUA mean that the UK minister is not lawfully able to cast a vote in the Council for the UK Government without first returning to the UK to seek approval for a draft decision from the

⁸³ s6(1) EUA “(1)A Minister of the Crown may not vote in favour of or otherwise support a decision to which this subsection applies unless— (a)the draft decision is approved by Act of Parliament, and (b)the referendum condition is met”.

⁸⁴ P Craig, ‘The European Union Act 2011: Locks, Limits and Legality’ [2011] CMLRev 1915, 1930.

⁸⁵ E.g Art 25 TFEU: “These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.”

⁸⁶ P Craig, ‘The European Union Act 2011: Locks, Limits and Legality’ [2011] CMLRev 1915, 1931.

⁸⁷ Art 16(2) TEU.

UK Parliament and from UK citizens in a referendum.⁸⁸ This means that in meeting the legal requirements set out in s6 EUA the minister will be unable to discharge their obligation according to EU law as set out in Art 16(2) TEU. The final aspect of the treaties that it has been suggested s6 EUA may conflict with is the principle of sincere cooperation in Art 4(3) TEU.⁸⁹ It is unclear though whether the provisions of the EUA requiring further approval in the UK of EU level decisions are so obstructive to the tasks and objectives of the EU as to fall foul of this principle. It is also less than certain that challenging the UK in the Court of Justice on this basis would be politically wise, given that the EUA provides for more EU democratic legitimisation.⁹⁰

Even if these questions of the legality of s6 EUA were able to be overcome, there are still a number of practical, political problems that could arise because of the introduction of the referendum provisions in s6 EUA.⁹¹ Negotiations in the Council may be complicated by the UK minister and other Member State representatives wishing to avoid triggering a referendum. Those involved in the negotiations will be aware of the issues that would trigger a referendum in the UK and this could be factored into the negotiations on any policy decisions in the Council and possibly cause delays or difficulties in reaching agreement. There is little clear evidence to date as to what impact the EUA provisions may have on EU level negotiations and decision-making either in terms of the UK's EU policy or the positioning of other Member States or the final form of the decisions taken. The closest the EUA has come to influencing negotiations at the EU level is probably in relation to the Treaty on Stability, Coordination and Governance (Fiscal Compact) where Prime Minister David Cameron's decided to exercise his veto. Although a referendum in the UK may not have been triggered by the Fiscal Compact, the complexity and uncertainty of whether the EUA provisions would have triggered a referendum, combined with the potential for significant political problems for the UK government, may have influenced the decisions taken by the UK and the final shape of the Treaty.⁹²

Previously, a UK minister went to the Council with a mandate, negotiating position and decision making power, legitimised at state level, prior to the supranational level engagement. The UK minister was given the authority to represent the Member State and to take decisions on behalf of

⁸⁸ EUA s6 (1).

⁸⁹ For comment on sincere cooperation see M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3, 21.

⁹⁰ Ibid pg 22.

⁹¹ See P Craig, 'The European Union Act 2011: Locks, Limits and Legality' [2011] CMLRev 1915, 1931- 1933 for comments on the practical problems arising from s6 EUA.

⁹² For discussion of the likelihood of the Fiscal Compact triggering a referendum as a result of EUA provisions see M Gordon, 'The United Kingdom and the Fiscal Compact: Past and Future' [2014] Eu Const 28. For comment on the possible impact of the EUA on UK negotiation at the EU level see D Hodson and I Maher, 'British Brinkmanship and Gaelic Games: EU Treaty Ratification in the UK and Ireland from a Two Level Game Perspective' [2013] BJPIR.

their government. Now, though, the minister will need to negotiate in the Council until there is enough clarity about whether the other Member States are going to approve a decision, then if he wants to support the decision that seems likely at the conclusion of the negotiations he will need to stop the EU legislative process and return to the UK to ask for the expected decision to be approved by parliament and referendum. The UK government would presumably try to hold the referendum at the end, or as close to the end as possible, of negotiations in the Council, but before the final decision is made. While referendum approval is being sought in the UK, the Council decision will be on hold and other Member States will likely be waiting for the UK referendum result before approving the decision. Implementing the decision at state level in other Member States would run the risk of having to repeal a recently enacted law in the event of a UK referendum rejection. During the delay in decision-making whilst the UK referendum is held, which may be anything upwards of 6 months, the position of the other Member States in relation to the decision at issue may also change, for example because of a change in Government in the meantime, which means that money may be spent on a referendum in the UK about a decision that has already altered, may never happen, or which the UK government no longer wants to support anyway; which would all make the referendum approval meaningless.

One possible outcome of rejecting the agreement that the UK government intends to approve is that a UK government representative will, if they wish to reach an agreement in this area, have to return to the Council to renegotiate with the other Member States. A referendum would then need to be held every time that it seemed that negotiations have reached a draft agreement that the UK government thinks the people will accept. These issues will make the Council decision-making process extremely unwieldy for the UK and the other Member States when the s6 EUA referenda provisions are triggered. If other Member States were to take the same position as the UK then all these issues would be exacerbated and undermine the purpose of membership of a supranational organisation with decision-making competence. Furthermore, implementing a functioning process consistent for all Member States for approving these decisions, which may include direct democracy at the Member State level, would require complex treaty change. Much of this comment is conjecture in lieu of any firm evidence of the impact of the EUA's legal provisions, but it seems likely at this point that there will be some impact on the effectiveness of Council decision-making.

There is also the potential for the EUA provisions to undermine the use of referendum in the UK. If, as was speculated in the previous paragraphs, there were to be referenda on decisions that change before they can be approved or multiple referenda on the same subject as part of the negotiations in Council, then there will be high levels of cost for the state to hold these referendums and for

people to engage with the issues and participate.⁹³ Even more significant in democratic terms is that the democratic value of the opportunity for citizen participation through the introduction of referenda in UK legislation may be severely devalued as a result, and would do little to allay concerns about the competence or willingness of citizens to engage effectively. It is appropriate for the people to legitimise decisions, but it is up to the Government to negotiate. It is one thing for the UK constitution ‘to know something of the people’ as a result of referendum when approving state decisions,⁹⁴ but quite another for the EU Council of ministers to know something of the UK people during the negotiations of what could be relatively minor EU level decisions, such as whether to change the voting in the Council in relation to energy measures that are primarily of a fiscal nature.⁹⁵

The s6 EUA provisions may be a challenge to EU law as it is currently established in the treaties, but it seems unlikely that an issue of significant substance will arise to lead to a legal challenge, or that there is likely to be much appetite for such a challenge. As Dougan and Gordon said a legal challenge based on UK law that provides for enhanced democratic provisions would seem “politically maladroit ... the perfect gift from naive Europhilia to cynical Euroscepticism”.⁹⁶ It seems more likely that any legal issues will be left in abeyance until such time as treaty amendment is once more on the agenda, which does not currently seem imminent, particularly given the understandable preoccupation with the ongoing economic crisis. The implications of the challenge to the EU paradigm by the implementation of the EUA are discussed in detail in chapter four. The next section of this chapter moves the discussion away from the direct implications of the EUA on EU level democracy to its implications for Member State level democratic legitimisation of EU policy in the UK, and the indirect legitimisation this provides the EU.

UK law compatibility

This section assesses the potential for an instrument of direct democracy to have an impact on the democratic legitimacy of the UK’s EU policy decisions, and therefore indirectly on the democratic legitimacy of the EU. First there is comment on the theoretical possibility of any instruments of direct democracy reducing the control of existing institutions over the political agenda and its

⁹³ The cost of the referendum on the voting system was estimated at £75 million by the Electoral Commission, information available at <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0009/153000/Costs-of-UK-May-2011-UKPVS-referendum.pdf> accessed 8 July 2015. For comment on the capacity of citizens to engage in referenda see, for example, G Smith, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009).

⁹⁴ The UK constitution is described as ‘knowing something of the people’ in V Bogdanor, *The New British Constitution* (Hart 2009).

⁹⁵ Schedule 1 EUA, relating to Art 194(3) TFEU.

⁹⁶ M Gordon and M Dougan, ‘The United Kingdom’s European Union Act 2011: “Who won the bloody war anyway?”’ [2012] EL Rev 3, 22-23.

outcomes because of the UK's fundamental constitutional principle of parliamentary sovereignty, and then secondly there is comment on the potential of the specific legislative provisions in the EUA to have a democratic impact in the UK, and therefore indirectly in EU democracy.

The EUA has established criteria for holding the first legally prescribed referenda in the UK. This is a potentially profound change from the previous position in the UK of referenda being initiated on an ad hoc basis, with the Government of the day having complete legal discretion over whether to hold a referendum. The legislative design of the EUA is expected to limit the legal discretion of future governments in relation to aspects of EU policy, and the holding of a referendum is now required at times as part of the legislative process in the UK. In theory, notwithstanding the political pressures that might be brought to bear to challenge them, any new Government could change the list of policy areas that require approval by referendum, or even repeal the EUA altogether. However, whilst the EUA is on the statute book there is a new process for passing legislation relating to the UK government's EU policy decisions covered by the situations and criteria in the EUA, which affects a central tenet of the UK constitution: parliamentary sovereignty.⁹⁷ Until recently, and according to the traditional approach to parliamentary sovereignty, it had been thought that legislation such as the EUA would not bind future parliaments as to the legislative process they had to follow.⁹⁸ The future Parliament would be sovereign and able to pass legislation on the issue of its choice following the standard legislative procedure of a vote in the two houses of parliament and then the royal assent. If this traditional approach to parliamentary sovereignty still held today it would make the EUA virtually legally redundant, certainly in so far as it deals with a change in the legislative process, of which the referendum provisions are a central part. It would also mean that the democratic potential of the EUA provisions introducing direct democracy was severely limited as the existing institutions would maintain control over the initiation and outcomes of a referendum relating to EU policy.

In recent years, though, the meaning of parliamentary sovereignty in the UK constitution has been reassessed as a result of legislation such as the European Communities Act 1975 and Human Rights

⁹⁷ For a full discussion of the impact of the EUA on parliamentary sovereignty see M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015), ch 6.

⁹⁸ The traditional approach to parliamentary sovereignty is based on Dicey who famously stated that the UK Parliament the right "to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament." This means that no Parliament can bind its successors as to the substance of or process for passing a future law. A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1985).

Act 1998, and cases such as *Factortame*⁹⁹ and *Jackson*.¹⁰⁰ Bogdanor stated in 2009 that the “traditional interpretation of parliamentary sovereignty, that Parliament cannot bind itself, is falling in to desuetude. But no new doctrine has yet replaced it.”¹⁰¹ Although not yet fully established there is significant support for a ‘manner and form’ approach to parliamentary sovereignty that is able to accommodate the numerous challenges to the traditional meaning of parliamentary sovereignty.¹⁰² The ‘manner and form’ approach accepts that it is possible for Parliament to alter the process that legislation should follow before being enacted, and further that there is an expectation that future Parliaments will follow this new process until such time as new legislation is passed that amends this process again. This means that any new Parliament retains sovereignty over the content of legislation, the form that it takes, but that the process followed, the manner in which it enacts future legislation can be prescribed by previous Parliaments. Under this manner and form reading of parliamentary sovereignty future parliaments would be bound by the provisions of the EUA and need to meet the referendum condition to approve the prescribed decisions and treaty changes. Gordon argues that the EUA is in fact confirmation that the manner and form reading of parliamentary sovereignty is the most appropriate for the UK constitution.¹⁰³ There has also been implicit judicial support for this position in the case of *Wheeler v the office of the Prime Minister* where the expectation was stated that Parliament is bound to follow the process set out in the EUA until it is repealed, although the case itself did not directly decide on whether the referendum provision had to be enforced.¹⁰⁴

This change in UK constitutional doctrine is particularly significant for direct democracy because it provides the doctrinal support for direct democratic instruments, such as the referendum or a citizens initiative, to have an impact on an ongoing basis. Without a shift towards a manner and form approach to parliamentary sovereignty direct democratic instruments provided for in legislation would have little or no legal force. Politically it may have been difficult to avoid a referendum in the past, but there was no legal impediment to the Government deciding not to hold a referendum. Now, assuming other legislation and cases confirm the expectation that a referendum will be held in the circumstances provided for in the EUA, the new legal requirement of the EUA to hold a referendum goes a long way to confirming the manner and form approach to parliamentary

⁹⁹ There were a series of cases before the courts in relation to *Factortame Ltd*. See in particular *R v Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] 2 AC 85, House of Lords, and *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603, House of Lords.

¹⁰⁰ *Jackson and Others v. Attorney General* [2005] UKHL 56.

¹⁰¹ V Bogdanor, *The New British Constitution* (Hart 2009) 282.

¹⁰² M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015)

¹⁰³ *Ibid* 239: “I will argue that the EUA is the confirmation of a modern shift to the manner and form conception of parliamentary sovereignty”.

¹⁰⁴ *Wheeler v The Office of the Prime Minister* [2014] EWHC 3815 (Admin).

sovereignty, which in turn reduces the executive control over the decision to hold a referendum pursuant to the EUA.

The doctrinal questions relating to parliamentary sovereignty are dealt with comprehensively elsewhere and are beyond the scope of this thesis, whose focus is the democratic potential of the EUA for EU democratic legitimisation rather than its impact on UK constitutional theory. The central message from these brief paragraphs on this complex aspect of UK constitutional law is that the shift away from the traditional approach to parliamentary sovereignty means that the possibility of direct democracy to have democratic significance in the UK has been formally enhanced. Not only is one Parliament now able to bind a future Parliament as to the process for passing legislation, but the people are also now able to exert a veto over some legislation, which moves the UK in the direction of popular governance.¹⁰⁵ In other words, the doctrine of parliamentary sovereignty has adapted to allow for the concession of a shift in sovereignty to include citizens. This is essential for a mandatory citizen vote on policy matters to exist and for direct democracy to have a significant impact on democratic legitimacy. The legislative sovereignty of Parliament may have been shared to some extent with the people, such that a sense of popular sovereignty in the UK may be talked about between general elections, but the extent to which power, or sovereignty, has actually been distributed to the people away from the existing institutions is still strongly dependent on the manner in which these same institutions design and implement instruments of direct democracy. It is to the motivation behind the implementation and design of the EUA referenda provisions that we turn next.

Prioritisation of citizen participation or party politics

Political motivation for introducing EUA

Gordon Smith, writing in 1976, described the pressures that led to the 1975 referendum on EC membership as follows: “On one level the pressure for the referendum resulted from a belief that the British people themselves should decide; on a second level the referendum represented the best available means of defeating the dominant inter-party coalition within parliament; on a third level, the referendum campaign was part of a wider strategy for the left wing of the [governing] Labour party to enforce its will on a reluctant leader and his close supporters”.¹⁰⁶ There are striking similarities between this description of the pressures on the then Labour Government that led to a

¹⁰⁵ V Bogdanor, *The New British Constitution* (Hart 2009), ch 5.

¹⁰⁶ G Smith ‘The Functional properties of the Referendum’ [1976] *European Journal of Political Research* 4, 14. For the political environment at the time of the 1975 referendum see also J Smith, ‘The 1975 Referendum’ [1999] *Journal of European Integration History* 41.

referendum in 1975 and the political motivation for the Conservative led coalition Government to enact the EUA in 2011.

The Government have stated clearly that they believe that it is democratically appropriate that citizens should have the final say on the development of EU policy. David Liddington, Minister for Europe stated: “I am immensely proud of what this historic law will do for our democracy. British voters have long felt disconnected from the EU and the decisions taken on the EU in their name, and this law is a vital step forward in this Government’s attempts to repair that disconnection”.¹⁰⁷ The refusal of the previous Labour government to hold a referendum prior to the ratification of the Lisbon treaty has been pointed to as an example that ‘the important decisions about the EU have been taken without real consideration for the wishes of the people’.¹⁰⁸ As well as this statement of the general importance of democratic participation and engagement with citizens, David Liddington has also emphasised the potential transfer of influence from political institutions to the people: he stated that the impact of the changes in the EUA will be “to disperse power more widely in Britain rather than hoarding authority within government”.¹⁰⁹ The political rhetoric could indicate a genuine desire for stronger political legitimacy through democracy for EU policy at the UK and EU level. However, a more cynical interpretation of the political comments about the democratic importance might be that the government are trying to put a rather disingenuous democratic gloss on legislation that is being implemented to resolve their own political problems rather than any overwhelming desire to limit institutional discretion, or increase citizen control, in relation to EU matters.¹¹⁰

As in the 1970s, there is a broad parliamentary consensus today on staying in the EU, with which eurosceptic opinion clashes; and the Government does not plan to leave the EU. The Programme for Government states that the Government intends, “to ensure that the British Government is a

¹⁰⁷ <<https://www.gov.uk/government/news/minister-for-europe-welcomes-entry-into-force-of-the-eu-act>> accessed 8 July 2015.

¹⁰⁸ HC Debate 7 Dec 2010 vol 520 col 196.

¹⁰⁹ <<https://www.gov.uk/government/news/minister-for-europe-welcomes-entry-into-force-of-the-eu-act>> accessed 8 July 2015 .

¹¹⁰ M Gordon and M Dougan, ‘The United Kingdom’s European Union Act 2011: “Who won the bloody war anyway?”’ [2012] EL Rev 3. For discussion of the reasons for ad hoc referenda and examples of use of political strategies see M Setala, *Referendums and Democratic Government: Normative Theory and Analysis of institutions* (Macmillan 1999) 87- 95. Setala distinguishes between policy maximising and power maximising strategies when using the referendum, the difference between referenda intended to strengthen the implementation of policy and referenda intended to strength the position of a political leader. The two are connected in the UK with referenda promised or held to strengthen particular policy positions and to avoid challenge to the governing party, particularly in relation to the EU. M Setala, *Referendums and Democratic Government: Normative Theory and Analysis of institutions* (Macmillan 1999) 89. See also L Morel ‘The rise of government initiated referendums in consolidated democracies’, in M Mendelsohn and A Parkin (eds) *Referendum democracy: citizens, elites, and deliberation in referendums campaigns* (Macmillan 2001) 47–64.

positive participant in the European Union, playing a strong and positive role with our partners”.¹¹¹ This parliamentary consensus leaves citizens with little opportunity to challenge the membership of the EU through the ordinary electoral process. Democratic participation in the UK is largely reserved to voting for a constituency MP based on that policies they represent. If all the political parties support membership of the EU, a citizen is not able to indicate their preference to leave the EU through the vote they cast to choose an MP, which is a failing of representative democracy.¹¹² Supporters of holding a referendum have seen a direct vote on the specific policy issue of EU membership as a means of challenging the policy preferences of the main political parties. The turn towards citizens directly making the decisions about EU policy in the one-off referendum of 1975 and the referenda provide for in the EUA 2011 perhaps indicates a lack of confidence in the ability of representational mechanisms to resolve these issues, and may even reflect a more general dissatisfaction with representative democracy.¹¹³

The third level of political pressure suggested by Smith in the quote on page 141 above was the party political pressure within the governing party. As there was in the 1970s for the Labour party, there has been a concerted campaign in recent years by a small faction of the Conservative parliamentary party to leave the EU or repatriate powers back to the UK from the EU. In 1975, the ‘committed anti-marketeters’ did not favour the usual democratic methods as control would remain in the hands of the Prime Minister, and the extreme wing of the leading political party campaigned then for renegotiation and referendum “as a strategy to tie the hands of a future Government”, and the same is true of the eurosceptic members of the Conservative party today.¹¹⁴ This clash between governmental and parliamentary policy preferences plays out badly in the public and a party divided on important issues usually lose votes as a result.¹¹⁵ The EUA was partly a Government attempt to tread the line between the competing positions within its party and to increase unity by sending “an important signal to the Europhobic wing of the Conservative party ... that its concerns would in the

¹¹¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_program_me_for_government.pdf pg 19.

¹¹² One difference between the 1970s and the current political situation is that a political party, UKIP, that wants to leave the EU has come to prominence in recent years, which provides an avenue for voting against EU membership when voting for an MP. To some extent this may redress the failing in representative democracy that results from the cross party agreement that the UK should stay as a member of the EU.

¹¹³ There is also evidence of a more general dissatisfaction with representative democracy – S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012) 9. Bogdanor states this dissatisfaction clearly in V Bogdanor, *The New British Constitution* (Hart 2009) 291-3.

¹¹⁴ G Smith, ‘The Functional properties of the Referendum’ [1976] *European Journal of Political Research* 13.

¹¹⁵ A referendum “designed to resolve divisions within the governing party or coalition” is the first of Morel’s four governmental objectives for holding a referendum. In L Morel ‘The rise of government initiated referendums in consolidated democracies’, in M Mendelsohn and A Parkin (eds) *Referendum democracy: citizens, elites, and deliberation in referendum campaigns* (Macmillan 2001) 53.

future be taken seriously by the coalition government".¹¹⁶ At the same time the EUA referenda were a means to avoid the need for an in/out referendum, which the Government was resisting and would have been worried about losing.¹¹⁷ With the EUA failing to quieten the anti-EU wing of the conservative party or stop the rise of UKIP, the Conservative party has promised EU renegotiation and a membership referendum in 2017, if re-elected.¹¹⁸ It would seem that the 'division resolving' intention of the EUA has failed and a further referendum has therefore been offered as a result of continued political pressures.¹¹⁹ Most of the referenda held in the UK have had a difficult political environment as part of their backdrop, for example the devolution referenda that tried to resolve regional tensions within the UK and the recent AV referendum that was held amid tensions in the coalition government. Bogdanor has gone as far as to conclude that in the UK the referendum has become an established part of the constitution because of "the vicissitudes of party politics".¹²⁰ The EUA is no different and the party politics associated with the EU have had an important effect on the introduction of the 'referendum locks'. The greater the extent to which the motivations of wishing to resolve political party divisions and to impose or reinforce a policy position are actually the reason behind the enactment of the referenda provisions in the EUA, the less democratic participation is prioritised and the less democratic impact the referenda are likely to have.

Despite the failure of the EUA to quell the Conservative party back bench rebellion on EU issues or to avoid the promise of a referendum on membership of the EU, a subject excluded from the EUA, eurosceptic political preferences, nevertheless, run strongly through the referenda provisions in the EUA. The Government selection of treaty amendment that increases EU competence, the four policy areas in S6 EUA, and the myriad changes in voting procedure included in S6 EUA and Schedule 1, means that there are a wide range of EU policy decisions or subject areas in the EUA that will trigger referenda. However, this seemingly broad spectrum is still only a limited part of EU policy and is a reflection of party political policy preference rather than criteria that prioritise the democratic participation of citizens. This subjective political preference is reflected by the fact that referenda

¹¹⁶ J Murkens, 'The European Union Act: A Failed Statute' [3/2013] LSE Working Papers 2, available at <http://www.lse.ac.uk/collections/law/wps/WPS2013-03_Murkens.pdf> accessed 8 July 2015.

¹¹⁷ Ibid.

¹¹⁸ This is also similar to the position in the 1970s, as G Smith said, "Since the [Labour] party was committed to 'renegotiate' the agreed terms of entry, it faced the problem of how the renegotiated treaty could best be presented to the electorate for a verdict". G Smith, 'The Functional properties of the Referendum' [1976] *European Journal of Political Research* 4, 13.

¹¹⁹ Morel describes division resolving referenda as those "designed to resolve divisions within the governing party or coalition, and those that are necessary in order to advance the legislative agenda of the governing party or coalition". L Morel 'The rise of government initiated referendums in consolidated democracies', in M Mendelsohn and A Parkin (eds) *Referendum democracy: citizens, elites, and deliberation in referendums campaigns* (Macmillan 2001) 53.

¹²⁰ V Bogdanor, *The people and the Party System: The referendum and electoral reform in the UK* (CUP 1981) 66.

have only been introduced to approve developments in the EU, therefore providing a veto only over the extension of the EU, and not over Government policy that would reduce the competences of the EU. The topics that the EUA provisions leave out are also indicative of current governmental policy preferences: for example there is no referendum for accession of more Member States or for withdrawal from the EU.¹²¹ Legislation is naturally going to reflect a particular policy position. The government of the day will set the laws that reflect the political ideology of the governing political party. The EUA though is different to other legislation in that it does not only alter policy as reflected in the legislation, but also changes the democratic process that approves this legislation.

It is worth emphasizing that issue is not being taken with the political policy of the present government, but of their decision to use legislation that purports to be for the purpose of a fundamental shift in power to citizens,¹²² to try in reality to entrench their own political preferences.¹²³ Extreme instances where referenda have been used for political rather than democratic purposes have been witnessed repeatedly within authoritarian regimes over the years, and led to a perception that referenda suffer inherently from this problem.¹²⁴ The EUA is clearly not in the same league as referenda held by dictators such as Pinochet or Hitler, but its political overtones point down the same road and the criteria for triggering democratic participation could have been more politically agnostic by triggering referenda for a policy area not a specific policy position, which in turn could have strengthened the democratic potential of the EUA.¹²⁵ The unidirectional, politically motivated design of the EUA and the prioritisation of politics over citizen participation are reflected in the criteria that have been set for holding referenda and the potential subject matter of EUA referenda, which are discussed next.

Criteria in the EUA that trigger referenda

¹²¹ Enlargement of the EU is stated as a policy position in the Programme for Government, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_program_me_for_government.pdf> accessed 8 July 2015.

¹²² Stated by W Hague, HC Debate 7 Dec 2010 vol 520 col 193.

¹²³ Matis Laisney came to a similar conclusion in relation to local referendum use in the UK. For discussion see M Laisney, *The Initiation of Local Authority referendums: participatory momentum or political tactics? The UK case*, [2012] *Local Government Studies* 639.

For summary of motivations that drive governments to initiate referendums see also L Morel 'The rise of government initiated referendums in consolidated democracies', in M Mendelsohn and A Parkin (eds) *Referendum democracy: citizens, elites, and deliberation in referendums campaigns* (Macmillan 2001) 47–64.

¹²⁴ See S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012).

¹²⁵ Matis Laisney came to a similar conclusion in relation to local referendum use in the UK. For discussion see M Laisney, *The Initiation of Local Authority referendums: participatory momentum or political tactics? The UK case*, [2012] *Local Government Studies* 639.

For summary of motivations that drive governments to initiate referendums see also L Morel 'The rise of government initiated referendums in consolidated democracies', in M Mendelsohn and A Parkin (eds) *Referendum democracy: citizens, elites, and deliberation in referendums campaigns* (Macmillan 2001) 47–64.

There has been a break from the past in the EUA by attempting to define criteria in legislation that will trigger referenda rather than rely on an ad hoc Government decision responding to the political situation and Government priorities at that time. The ad hoc approach that relies on existing institutions deciding when a referendum should be held can be criticised for underestimating the value component of issues, for predetermining the issues that citizens will be interested in and capable of engaging with,¹²⁶ and for being an elitist, limited approach to democracy reminiscent of Schumpeter.¹²⁷ At the other end of the spectrum from this high level of institutional control of referenda is the option that is taken in states such as Switzerland and California of allowing citizens to choose the subject of a referendum through the use of a popular initiative.¹²⁸ Citizens are able to propose a subject for a referendum vote and then, if the organisers reach the required support threshold, a referendum will be triggered. This avoids the problem of deciding which subjects are appropriate for a referendum in terms of constitutional significance or salience on an ad hoc basis, or of trying to set objective criteria to define in legislation when a referendum should be triggered, but could potentially lead to high levels of uncertainty for policy direction. The EUA takes a middle ground between these positions of institutional and citizen control and sets in legislation criteria that trigger a referendum. The criteria trigger referenda in three categories: treaty amendment, specific policy areas, and voting procedures. The position taken here is that the closer these criteria are to being an objectively set and unqualified, rather than a narrow subjective expression of party political preferences, the wider participation is likely to be and the stronger the democratic potential of the referenda. The criteria that trigger referenda are commented on next from this perspective.

s2 and s3 EUA set out a type of political decision that should be approved by referendum, the ratification of treaty amendments, but then in s4 EUA it limits when referenda to approve treaty amendments need to be held by specifying circumstances that must also occur to trigger a referendum. Broadly speaking, it is only treaty amendment that transfers powers to the EU that citizens are intended to be given a veto over. This means that in s4 EUA there is a subjective categorisation of the subject matter that must be legitimised by referendum, which conditions the

¹²⁶ Capability is the basis of regular criticism of referenda and direct democracy in general. 'An obvious concern with direct democracy is that it places decision-making power in the hands of the uninformed', S Hobolt, *Europe in Question: Referendums on European Integration* (OUP 2009) 6. However Hobolt concludes that voter capability is not the barrier to the use of direct democracy that it is sometimes portrayed as. She concludes, 'the findings of this book have shown that voters are smarter than they are often given credit for', *ibid* 249.

¹²⁷ See J Schumpeter, *Capitalism, Socialism and Democracy* (Allen and Unwin 1954).

¹²⁸ For the manner in which Switzerland uses the popular initiative see G Lutz, 'Switzerland: Citizens' Initiatives as a Measure to Control the Political Agenda' in M Setala and T Schiller (eds) *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012) 17. In relation to California see J Mathews, 'California's troubles, Europe's Future - and the need for a more direct representative democracy' in B Kaufmann and J Pichler (eds) *The European Citizens' Initiatives – Into new democratic territory*, (Intersentia 2010) 79.

objective criteria based on the type of legal act in s2 and s3 EUA. The seemingly broad, objective promise in s2 and s3 EUA of referenda on all treaty amendments is also restricted by the significance clause in s3(4) EUA. This subjective categorisation and requirement of significance introduce an element of discretion for the Government of the day, albeit a small one, in deciding whether a referendum has been triggered. It is likely to be difficult to avoid a referendum when powers are transferred as part of the ordinary revision procedure for treaty amendment because of the extent of the provisions in s4 EUA, but significance is a more malleable concept that is left undefined in the EUA. PM Gordon Brown avoided a referendum on the Lisbon Treaty because it was not 'significant', despite its close resemblance to the EU constitutional treaty, which the previous Prime Minister Tony Blair had decided was significant enough for a referendum.¹²⁹ A referendum to approve treaty amendment will not always be triggered, therefore, and democratic participation is qualified as a result.

Secondly, having used the objective criteria of the type of political act to define when referenda should be used to legitimise Government decision making and then qualified it, the legislation moves further from an objective approach to triggering referenda by including, in s6 EUA, a list of policy topics, rather than types of political act, that should be approved by referendum. The decision to include a list of subjects that trigger a referendum rather than using objective criteria is in itself reflective of the political subjectivity of the EUA. The explanation for including the list in s6 is that these are decisions that are "one-way, irreversible decisions which would transfer power or competence from the UK to the EU".¹³⁰ It is presumably on this basis that the EUA has established what subjects are appropriate for legitimisation via referendum and arguably provides some consistency to the types of issues that will be the subject of referendum votes.¹³¹ However, we will see in the next section that analysis of the subject matter of the referenda that are likely to be triggered only adds to the sense of prioritising political preferences and inconsistency, for example through excluding from s6 issues such as the increase in the number of Member States and EU withdrawal. There is a clear preference towards restricting EU development in the EUA, which is prioritised ahead of maximising democratic participation to address party political difficulties. This makes the 'referendum locks' appear more like an attempt to lock the political policies of the Conservative party in place rather than to lock in citizen choice over all EU treaty and policy

¹²⁹ 'The compromise position was a redrafting of the ECT as the Reform Treaty (Lisbon Treaty), which removed the symbolism of a constitution and some of the more controversial reforms, yet retained the key institutional initiatives'. S Hobolt, *Europe in Question: Referendums on European Integration* (OUP 2009) 244.

¹³⁰ Explanatory notes to the EUA 2011 para 71.

¹³¹ The use of the word irreversible is surprising given the position in the EUA, as expressed in s18 EUA, that EU membership and presumably the provisions it entails are only enforceable as long as they are applied through UK statute.

decisions. The next section looks at the implications of the decisions on the subject matter of the EUA on the democratic potential of implementing referenda.

Potential subject matter of referenda triggered by the EUA

Direct democracy has been summarised as ‘citizens voting on the most important issues’.¹³² Usually a referendum would be on a topic that has public salience or some fundamental significance so that citizens engage with the issues, and turnout is high enough to be representative. Descriptive classifications of the salient or significant issues of previous referenda vary, with categories such as constitutional, territorial or moral issues often used to identify past referenda subjects.¹³³ This section considers whether classifications of past referenda might help indicate the appropriateness of the likely subject matter of the referenda triggered by the EUA. This is approached from the perspective of a predetermined definition of what is fundamental or constitutional, or from the perspective of reserving referenda for subjects of public salience.

In terms of fundamental constitutional significance, the House of Lords Constitution Committee, despite believing that referenda are best reserved for such issues, stated ‘We do not believe that it is possible to provide a precise definition of what constitutes a "fundamental constitutional issue"’.¹³⁴ Instead the committee offered a list of some of the current issues that they believe should be described as fundamental constitutional issues, such as abolishing the monarchy, changing the currency, and leaving the EU.¹³⁵ In the UK there is also no written constitution that could be referred to for a list of constitutional issues and there will always be a grey area where it will be a matter of judgment whether issues are of a fundamental constitutional nature or not, which means that it can provide only a limited guide to subject matter for future referenda. As Bogdanor confirmed: ‘to enunciate those matters which are constitutional and therefore to be submitted to referendum

¹³² S Hug, ‘Some thoughts about referenda, representative democracy and the separation of powers’ [2009] *Constitutional Political Economy* 251.

¹³³ V Bogdanor, *The New British Constitution* (Hart 2009) 175-6. For a similar categorisation see also G Smith, ‘The Functional properties of the Referendum’ [1976] *European Journal of Political Research* 5: “decisions on constitutional matters and others concerning the basic nature of the state; the determination of important lines in public policy; and the resolution of moral issues which have social rather than political salience”. For a different approach that combines the constitutional and territorial see S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012).

There are other referenda that do not fit in to these categories such as votes of confidence in political leaders such as the De Gaulle referendum, M Setala, *Referendums and Democratic Government: Normative Theory and Analysis of institutions* (Macmillan 1999) 69.

¹³⁴ House of Lords Select Committee on the Constitution, 2009-10. *Referendums in the United Kingdom* para 94, available at <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>> accessed 8 July 2015.

¹³⁵ *ibid*

leads only to an impasse'.¹³⁶ Public salience, which is an alternative approach to deciding what subjects are appropriate, is used here to refer to issues that people are interested in and care about and therefore have meaningful opinions on. This raises as many questions as trying to decide which issues are of 'fundamental constitutional significance' and is probably even less precise and more subjective than using constitutional significance to decide when a referendum should be held.¹³⁷ Having a list of subjects that trigger referenda, although not 'constitutional' issues in the UK, also suffers from the difficulty of needing to reach agreement on which criteria or subjects are fundamental enough to be included in such legislation.¹³⁸

The inconsistent experience of referenda subjects in the UK does not help resolve the difficulty of identifying the salient or constitutional issues that might be appropriate as referendum topics. Only a small number of such issues have been decided by referendum and there are a far larger number of policy decisions and legislative changes that are easily categorised as being fundamental constitutional issues or of high public salience that have not been considered to require approval by referendum: reform of the House of Lords, the Human Rights Act, and the ratification of a series of EU treaties, amongst many others. This inconsistency, the lack of a written constitution, the difficulty of defining a 'fundamental constitutional issue' or public salience, and the repeated ability to avoid a referendum on European membership in recent years means that the use of descriptive criteria based on past experience does not provide an effective method of identifying what subjects should trigger a referendum in the future, and be included in legislation such as the EUA.¹³⁹

Whilst defining a 'fundamental constitutional issue' or 'public salience' precisely remains problematic, they are still a reasonable scalar guide to whether the subject matter selected might be appropriate as the topic of a referendum. The easier it is for one of these terms to be applied, the more appropriate the subject matter is for a referendum. The House of Lords constitutional committee, having accepted that it is not possible to classify referendum on this basis, went on to state that they "acknowledge arguments that if referenda are to be used they are most

¹³⁶ V Bogdanor, *The people and the Party System: The referendum and electoral reform in the UK* (CUP 1981) 74

¹³⁷ For comment on issue salience calculation see S Hobolt, *Europe in Question: Referendums on European Integration* (OUP 2009) 51.

¹³⁸ See V Bogdanor, *The people and the Party System: The referendum and electoral reform in the UK* (CUP 1981) 73 and list in the report by the House of Lords Select Committee on the Constitution, 2009-10, *Referendums in the United Kingdom* para 94 to compare differing opinions on what might be included in a list of 'fundamental constitutional issues', available at <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>> accessed 8 July 2015.

¹³⁹ Classification of referenda by subject matter is only descriptive and not analytical, M Setala, *Referendums and Democratic Government: Normative Theory and Analysis of institutions* (Macmillan 1999) 69.

appropriately used in relation to fundamental constitutional issues".¹⁴⁰ Appropriateness of subject matter is important for the extent of the opportunity for democratic participation that the EUA referenda will provide. Constitutional significance and public salience are used therefore in the analysis of the EUA referenda triggers, to the extent that it can be presumed that the more an issue is constitutionally significant or salient, the more appropriate it is to hold a referendum, and that the less this is true the less appropriate it will be to hold a referendum and the less the referendum will be an effective participative opportunity for citizens.

One democratic issue for referenda is that for them to be an effective means of participation the turnout needs to be sufficiently high for the result to be considered as representative of the wishes of citizens as a whole. It is difficult to say, though, at what point turnout is low, and this will vary from referendum to referendum.¹⁴¹ The conclusion from House of Lords Committee in 2009-10 was that "there should be a general presumption against the use of voter turnout thresholds and supermajorities. We recognise however that there may be exceptional circumstances in which they may be deemed appropriate".¹⁴² The Scottish referendum on devolution in 1979 is one example of a referendum that fell short of its turnout threshold and therefore the majority vote in favour was not implemented. It seems reasonable that a decision on the subject of the referendum reverts back to Parliament, if there is not sufficient interest for citizens to turn out in high numbers and make the decisions themselves. The referendum result can still be considered in Parliamentary debate, which will presumably take in to consideration the choice of those that did vote and any indication of a strong minority preference, but it avoids the weak legitimacy issues of referenda with low levels of public interest being automatically implemented. What the turnout level should be and whether it should be a fixed figure or left to the discretion of Government to decide when a referendum result should revert back to parliamentary decision-making is a question for further debate. One of the issues discussed here in relation to the EUA is whether the subject matter chosen for referenda is likely to lead to a turnout that is sufficient for a presumption that the subject matter is appropriate.

In Government speeches relating to the EUA the distinction between the constitutional significance of the overarching EU policy of the UK government and each of the specific situations that will lead to a referendum are often elided, with the importance of the EU to the UK constitution being used

¹⁴⁰ House of Lords Select Committee on the Constitution, 2009-10. *Referendums in the United Kingdom* para 94, available at <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>> accessed 8 July 2015.

¹⁴¹ For summary of issues relating to the use of thresholds see V Bogdanor, *The New British Constitution* (Hart 2009) 192-3. For discussion of turnout and the use of turnout thresholds see House of Lords Select Committee on the Constitution, 2009-10. *Referendums in the United Kingdom* para 180-189, available at <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>> accessed 8 July 2015.

¹⁴² *Ibid* para 189.

to justify the whole range of situations that trigger referenda in the Act, whether or not the particular issue that would be the subject of the referendum is in itself significant.¹⁴³ Ratification of an extensive treaty amendment or new treaty that might alter the EU competence framework or legislative process will have significant implications for the UK and are easy to categorise as constitutional. At the other extreme it is difficult to see how the change in Council voting process from unanimity to QMV with regard to changing the list of military products exempt from internal market provisions could be viewed as fundamental in UK constitutional terms.¹⁴⁴ Between these extremes there are a wide range of issues that may or may not be classified as 'constitutionally significant' depending on the perspective of the person making the decision and the current legal and political situation, such as adoption of the Euro,¹⁴⁵ environmental measures,¹⁴⁶ police co-operation,¹⁴⁷ and the EU's multi-annual financial framework.¹⁴⁸ Even treaty amendments that transfer competence are likely to vary in their constitutional significance to the UK. To avoid discretion for future governments and to ensure the consistent application of referenda the EUA was drafted to cover all transfers of competence in a Treaty amendment, but the consequence of that decision is the lack of consistency in the constitutional significance of the issues that trigger referendum. This is less problematic if all referenda attract sufficient interest from the public for a high turnout, but it is more likely that there will be referenda required that do not attract high numbers of citizens to vote, meaning that the administrative cost is more likely to be viewed as unjustified and the effectiveness of the democratic participation through a referendum vote limited.

The EUA criteria eschew the 'fundamental constitutional issues' approach to deciding when a referendum should be held. The EUA does, however, require referendum for some clearly fundamental constitutional issues, such as treaty amendment, which are likely to have a high turnout at a referendum. It is also possible that the Government have taken the view that all increases in the competences of the EU, and changes in voting procedures that affect national control of EU level policy, are fundamental constitutional issues because of their impact on sovereignty, and are therefore appropriate as subjects of a referendum. However, not only are there other clearly constitutionally significant issues, such as the accession of new Member States or a decision to leave the EU, that are not included, referenda may also be held to approve issues that are not only difficult to be viewed as constitutionally fundamental, but might even be described as

¹⁴³ See for example speech by William Hague HC Debate 7 Dec 2010 vol 520 col 191.

¹⁴⁴ M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3, 19.

¹⁴⁵ S6(5)(e) EUA.

¹⁴⁶ Part 2, Schedule 1 EUA.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

trivial.¹⁴⁹ If the Government were to justify the use of referenda on the basis that any increase in competence is a fundamental constitutional issue, then it would beg the question as to why they do not also see reductions in competences as fundamental issues. It would have been more consistent to define the relationship with the EU as the fundamental issue that will require legitimisation by a direct citizen vote and require a referendum whenever this relationship changes, either to enhance or reduce the supranational powers of the EU. It is only certain aspects of the UK's relationship with the EU that have been selected as appropriate for legitimisation via a referendum, not the UK's relationship with the EU or the EU's competences overall.

The inclusion of the significance condition, despite the relatively small impact it is likely to have on the number of referenda held, is important because it would seem to acknowledge that it is not appropriate for referenda to be held on EU policy issues that have little impact on the UK. This condition confirms in the legislation that it is not sufficient to deem all referenda triggered by changes to the UK's relationship with the EU, even if limited to increases in EU competences or powers, as significant enough to warrant a referendum vote. As the explanatory notes of the Act stated: 'The inclusion of the significance condition minimises the risk that a referendum will be required in relation to the transfer of power considered to be insignificant'.¹⁵⁰ It may be true that the significance condition reduces the risk, to some degree, of holding insignificant referenda that have low turnout, although it is not clear whether in constitutional or salience terms, but it only does so in relation to two clauses within the EUA (s4(1)(i) and (j)) and does not 'minimise' this risk in general when viewing the legislation as a whole. Moreover, its inclusion is in apparent contradiction of the blanket requirement in the EUA for all other competence increases and for almost all voting procedure changes to be approved by referendum as a result.

As well as moving away from holding referenda just on issues of constitutional significance, the EUA has not tried to limit referenda to subjects that resonate strongly with the public, irrespective of their constitutional significance, and a number of referenda could be triggered that lead to low turnout as a result.¹⁵¹ There are issues of high public salience, such as the issue of joining the Euro,¹⁵² included in the EUA, but there are other topics that are likely to attract a far lower voter turnout, such as the European public prosecutors office¹⁵³ and the Schengen protocol.¹⁵⁴ There are also highly

¹⁴⁹ M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3 refer to the military products voting rule in these terms.

¹⁵⁰ Explanatory notes to the EUA 2011 para 47.

¹⁵¹ This is described as a minimalist approach in M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3, 9 and 18-23.

¹⁵² s6(5)(e) EUA.

¹⁵³ s6(5)(c) and (d) EUA.

salient issues that have not been included in the EUA. One surprising omission from the list, for example, is withdrawal from the EU. The issue of salience also arises in relation to the technical nature of some EUA referendum triggers; for example people could be asked to vote on whether there should be a change from a special legislative procedure to the ordinary legislative procedure in the EU in relation to a specific treaty article without a significant policy hook. The relatively technical process based subjects in s6 and schedule 1 EUA are particularly problematic as they require a higher investment in time to understand and may be coupled with topics that do nothing to increase the salience of the issue; so that even if these voting processes have constitutional significance their lack of salience for the public may make them less appropriate as the subject of a referendum, lead to low turnout, and reduce the effectiveness of direct participation. UK experience of referendum indicates that technical procedural issues of this nature, even when they are of fundamental constitutional significance in the UK, do not resonate strongly with the public. The turnout for the AV referendum, despite its significance for UK politics, was only 42%, and this was boosted by being held on the same day as people were voting in other elections.¹⁵⁵ It would be surprising if there was even this level of turnout for a referendum on the voting processes in the rather distant Council of Ministers. This may go some way to explaining why this sort of referendum requirement for technical changes to voting procedures or the legislative process is unprecedented in EU Member States, if not attached to highly politically salient or fundamental policy issues.¹⁵⁶

These issues related to the lack of constitutional significance or public salience could increase the risk of poorly informed voting occurring,¹⁵⁷ reduce the willingness of citizens to engage with the referenda issues, increase the reliance on political cues, and increase the possibility of votes based on opinions on matters other than the specific ones in the question, such as the popularity of the incumbent government.¹⁵⁸ All of this undermines the democratic value of using referenda and increases the possibility of manipulation of the referendum process by political elites.¹⁵⁹ The distinction between expressing popular will as relates to the outcome of policy issues and more

¹⁵⁴ s6(5)(k) EUA.

¹⁵⁵ The other UK referendum on governance arrangements also received significantly lower turnouts than those on more salient topics: the turnout for referendum on establishing the London Assembly and an elected mayor was only 34% and the North East vote on regional government 47%. Scottish independence referendum on the other hand recently had a turnout of 85%.

¹⁵⁶ M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3, 20.

¹⁵⁷ For conclusions about conditions conducive to competent voting see S Hobolt, *Europe in Question: Referendums on European Integration* (OUP 2009) 239-242.

¹⁵⁸ S Hobolt, *Europe in Question: Referendums on European Integration* (OUP 2009) 50-53. A Glencross, 'First or second order referendums? Understanding the votes on the EU constitutional treaty in four EU Member States', [2011] *Western European Politics* 755

¹⁵⁹ For comment on political manipulation see M Setala, *Referendums and Democratic Government: Normative Theory and Analysis of institutions* (Macmillan 1999) 161-3.

technical political process issues might be one way to indicate where the people's and their representatives' roles might be distinguished in making choices using direct democracy. The more an issue requires specialist knowledge and time for an understanding that can lead to an informed decision the more likely it is that people would rely on their representatives for a decision. On the other hand, the more that a referendum issue is a subject or policy based one, or about policy outcomes of the legal process rather than the process itself, the more appropriate it is to make a decision using a referendum. The EUA criteria that trigger a referendum, though, do not follow such an approach, contain a number of inconsistencies and as a result may undermine the democratic value of using referenda in the UK.

Of course, from a normative perspective, it might be argued that the people should be directly asked their opinion in a specific policy vote whenever possible to maximise the opportunity for democratic participation, irrespective of whether the issue is fundamental or not, or policy or process based, and that there will be a natural selection by citizens of the issues that they consider significant and worth voting on, and therefore appropriate as topics for a referendum. If this view were taken, then the EUA's inconsistent selection of potential referendum topics is less problematic. However, a number of reasons have been indicated for taking a more cautious or limited approach to extending the use of referendum than that taken by the EUA.¹⁶⁰ First it is impractical, even with today's technology, to have referenda on even a small percentage of the policy issues that pass through Parliament without overloading people with the number of issues that they would need to understand and take the time to vote on. Secondly, direct democracy is a complement to representative democracy and political representatives elected will be expected to continue to carry out a decision-making role. In the usual course of events where an issue is of relatively minor constitutional impact or of minor interest to the public, it is likely that representatives will be expected to study the available options and then make a decision, rather than ask the people to understand and vote on them in a costly national referendum.¹⁶¹ The EUA confuses this position. Thirdly, the UK has only held a limited number of referenda so the culture of direct democracy is in an early evolutionary phase and voter engagement is not likely to be automatic. The reservation of referenda, as far as this is possible, for decisions on fundamental issues, before moving possibly to include the less significant issues of the type included in the EUA, would allow a gradual incorporation of direct democracy in to the existing representative framework, which would in turn allow the potential disadvantages and advantages of using referenda, such as the impact they might

¹⁶⁰ For a summary of concerns raised about the wide use of referenda in an EU context see M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3, 19-23.

¹⁶¹ See V Bogdanor, *The New British Constitution* (Hart 2009), Ch.1.

have on Governmental ability to respond to political events and engage in EU policy making, to be assessed and the further roll out of referenda managed accordingly, if required.

Behind the seemingly altruistic intentions of the UK Government increasing the democratic influence of UK citizens over EU policy decisions, and indirectly increasing the democratic legitimacy of the EU, lie the policy preferences and self interest of party politics at Member State level. These political motivations for introducing direct democracy in to UK legislation are reflected in the strongly politically motivated criteria for the triggering of referenda, and the inconsistency in the significance of the issues that could be the subject of these referenda. Overall this gives a sense of a legislative framework that prioritises party political concerns over citizen participation, despite its introduction of a new democratic instrument in to UK legislation. The final section of this chapter assesses the overall impact of the legislative design of referenda in the EUA on the democratic potential of direct democracy.

Democratic potential of the EUA - referendum initiation and binding results

Finally, what does the analysis of the EUA legislative design tell us about the potential for enhancing the EU's democratic legitimacy, through increasing citizen influence over the UK's EU policy and legislative agenda and the ability to challenge established preferences? In addressing this question we return to the classification of referenda in the EUA according to their initiation and the extent to which the result is binding, and what this means for the democratic criteria of increased citizen influence over agenda content and over agenda outcomes. As with the ECI, the two key factors for how strongly these criteria are met are the institutional mediation of the EUA referenda and the extent to which they enable citizens to challenge established policy preferences.¹⁶²

In terms of increasing the influence of citizens over the content of the policy and legislative agenda, the referendum is inherently limited. In a referendum citizens are asked to approve or reject a government proposal or decision in a specific policy area, but usually this opportunity only arises when the Government decides to offer it to citizens or when legislation triggers a referendum. The ability of citizens to choose the subject matter and the timing of a referendum will only be enhanced if the referendum is combined with a democratic instrument such as the popular initiative, which allows them to propose laws. As Lipjhart says, "The voters' influence is strengthened a great deal if they are allowed not only to vote on propositions originating in the legislature or the executive but also to propose laws ... The referendum by itself entails a very modest step towards direct

¹⁶² The issue of institutional mediation in relation to referenda is explored in detail in S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012) 98-128 Ch 2.

democracy but, combined with the initiative, it becomes a giant step".¹⁶³ The EUA has not introduced anything akin to the initiative to allow citizens to propose the subject matter on which referenda should be held on an ongoing basis, it has only established in law a promise that citizens will be able to have a direct influence on certain specified policy matters when these are engaged with by future governments.

As well as not providing citizens with an opportunity to choose when they want an issue to be the subject of a policy vote on an on-going basis, the Government also did not offer any means of direct participation for citizens to choose the subjects or criteria that have been included in the EUA as triggers for participation through referenda. The Government controlled and defined the decision as to when the EUA would provide citizens the opportunity to directly participate in EU policy. There is also no provision in the EUA for any direct involvement of citizens in the future redrafting of the EUA; for example, a requirement for referendum approval of changes to the legislation could have been included. As it stands, therefore, modification or repeal of the EUA need only follow the standard legislative procedures of the UK, and citizens will have no formal influence over the issues that may or may not be included as requiring referendum approval.¹⁶⁴ If citizens have not been given control over the initiation of referenda and the policy issues they get the chance to vote on, the question becomes to what extent the legislative design of the EUA restricts government discretion over the initiation of referenda.

The EUA has moved the UK from its previous constitutional position of referendum initiation being formally controlled by the incumbent government to a position where there is a legal obligation to hold a referendum if any of the criteria established in the EUA are met.¹⁶⁵ Until such time as the legislation is amended future governments are expected to abide by the referendum condition when it is triggered.¹⁶⁶ Despite the importance of this legal prescription, future governments will still retain some degree of control over the initiation of referenda as provided for in the EUA, which will limit the reduction in institutional control over the UK's EU policy agenda. First, through negotiations in the EU, the UK Government could choose to use its influence to try to avoid the issues that would trigger a referendum in the UK or modify the approach in addressing them.¹⁶⁷ Secondly, the Government still retains control over interpreting whether a referendum has been triggered.

¹⁶³ A Lipjhart, *Democracies: patterns of majoritarian and consensus government in 21 countries*, (YUP 1984) 200.

¹⁶⁴ Political pressures, outside the legal avenues of legislative amendment, will of course still remain.

¹⁶⁵ M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015).

¹⁶⁶ There has been some implicit legal support for this in *Wheeler v The Office of the Prime Minister* [2014] EWHC 3815 (Admin).

¹⁶⁷ M Gordon, 'The United Kingdom and the Fiscal Compact: Past and Future' [2014] Eu Const 28.

Politicians have been adept at interpreting the political situation to avoid fulfilling political promises to hold a referendum in the past, for example during the Lisbon treaty ratification process as promises were made and then reasons found for not holding a referendum. It is possible that future Governments will be just as adept at interpreting the legal provisions of the EUA to avoid holding referenda, although the provisions in the EUA will make this more difficult.

The EUA has been described as establishing a 'referendum lock' that guarantees a referendum will be held when there is any transfer of competence or power to the EU from the UK; but there are gaps in the provisions that could be exploited, such as the lack of a requirement for referendum approval for the UK to join an enhanced cooperation group even if this means new competences for the EU with regard to the UK, which would normally trigger a referendum; there may be some discretion for the Government when deciding whether competences have been increased; and the significance clause specifically provides for discretion in some limited areas.¹⁶⁸ As a result, not only have citizens not been given increased influence over the policy agenda issues that a referendum might be held on, but the promise made to them in the EUA to hold referendum under certain conditions might also not be as locked in as it first appears.

Furthermore, the complex and inconsistent framework for the referenda criteria that is the result, in part, of attempting to tightly restrict future government discretion could paradoxically have left the EUA more open to amendment and give future governments the opportunity to increase their discretion. This hypothetical situation might arise, for example, if costly and time consuming referenda start to be needed regularly on minor policy issues, or if the UK starts to be marginalized in the EU because of complications arising from the EUA provisions, or if the sheer number of referenda undermines their value in the eyes of the public. These issues could lead to a future government deciding that amendment of the EUA referenda provisions was necessary, which would afford them an opportunity to alter the political tone of the legislation or reduce the use of referenda that might not otherwise have arisen if the legislation had been drafted in a more straightforward manner. Despite the possibility of amendment of the EUA and Government discretion, the control of future governments over the initiation of referenda, in the policy areas covered by the EUA, has been limited to some degree, and there will be occasions when approval by referendum is legally required; particularly for the more significant EU related events, such as the ratification of treaties. More experience is needed, though, of how the legal provisions of the EUA are to be applied, and how future governments respond to the existence and content of the

¹⁶⁸ For 'gaps in the armour plating of the Act' see M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3.

legislative provisions for referenda, before a proper assessment can be made of the extent to which this potential for institutional control over the holding of a referendum is realised.

Subsequent to confirmation that a referendum is to be held, there is the opportunity for the authorities to influence democratic participation by referendum through its administration. The Government has significant control of the process that is followed during a referendum because they set the question, the precise timing of the referendum, and frame the political agenda environment within which public debate occurs; all of which influences the voting decisions in the referendum itself and potentially allow the Government to increase the support for its preferred policy position.¹⁶⁹ The EUA only addresses this issue directly by requiring a separate question on the ballot paper for each treaty or decision that the referendum is deciding upon,¹⁷⁰ and by stating that the Electoral Commission is responsible for public awareness of the issues.¹⁷¹ The potential for institutional control as a result of electoral administration is moderated in the UK through the Political Party Elections and Referendums Act,¹⁷² which sets parameters for the funding of referendum campaigns, gives the Electoral Commission some influence, in an advisory capacity, over the question that is set in a referendum,¹⁷³ and requires a separate act of parliament for the rules and processes of each referendum held, which further disperses control. Although the administrative control of the referendum process has an influence on a referendum result, the lack of specific provisions in the EUA relating to this issue mean that it is not discussed further here.

The point at which the institutions have least control over a referendum is when citizens vote. Citizens are free when voting and when the ballot has been held in a fair manner there is the potential for a vote contrary to the institutional policy preference. Given the limited citizen control over the timing, procedure or subject matter of the referendum in the EUA, this relatively direct legal impact of a vote cast by citizens on a specific issue is the principal means by which the EUA will influence EU democratic legitimacy. It is clear from the drafting of the EUA that the Government should be bound by the referendum result when the result is negative: the referendum condition is only met if “the majority of those voting in the referendum are in favour ...” of the relevant treaty or decision.¹⁷⁴ This is true to the extent that when a government policy in relation to the EU is rejected

¹⁶⁹ Tierney emphasises the importance of recognising institutional control over the referendum administration process in S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012) 109-116.

¹⁷⁰ s12 EUA.

¹⁷¹ s13 EUA.

¹⁷² s103 Political Parties, Elections and Referendums Act 2000.

¹⁷³ See S Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012) ch 8, 226 -259 for detailed discussion of importance of the referendum question for democratic impact.

¹⁷⁴ Art 2(2)(c) and Art 3(2)(c) EUA.

in a referendum, the treaty cannot be ratified and Council decisions cannot be approved. However, it is not as clear whether the Government should be bound by a positive referendum result, or what the response of the government should be following a negative referendum result beyond the initial non-ratification of a treaty or non-approval of a s6 EUA decision.

It would be surprising if a positive referendum result was not implemented by a government that has negotiated at EU level and reached a position where they wish to approve the decision or ratify the treaty. However, on rare occasions a Government may not want to implement a positive referendum vote. For instance, economic or political circumstances in the UK may change suddenly between the holding of the referendum and completing the ratification of the treaty, so that the Government no longer believes it is tenable or desirable to ratify a treaty, despite the referendum result. It is also possible that there is a change in Government in the time between holding the referendum and finalising the ratification of a treaty or approving a Council decision, and that the new Government does not agree that the referendum approval should be implemented. The EUA does not address this eventuality. The legislation clearly states that a treaty cannot be approved without a positive referendum result, but conversely it lacks specific legal provisions stating that referendum approval must be applied. The significance of this for the analysis of the EUA is that it is another example of the unidirectional nature of EUA provisions and reflects the appearance of a political rather than democratic motivation behind introducing the EUA referenda. This scenario also raises interesting constitutional questions, which are outside the scope of this thesis, about whether direct or representative democracy would take precedence when they would lead to different decisions, and whether there is the need to specify in legislation that a referendum result must be implemented.

The Government also retains control over action taken following a rejection for a policy position from citizens in a referendum, which could influence the eventual policy outcome of the vote by citizens. There are options open to a Government that is determined to get approval for the decision or treaty that has been rejected in a referendum vote. One option is to repeat the referendum and rerun the campaign in an attempt to have a different result second time around. This approach has been taken twice in Ireland when an EU treaty has been rejected by referendum and on both occasions the second referendum result approved the ratification of the treaty.¹⁷⁵ This raised a number of questions about the enforcement of referendum results and the appropriateness of

¹⁷⁵ For discussion of Ireland's experience regarding EU treaty referenda see for example, C Costello, 'People's Vengeances: Ireland's Nice Referenda' [2005] *EU Const* 357 or G Hogan, 'The Lisbon Treaty and the Irish Referendum' [2009] *European Public Law* 163. For more general discussion of the use of a 2nd referendum see G de Búrca, 'If at first you don't succeed: vote, vote again: Analysing the second referendum phenomenon in EU treaty change' [2010] *Fordham International Law Journal* 1472.

holding a referendum again on the same subject, or how long it is appropriate to wait before a referendum can be validly rerun. The legislative design of referenda in the EUA does not address these essentially political decisions relating to the negotiation about a decision or treaty that has been rejected in a referendum vote in the UK. The key issue for this chapter is the potential institutional mediation that this lack of legal provision leaves in relation to a referendum vote. The Government will decide whether to renegotiate the decision or treaty, what the key issues are, and when a suitable point has been reached to present the decision to its citizens for a vote again. The voice of UK citizens has been injected in to the approval process but the existing institutions handle the echoes of that voice.

The legal provisions in the EUA may leave options open to the UK government in their response to a referendum result, but there is likely to be political pressure on implementing the result. Even for non-binding referenda that lack any legal obligation on a government to implement the wishes of citizens expressed in a referendum result there are likely to be political pressures on a government to ensure the implementation of the result. As Setälä put it, “in established democracies it seems to be very difficult for parliamentarians to vote against the result of an advisory referendum”.¹⁷⁶ The greater the level of support for an issue and the greater the level of turnout at the referendum the more difficult and less likely it will be that the government would ignore the result. Mendez, Mendez and Triga described the divide between legally binding and non-binding referenda as “being somewhat artificial” and cited Finland’s EU membership referendum as an example of an advisory referendum whose result it would be “unimaginable” not to be implemented.¹⁷⁷ Similarly, none of the referenda that the UK national government has held before have been formally binding, but the results have always been implemented. On this reading, therefore, the EUA referenda results are likely to be implemented by the Government, even if the provisions in the legislation might legally allow an element of discretion at times. It is also possible, however, that the Irish example is indicative of the influence of EU membership on the political response to Member State referenda on important EU issues, which brings in to conflict the expressed wishes of a specific Member State and the political preferences of the other Member States. Similar pressure to find a ‘solution’ may be brought to bear on the UK government following a no vote in a referendum, which could also influence their political response to the referendum vote.

¹⁷⁶ House of Lords Select Committee on the Constitution, 2009-10. *Referendums in the United Kingdom* para 193, available at <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>> accessed 8 July 2015.

¹⁷⁷ Finland is one example of a state with non-binding referenda – F Mendez, M Mendez, V Triga, *Referendums and the European Union: a comparative enquiry* (CUP 2014) 37.

The final point about outcomes is whether, irrespective of the political pressures, the referendum result can be legally binding on any Government in the UK system, as a result of the provisions in the EUA, because of parliamentary sovereignty. The EUA not only imposes an obligation on future institutions to hold a referendum, when the criteria in the EUA are met, but it also imposes an obligation to abide by a result that vetoes a treaty or decision. As discussed above, the manner and form approach to parliamentary sovereignty is that future parliaments can be bound as to how legislation should be passed, in this case through the addition of the referendum condition.¹⁷⁸ The new legislative process established for the issues covered by the EUA means that if there is a disagreement between a Parliament that wishes to approve a decision taken by the UK Government and citizens who have indicated through a referendum that they do not, then it is more likely now that the view of the people will prevail and the decision will not be approved. The referendum condition of the EUA introduces popular sovereignty in to the UK's parliamentary system to some degree and, once you have accepted that this is possible, an extension of the same argument means that it is likely the referendum result will become binding in law as a result of the EUA provisions and also through political pressure.¹⁷⁹

Conclusion

The analysis of the ECI in the previous chapter showed evidence of institutional mediation by a bureaucratic institution through the manner in which they implemented the legislative provisions and as a result of the ECI's legislative design. That there will be institutional control over the referenda of the EUA is less apparent than for the ECI because of the strength of the legal obligation imposed by a referendum result, but the analysis in this chapter shows that there is still a strong degree of institutional control written in to the legislative design of referenda in the EUA. When a referendum is triggered, the impact of the vote will be the point at which institutional mediation is weakest. Prime facie, the EUA has established referendum 'locks' that promise mandatory recourse to popular vote and implementation of the referendum result, and the limitation of future governmental discretion in relation to EU policy. However, as we have seen from the analysis of the EUA provisions, once this promise and the extent of Governmental discretion is examined in more detail, it becomes apparent that future governments will still have a degree of control over the promise that has been made and the policy impact the EUA might have. Without experience,

¹⁷⁸ M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015).

¹⁷⁹ Peter Browning stated the conundrum that this brings: The sovereignty of Parliament "is certainly threatened by the use of referendums. Referendums put the people before parliament. ... If the people vote one way, their representatives another, who should prevail, who is sovereign?", House of Lords Select Committee on the Constitution, 2009-10. *Referendums in the United Kingdom, para 58*, available at <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>> accessed 8 July 2015.

though, of how Governments respond to situations where a referendum may be required, and how they administer and respond to a referendum vote, the extent that the democratic potential of the EUA referenda are limited by institutional mediation remains unclear. It will be interesting to see how the UK government responds to referendum results, legally and politically, when citizens are eventually given an opportunity to directly participate in EU policy decisions through the referenda provisions in the EUA, and the extent to which they restrict the quantity and quality of the opportunities for democratic participation.

The governmental control over the policy agenda has led to the EUA containing partisan policy preferences which reflect a form of 'party political' institutional mediation. The government has used its institutional position to protect a policy position against future challenges by other political parties that may be in Government. This policy preference that the Government has reinforced is a strengthening of the inter-governmental nature of the EU even if it leads to insignificant referenda topics that could undermine attitudes towards using direct democracy. Increasing democratic participation therefore appears as a tool for these political purposes, rather than the central objective of the legislation itself.

The continued control of the representative institutions over the opportunity, agenda and even, to some degree, the legal impact of the EUA referenda means that the democratic impact of writing referenda in to UK legislation is likely to be limited. As with the ECI, the striking introduction of direct democracy, through the EUA, in to an otherwise representative democratic system is better described as a 'baby step' than a leap forward in democracy. That said, introducing referenda in to UK legislation remains a change of some importance, not least for UK constitutional doctrine, because citizens are now empowered, if they wish, to reject the established policy preferences of the standing government, and almost any future EU treaty amendment is dependent on citizen approval. Having analysed the ECI and the EUA separately, the final chapter brings together the findings in the two previous chapters to consider what they mean overall for the EU's dual democratic paradigm and its democratic legitimacy.

Chapter Four

Direct Democracy In and Between the EU and the UK

The ECI and EUA are an important part of the recent developments in the ongoing process of dual democratisation that is taking place in and between the EU and its Member States. The rise of direct democracy in the EU has the potential to be a substantial stride towards increased citizen participation and popular influence over the EU constitutional framework and the legislative authority of EU institutions. This final chapter brings together the research findings from the separate legal analysis of the ECI and EUA and their democratic potential, in the two previous chapters, to consider what the joint impact from the contemporaneous implementation of these two new instruments of direct democracy could be for the institutional framework of EU democracy and its legitimacy. This is done by examining two questions.

The first question is, *'What are the implications of the ECI and EUA for the existing EU democratic paradigm?'* There are some tensions between the ECI and the EUA, and the EU's dual democratic paradigm where these new instruments challenge the existing legitimisation boundaries in the EU. The analysis of the previous chapters indicates that for the ECI this challenge comes particularly when it raises questions of whether EU citizens should be able to propose treaty amendments, and for the EUA from the provision in the legislation for Member State level referenda on matters of EU level law and policy making. However, the findings discussed in this final chapter indicate that in general the ECI and EUA fit within the existing democratic paradigm to the extent that they legitimise EU law and policy making, and EU treaty amendment, respectively. The first section of this chapter, therefore, includes first a reminder of the characterisation of the EU democratic paradigm used in this thesis and secondly comments on the implications for the democratic institutional framework from the implementation of direct democracy at Member State and EU level.

The second question examined in this chapter is, *'What is the potential influence of the ECI and EUA on the democratic legitimacy of the EU?'* The findings from chapters two and three, in relation to this question, show that institutional mediation limits the democratic potential of the ECI and EUA to increase citizen influence over the policy agenda and its outcomes. This similarity in experience is reflected in a restricted ability to challenge established policy preferences, which is a key indicator of the democratic strength of any democratic instrument. This restriction occurs despite the ECI and EUA operating at different levels in the EU and influencing different aspects of EU democratic legitimacy. The ECI and EUA both provide an extra opportunity for citizen participation to democratically legitimise the EU, but in practice there are limits on their democratic potential to

facilitate an increase in citizen influence over the EU law and policy agenda, or its outcomes. The second section of this chapter, therefore, comments on the institutional mediation of direct democracy from an EU perspective, the extent to which policy preferences were restricted as a result, and what the implications might be for the use of direct democracy in the EU.

The overall conclusions that are drawn in relation to these two questions are that the introduction of the ECI and the EUA could, in principle, bring significant changes to both the democratic paradigm and democratic legitimacy of the EU. However, in practice, the challenges of the ECI and EUA to the current dichotomies within the dual framework of EU democracy are limited in number and unlikely to lead to any telling alteration to the status quo in the short term. Similarly, the ECI and EUA have the potential to increase EU democratic legitimacy through greater citizen participation and influence over the EU political agenda and its outcomes, but the structure of the EU polity and the institutional mediation of these democratic instruments, which has prioritised politics over participation, have limited the ability of citizens to challenge the established policy preferences.

Democratic paradigm of the EU

The institutional form of democracy in the EU polity is based largely on representative democracy, but is supplemented now by the referenda of the EUA since 2011 for UK citizens, and by the ECI since 2012 for EU citizens.¹ Two of the key characteristics of EU democracy are its combination of supranational and Member State democratic processes and legitimisation, and the differentiation between the legitimisation of the constitutional framework of the EU, and its daily policy and legislative decision-making.² In the following section there is a reminder of the manner in which these two dichotomies interact and the institutional paradigm they underpin, which is followed by discussion of the impact that the new challenges of the ECI and EUA might pose.

There are three types of institution in the EU: the supranational institutions directly legitimised by EU citizens, the intergovernmental institutions that are indirectly legitimised via Member State level democratic processes, and there are the Member State institutions that make EU related policy decisions and ratify treaties that are directly legitimised by Member State citizens. The treaties, the constitutional framework of the EU, are predominantly legitimised using member state level democratic processes, such as the general election of political representatives and, for a limited

¹ Art 10(1) 'The functioning of the Union shall be founded on representative democracy'. The UK has also previously held a referendum on EU membership in 1975.

² These dichotomies were described in detail on pgs 10-13.

number of states, approval by Member State citizens through a referendum.³ There is some relatively minor involvement of the supranational EU institutions, for example through participation during the early stages of the treaty convention process, in establishing the constitutional order of the EU, but the agenda is set through Member State representatives in the European Council and the final treaty text must be ratified in accordance with Member State processes.⁴

The daily policy and legislative decision-making of the EU, on the other hand, is largely controlled by supranational institutions.⁵ The co-legislating bodies, the European Parliament and the Council of ministers, are legitimised through EU level and indirect Member State level democratic processes, respectively. UK citizens, prior to the introduction of the ECI and EUA, could vote in European Parliament elections as part of democratically legitimising EU law and policy making, and they could vote in Westminster elections, which indirectly legitimise the role of Government ministers in the Council, the role of the Prime Minister in the European Council, and the role of the Government in negotiating and ratifying treaty change.

Although there is Member State level legitimisation of both the constitutional order and the daily political authority of the EU, there is an important distinction between the two that is written in to EU law. Art 48(2) TEU states that ratification of a new treaty or treaty amendment must be carried out in line with Member State law and processes, which means that agreement at supranational level is followed by approval at Member State level.⁶ For EU legislation, however, it is expected that in the normal course of events the minister will be there acting as representative of their Member State government and able to approve decisions without recourse to further Member State level approval processes, once agreement has been reached in the Council.⁷ This means that although there is indirect Member State level legitimisation of the policy making and legislative procedures of the EU, there is little direct involvement of Member State level institutions or democratic processes, which has implications for the use of direct democracy at Member State level as part of the EU's democratic legitimacy.⁸

³ See F Mendez, M Mendez, V Triga, *Referendums and the European Union: a comparative enquiry* (CUP 2014) ch 2 for a summary of parliamentary processes that need to be followed in each Member State for treaty ratification and which Member States need to hold a referendum.

⁴ The ordinary revision procedure is set out in Art 48 TEU.

⁵ The ordinary legislative procedure is set out in Art 294 TFEU.

⁶ Art 48(6) TEU also provides for a two stage process for approval of the simplified revision procedure.

⁷ The expectations of ministers in the Council are outlined in Art 16 (2) TEU.

⁸ There is an exception where National Parliaments can stop the legislative process in Art 81(3) TFEU. The yellow card system introduced by the Lisbon Treaty also gives National Parliaments a role within the legislative procedure to protect the principle of subsidiarity. For more details on yellow card system see A Cygan, 'Collective' Subsidiarity Monitoring by National Parliaments after Lisbon – The Operation of the Early Warning

One noteworthy gap in the EU democratic paradigm is that the Commission is not an institution democratically legitimised by its citizens. The Commission derives some democratic legitimisation as a result of its accountability to the directly elected European Parliament for its membership and performance.⁹ However, there has been no specific mechanism for citizens themselves to elect members of the Commission or, prior to the ECI, to influence their policy decisions. This is of particular relevance to the discussion of the ECI because of the Commission's control over the ECI process and its role of legislative initiative. The institutional position of the Commission, including its virtual monopoly over legislative initiation that provides influence over the EU policy agenda, has traditionally relied on the rule of law and technocratic, performance legitimacy for its legitimisation.¹⁰ The ECI might, in the long term, come to be viewed as part of the legitimisation of the Commission's role of legislative initiative,¹¹ but as things stand the extent to which the ECI might move the Commission along a path towards being viewed as less technocratic and a more democratically legitimate institution is very limited.

This sketch of the EU democratic paradigm is structured around the institutional balance of the EU and the manner in which Member State and EU institutions combine to legitimise the EU. However, it should be emphasised that the political rights to participate in parliamentary elections at supranational and Member State level, and now through direct democracy instruments for UK citizens at both levels, rely on dual Member State/EU citizenship. Central to the discussion of the impact of the ECI and EUA is the change in the role that citizens might play in influencing the EU constitutional framework and daily political decision-making through the contemporaneous introduction of the ECI and EUA, and the extent that it remains controlled by the existing institutions. This inevitably has links to the subject of citizenship, but the analysis in this chapter is of

Mechanism in Trybus and Rubini (eds) *After Lisbon: the Future of European Law and Policy* (Edward Elgar, 2012).

⁹ The Commission is responsible to the European Parliament (Art 17(8) TEU) and its members must pass a vote of consent by the European Parliament before confirmation of their appointment (Art 17(7) TEU). Art 17(7) TEU also provides that the elections to the European Parliament must be taken in to account when the European Council proposes a president, which was extended in 2014 so that the Commission president would be the candidate nominated by the party grouping that won most seats in the European Parliament elections. See also Art 234 TFEU on the tabling before the European Parliament of a motion of censure of the Commission. Art 11 (1), (2) and (3) TEU establish some standards in terms of transparency, against which the Commission's activities can be assessed, but they are not mechanisms of accountability.

¹⁰ For further comment on this point see chapter one pgs 26-28. For an outline of the early approaches to legitimisation of the EU see P Craig, 'Integration, democracy and legitimacy' in P Craig and G de Búrca (eds) *Evolution of EU Law* (OUP 2011) 13-40.

¹¹ An ECI proposal that gathers the necessary support is presented to the Commission for them to decide whether to propose a legal act of the Union based on the ECI proposal, as part of its role of legislative initiative. The ECI could, therefore, potentially increase citizen influence over the legal acts initiated by the Commission and increase the democratic legitimacy of this role as a result.

the impact on EU democracy and citizen participation rather than an analysis of citizenship per se.¹² The focus, therefore, is on the extent to which citizens are able to influence the policy agenda and its outcomes as a result of the ECI and EUA, and the impact this has on EU democratic legitimacy rather than the meaning of citizenship.

The characterisation of the EU democratic paradigm that is presented here is not always clearly reflected in EU law and is already challenged by a number of processes other than the ECI and EUA, for example, the supranational institutional right to propose treaty change, and the EU organic laws, which are commented on below.¹³ Another challenge is provided by the so called yellow card process, which was introduced following the Lisbon Treaty and provides a stronger role for national parliaments in relation to monitoring the application of the principle of subsidiarity in EU law.¹⁴ Notwithstanding its limited use and impact so far,¹⁵ the significance of the 'yellow card system' to the discussion here is the example it provides of Member State level institutions having an opportunity to participate directly in the daily political authority of the EU, rather than in the Member State ratification of treaties.¹⁶ This does not fit easily within an EU democratic paradigm where EU level institutions usually carry out policy making and where Member State involvement in the EU legislative process is indirect through the Council and European Council, and which reserves EU legislative initiative almost exclusively to the supranational Commission. The Art 48(2) TEU right of supranational institutions is discussed below in relation to the ECI, and the EU organic laws are discussed in relation to the referenda provisions in the EUA. These are just three examples of challenges to the general position that there is Member State legitimisation of the EU constitutional order, and predominantly supranational legitimisation of EU policy and law making. This complexity

¹² For recent discussion of EU citizenship see for example M Dougan, N Shuibhne and E Spaventa (eds) *Empowerment and Disempowerment of the European Citizen*, (Hart 2012). Or J Shaw, *The transformation of citizenship in the European Union: Electoral Rights and the Restructuring of Political Space*, (CUP 2007).

¹³ Under Art 48(2) TEU the government of any Member State, the European Parliament, and the Commission may propose treaty amendments.

The five organic laws are Art 42(2) on common security and defence policy; Art. 25 TFEU on additional rights for Union citizens; Art. 223(1) TFEU on a uniform electoral procedure for the EP; Art. 262 TFEU on ECJ jurisdiction over European IPRs; Art. 311 TFEU, third para on the initial decision on Union own resources.

¹⁴ Art 5(3) TEU, 'National Parliaments ensure compliance with the principle of subsidiarity in accordance with procedure set out in that protocol [on the application of the principles of subsidiarity and proportionality]'. Details of how the Commission must respond and when the different parliamentary vote thresholds apply is set out in Art 7 of The Protocol on the Principles of Subsidiarity and Proportionality.

¹⁵ Further information and comment on the use of the yellow card system can be found in the Proportionality and Subsidiarity Report that is part of the Review of the Balance of Competences between the United Kingdom and the EU, available at

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388852/BoCSubAndPro_ac.c.pdf> accessed 8 July 2015. The two occasions that the yellow card process has been triggered are summarised on page 30 of the report.

¹⁶ For more details on yellow card system see A Cygan, 'Collective' Subsidiarity Monitoring by National Parliaments after Lisbon – The Operation of the Early Warning Mechanism in Trybus and Rubini (eds) *After Lisbon: the Future of European Law and Policy* (Edward Elgar, 2012).

in the EU democratic paradigm reflects the piecemeal, dual democratisation of the EU. Next is considered the extent of the challenges posed by the ECI and the EUA to the already partially blurred institutional and democratic framework of an EU polity that rests on supranational and intergovernmental democratic legitimacy.

The ECI, EUA and their combined implications for the current EU democratic paradigm

The ECI and the EUA might question whether the current democratic paradigm is to be sustained, but it seems unlikely that they will have a major impact. Despite the challenges commented on in subsequent pages, the current paradigm substantially accommodates these instruments of direct democracy. The ECI is a supranational instrument that is able to be used by citizens to propose legal acts within the framework of the Commission's powers. EU citizens are able to propose EU law and policy and the Commission, in line with its current role, decides whether to initiate a legal act or not. There may be scope to interpret Art 11(4) TEU and Reg 211/2011 as allowing the inclusion of treaty amendment in the ECI, but there has been little indication from the Commission that they intend to follow this path. The Commission stated prior to enacting the ECI regulation that citizens could not use the ECI process to ask the Commission to propose treaty amendment, and this was confirmed when they rejected the *Anti Nuclear Energy* initiative.¹⁷ Supranational political rights will, on this reading of the ECI, therefore be reserved for the legitimisation of the daily political authority of EU institutions and not challenge the democratic paradigm. Moreover, the Commission approach to ECI registration and subsequent legal outcomes has meant that a challenge to the existing EU policy agenda is unlikely; let alone a challenge to the institutional balance of the EU through the ECI.¹⁸

The s2 and s3 provisions of the EUA, which require referendum approval in the UK before the Government can ratify a new EU treaty or treaty amendment, fit within the EU democratic paradigm of Member State legitimisation of the EU's constitutional order.¹⁹ This strengthens the already intergovernmental nature of the treaty process for UK citizens by providing for an extra domestic step in the ratification process,²⁰ but EU law specifically provides for this two step process and it is in

¹⁷ For initiative details see <ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/429> accessed 13 Apr 2015.

¹⁸ The ECI registration decisions by the Commission are discussed in detail in chapter 2, pgs 98-117. See also J Organ, 'Decommissioning Direct Democracy? A critical analysis of Commission decision making on the legal admissibility of European Citizens Initiative proposals', (2014) EU Const 422.

¹⁹ s4 EUA provides for the conditions that need to be met for approval by referendum to be required. For example, there needs to be a transfer of competence to the EU for there to be an obligation to hold a referendum.

²⁰ It is not just referenda that are provided for in the EUA, there are also strengthened parliamentary procedures before decision can be approved at EU level. For discussion of UK parliamentary procedures specified in the EUA see M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3, 9-18.

line with developments in several other Member States.²¹ The constitutional treaty, in particular, saw a rise in the use, or at least promise of, Member State ratification referenda: France, Netherlands, Spain and Luxembourg held a referendum, and Portugal and the UK promised one.²² In an EU context in relation to its provisions on treaty amendment, therefore, the EUA is not particularly remarkable and fits within the approach of using direct democracy for treaty ratification that appears to have been developing across EU Member States in recent decades.²³

In general the ECI and EUA have fitted within the EU democratic paradigm and their impact on the overall structure of the EU is likely to be limited, but they have raised some questions about EU legitimisation of the EU's constitutional order and the daily law and policy making authority of the EU, respectively. The first question addressed in this section is whether it is appropriate for EU citizens to be able to use the ECI to influence the treaty change agenda, given the supranational character of this voting right and the institution that the proposals are presented to,²⁴ or whether responsibility for legitimising the EU treaties is best left with Member States and the participation of their citizens through national instruments, such as the referenda of the EUA. This question is addressed through considering the arguments for the inclusion of treaty amendment in the ECI process and then the arguments against. The question of Member State level legitimisation of EU law and policy making is discussed later in this section in relation to the referenda provision in s6 EUA.

Supranational legitimisation of EU treaty amendment

So far the Commission's stated policy has been to refuse to register initiatives that propose or require treaty amendment.²⁵ If this were to continue it would mean that the largely intergovernmental process for legitimisation of the EU's constitutional framework would remain unaffected by introducing the ECI. However, the Commission has already diverted from this policy

²¹ See list of referenda held in relation to EU in F Mendez, M Mendez, V Triga, *Referendums and the European Union: a comparative enquiry* (CUP 2014) 24-5.

²² Referenda in the UK and Portugal were not held once the Constitutional treaty had been rejected by voters in the referenda in France and the Netherlands.

²³ It should be noted that only Ireland held a referendum to ratify the Lisbon Treaty. It will be interesting to see the number of Member States that use referenda to ratify the next EU treaty amendment and whether the upward trend is returned to.

²⁴ The Council and European Council are the intergovernmental character institutions as they are legitimised indirectly through the Member States. The Commission and the European Parliament are supranational as they are legitimised at EU level, by direct EU citizen elections for the European Parliament.

²⁵ For comment on the Commission's position in relation to the inclusion of a request for treaty amendment in an ECI proposal see pgs 108-114.

when registering the *'Let me vote' initiative*,²⁶ which proposed a change to Art 20(2) TEU; accepting in the process that treaty amendment can, in their view and in certain circumstances, be a part of the ECI.²⁷ The Commission's position is that treaty amendment that is triggered by a special revision procedure, such as the *passerelle* clause of Art 25 TFEU, can be the subject of an ECI proposal, even though an ECI proposal that would require the initiation of the ordinary revision procedure cannot. The Commission argues that there is a different legal character between the two treaty revision procedures and that the ECI proposal to extend voting rights for EU citizens can be registered because, although it does ask for a change in the TEU, it does not require a new power to be granted in the Treaties for the proposal to be acted upon. Whether this argument is sustainable or not, it does raise the question of using a supranational democratic instrument to initiate treaty amendment, which challenges the current democratic paradigm.

The arguments about whether it is lawful to request or require treaty amendment as part of an ECI proposal were analysed in chapter two.²⁸ The conclusion was that it could be lawful for ECI proposals to include treaty amendment, particularly as a result of Art 48(2) TEU, which provides the supranational EU institutions, the European Parliament and the Commission, a limited opportunity to influence the treaty change agenda by submitting treaty amendment proposals to the European Council via the Council of ministers.²⁹ This not only challenges an EU democratic paradigm that predominantly reserves treaty change legitimisation to Member State processes and institutions, but is of particular significance for the ECI because it directly calls in to question the position adopted by the Commission that the ECI cannot be used by EU citizens to propose treaty amendment. By excluding treaty amendment from the ECI, the Commission leaves a position where EU institutions can propose amendments to the Treaties via Art 48(2) TEU and blur the lines of the EU democratic paradigm, but EU citizens cannot do the same by using the ECI to request the Commission to consider using the existing powers provided by Art 48(2) to make a proposal for treaty amendment.³⁰

²⁶ Further details available at <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000006> accessed 13 Apr 2015.

²⁷ Detailed discussion about the Commission's decision about the Let me Vote initiative can be found above on pages 108-110, ch 2.

²⁸ Detailed discussion can be found above on pgs 107-111, ch 2.

²⁹ Art 48(2) states that 'The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, *inter alia*, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.'

³⁰ The Commission confirmed its position that an initiative cannot rely on Art 48(2) to support its admissibility in the decision on the registration of the *Self Determination Human Right* initiative.

It may be arguable that it is lawful for treaty amendment to be a part of an ECI proposal, but there are also democratic and political arguments to be considered in relation to this argument. ECI campaigners wanting further democratic participation continue to press for ECI proposals to be able to include treaty amendment.³¹ They argue that if the aim of the ECI is to bring citizens closer to the Union through either facilitating political debate, or through enabling citizens to directly influence the whole of the EU political agenda, then cutting the instrument off from the EU constitutional order in the Treaties, and many of the most significant and fundamental issues of the Union, is unlikely to help achieve this. Increasing the scope of the ECI to include treaty amendment, it is argued, would increase the salience of the issues able to be proposed by an ECI, increase the public debate generated and citizen influence over the political agenda, and therefore significantly enhance the democratic potential of the ECI. If increasing democratic participation were the priority of the ECI, then including treaty amendment would be one way to maximise the extent to which it were met.

Although there could be democratic value in extending the scope of the ECI, it might on the other hand be argued that Member State citizens already have sufficient opportunity to legitimise EU treaty amendments at state level. In the UK, for example, the EUA referenda give citizens a direct democratic means of legitimising EU treaties, which supplements the existing citizen participation through parliamentary elections. This raises the question of whether there are democratic benefits for citizens to be able to legitimise the EU treaties at supranational level as EU citizens and also as Member State citizens. One answer is that there could be value in having an ECI that provides a message from citizens about the interests of the Union as a whole to complement the presumably national interest expressed in a Member State level referendum.³² The ECI could give Member State citizens, in the UK or elsewhere, the opportunity to support a treaty amendment proposal that is not necessarily a strong enough national concern to trigger a national institutional response, but which Member State citizens may think is a significant EU issue and, when combined with support from other citizens in other Member States, is of enough concern for the proposal to reach the ECI support thresholds. Furthermore, citizens of Member States that do not hold a referendum to ratify treaty amendment and only have the infrequent and imprecise opportunity of electing representatives to indicate whether they approve of the constitutional framework of the EU, might benefit from a direct opportunity to support treaty change. Citizen engagement with treaty

³¹ <<http://www.citizens-initiative.eu/position-on-treaty-amendments>> accessed 8 July 2015.

³² This of course assumes that UK citizens are considering supranational/EU level issues when supporting an ECI and that the 'second order' criticisms of the European Parliament do not apply to the ECI. On second order voting in European Parliament elections see for example S Hix *'What is wrong with the European Union and How to fix it'* (Polity 2008). A Glencross, 'First or second order referendums? Understanding the votes on the EU constitutional treaty in four EU Member States', [2011] *Western European Politics* 755.

amendment through the ECI as EU rather than Member State citizens could therefore be of some democratic value.

A second possible benefit of allowing the ECI to be used for treaty change is that Member State citizens would have an opportunity to directly influence the actual content of the treaty change agenda that is otherwise denied to them. Even in Member States, such as the UK, where a referendum is held to ratify treaty amendment, citizens are only given the opportunity to influence a proposed policy outcome through stating their approval, or not, of the proposal. A referendum does not provide an opportunity, as the ECI does, to influence the content of the EU agenda by proposing a new policy position for public debate because the existing institutions decide which situations and subject matter trigger a referendum. The distinction between influencing the policy agenda and having a policy veto is one of the key differences between the democratic opportunity provided by the ECI and that provided by the EUA. The ECI could complement the Member State use of referenda, therefore, by providing Member State citizens with a formal route of democratic participation that increases the level of public debate in relation to EU policy, influences the treaty amendment agenda, and which compensates for the weakness of referenda in terms of providing citizens with direct agenda influence.

It may be arguable that it is lawful for treaty amendment to be part of the ECI and there may be democratic value in extending its scope, but the institutional framework of the EU and the political tensions within it mean that treaty amendment is unlikely to become part of an EU level instrument such as the ECI. Before commenting on this, it is worth noting that any concerns about the impact that extending the scope of the ECI to include treaty amendment might have on the direction of EU policy or its institutional or constitutional framework are unlikely to be realised, because any proposal from citizens for treaty amendment must pass through the existing political institutions during the treaty amendment process. This representative 'filter' starts with the control the Commission has over the registration of ECI proposals and the weak legal obligation imposed on it by citizen support for an ECI proposal. This means that even if treaty amendment is accepted as a subject of ECI proposals there is no obligation on the Commission to pass on such a proposal to the Council. Then if the Commission did decide to pass on a proposal for treaty amendment, the filter of issues continues through the long treaty revision process controlled by Member State governments so that, even if citizen deliberation and agenda influence are given a wide scope that includes treaty amendment, the risk of uncoordinated, unexpected or sub-optimal developments in the EU Treaties is significantly reduced.

The request by an ECI for the Commission to propose treaty amendment would be a request for the Commission to propose legal acts that sit outside its principal activity of initiating EU legislation in the 'general interests of the Union'.³³ It would increase the extent to which the Commission becomes involved in the treaty amendment process ordinarily legitimised via Member State democratic means. If an initiative that included a request for the Commission to propose treaty amendment were registered, succeeded in reaching the necessary support thresholds to trigger consideration by the Commission, and was submitted to the Council by the Commission, then it would increase supranational institutional involvement in treaty amendment and open up a new supranational avenue for proposing treaty amendment. This would be a direct challenge to the current EU democratic paradigm that ordinarily provides for Member State control over treaty amendment through a largely intergovernmental process. It seems unlikely therefore that Member States would accept this incursion in to their role as 'masters of the treaties', something which is indicated by the UK government implementation of the EUA 'referendum locks'. This highlights the fact that one of the difficulties of strengthening EU level democracy is that the corollary may be a lessening of state control over the Treaties.

The Commission may also be reluctant to risk any damage to its reputation that might arise from the ECI giving it a stronger position within the Treaty amendment process than Member States think is legally justified. The Commission has a supranational role of promoting Union interests, but this authority rests on the existence of the treaties and the provisions within them. If treaty amendment were included in the ECI process and the Commission started regularly making treaty amendment proposals, the competence of the Commission could be viewed as creeping beyond its established boundaries and be detrimental to its political legitimacy in the long run.³⁴ The Commission must stay within the bounds of the role conferred on it by the Member States; its role is not conferred directly by EU citizens. If the Commission starts to push beyond its treaty allocated competence, even if it may be doing so to extend the democratic participation of EU citizens, there is likely to be a reaction from the Member States. As a result the Commission could be politically damned if it does allow treaty amendment proposals to be part of the ECI, and democratically damned if it does not.

Whatever the pros and cons of including treaty change in the ECI, or the likelihood of it happening, the underlying truth about the relative strength of the participative opportunities under analysis here is indicated by considering the following hypothetical consequence of allowing both EU and UK

³³ Art 17 TEU states: 'The Commission shall promote the general interest of the Union and take appropriate initiatives to that end'.

³⁴ 'Nothing has been more detrimental than the Commission overstepping its bounds', J Weiler *The Constitution of Europe: Do the new clothes have an emperor*, (Cambridge 1999) 353.

citizens to legitimise treaty change, and the possibility of a conflict between Member State and EU level opinion to be played out through direct democracy as a result. An ECI proposal could meet the necessary support thresholds, including the number needed from the UK, to trigger a proposal from the Commission to amend the treaties. The proposal could make it all the way through the ordinary revision procedure and lead to a new treaty being put to the Member States for approval in line with their constitutional requirements. Let us assume that in the UK a referendum vote would be triggered by the provisions in the EUA, and that the proposal supported by a representative number of EU citizens is then rejected in the referendum by a majority of UK citizens. The underlying truth is that EU law, as it stands, would prioritise Member State citizen opinion, as expressed in a Member State referendum, over EU citizen opinion as expressed through an instrument such as the ECI. Ratification is required by all Member States and a majority vote in a Member State will take precedence over the conflicting policy preference indicated by a representative number of EU citizens.³⁵ This puts in stark relief one of the possible difficulties inherent in using direct democracy in a polity with dual citizenship, and the relative strengths of Member State and EU citizenship.

In conclusion, there could be democratic benefits for EU legitimacy, if the decision were taken to extend the scope of democratic participation for EU citizens and lessen the distinction between constitutional and legislative legitimisation by allowing the ECI to be used to propose treaty amendments. It would also be a way to resolve the inconsistency between allowing supranational institutions, through Art 48(2), to propose treaty amendment, but at the same time not allowing EU citizens to include treaty amendment in an ECI proposal. However, the impact of such a change in the dual democracy of the EU is likely to be limited by the legislative design of the ECI itself, the institutional filters a proposal would have to navigate in the EU legislative process, and ultimately must give precedence to Member State citizen opinion. Furthermore, the current democratic paradigm, with Member States designated as the 'masters of the treaties', would be undermined by a supranational instrument of direct democracy that leads to EU level proposals through the Commission. With the Commission also seemingly wary of including treaty amendment in a supranational instrument of direct democracy because of possible damage to the Commission's reputation and political legitimacy, this situation seems unlikely to change.

Member state level legitimisation of EU law and policy making

The focus for the discussion about the EUA is whether there should be Member State level referenda to legitimise EU law and policy decision-making that is ordinarily carried out by

³⁵ Art 48(4) requires ratification by all Member States. Art 48(5) TEU says that if after two years 4/5 of the Member States have ratified the treaty, then the matter is referred to the European Council.

supranational institutions. This applies to the referenda triggered by provisions in s6 EUA,³⁶ which are divided between those triggered by support for a policy decision in the five areas listed in s6 EUA, such as adoption of the Euro³⁷ or signing up to the Schengen Agreement,³⁸ and those referenda that would be triggered if the UK government want to support the removal of unanimity, consensus or common accord from the EU legislative procedure in the wide range of policy areas that have a special legislative procedure in the EU treaties.³⁹ The treaties do not commonly accommodate the two step process that this requirement for Member State level referendum instigates for the approval of EU level institutional decision-making.

The two level approval process introduced by s6 EUA sits uneasily in the policy legitimisation process of the EU democratic paradigm. This is despite the fact that policy and law making at EU level, unlike the legitimisation of the constitutional framework, is a mixed process that combines supranational and also intergovernmental elements; and despite the fact that it involves the Council, which contains representatives from Member States who could voice the preferences of its citizens, expressed in a national referendum, at EU level. This legislative process is mixed in terms of legitimisation, but is supranational in decision-making terms as they are taken by EU level institutions. In general the Member States have agreed in the treaties that their representatives in the Council, once negotiations have been concluded and a sufficient level of consensus reached, will be able to approve the relevant policy decision: Art 16(2) TEU states that, 'The Council shall consist of a representative of each Member State at ministerial level, who may commit the Government of the Member State in question and cast its vote'. The provisions of s6 EUA mean that the ministerial representative from the UK is not lawfully able to cast a vote for the UK Government, as part of the relevant special legislative procedure for the EU policy issues or voting changes indicated in s6 EUA, without returning to the UK to seek approval for a draft decision from the UK Parliament and from UK citizens in a referendum.⁴⁰ This means that there must be UK/Member State level institutional and citizen involvement to approve a decision in a policy area that Member States had previously agreed in the Treaties would be an EU level competence with decisions taken at EU institutional level, and has led to questions being raised about whether the UK is in breach of EU law.⁴¹

³⁶ S6 (5)(a), (b), (f), (g), (h), (i) and (j).

³⁷ s6 (5)(e) EUA.

³⁸ s6 (5)(k) EUA.

³⁹ The full list of treaty articles to which this change could relate is found in Schedule 1 of EUA.

⁴⁰ s6(1) EUA.

⁴¹ For discussion of the legality of the EUA provisions in terms of EU law see discussion on pg 134-138 in chapter 3.

For the purposes of the following comments there are three categories of legislative procedure in EU law:⁴² first, the Ordinary Legislative Procedure that does not require a unanimous vote in the Council; secondly, the special legislative procedures that require a unanimous vote in the Council; and thirdly, the less common ‘organic’ laws that differ from the previous two because they require a decision in the supranational institutions and also approval at Member State level in accordance with their constitutional requirements.⁴³ In considering the extent of the impact on the EU democratic paradigm it is important to note that all of the referenda in s6 EUA relate to law and policy making to which a special legislative procedure is applied in EU law, and which require a unanimous vote in the Council, such as a decision to participate in a European Public Prosecutors Office,⁴⁴ or they relate to a decision to change the voting procedure in a way that would remove the Member State veto in a wide range of policy areas.⁴⁵

It might even be argued that the enactment of the EUA has had the dramatic effect of moving decisions relating to the policy areas specified in s6 EUA in to the third category of organic laws, only for the UK. The organic laws of the EU already blurred the distinction between the legitimisation process for treaty amendment and for EU legislation as they are competences allocated to the EU level, but which nevertheless use the two stage legitimisation process of the more intergovernmental treaty ratification process. For the organic laws, despite not being amendments to the treaties, their provisions will only enter in to force ‘following their approval by the Member States in accordance with their respective constitutional requirements’.⁴⁶ The difference between the provisions of s6 EUA and the existing organic laws is that the latter have been agreed by Member States through the ratification of the treaties and the two step process applies equally across the EU, whereas the provisions of s6 EUA have, in effect, unilaterally and inadvertently increased the numbers in this third category quite significantly, and has impliedly introduced, just for the UK, a phrase similar to, “these decisions shall be approved in accordance with respective

⁴² For discussion of decision making procedures after Lisbon Treaty see M Dougan, ‘The treaty of Lisbon: winning minds, not hearts’ [2008] CML Rev 617, 637-652. There are still a number of variations in the category of special legislative procedures, such as different requirements for the Council to engage with the European Parliament or with the European Council. All the referenda of s6 fall within the category of SLPs.

⁴³ The five organic laws are Art 42(2) on common security and defence policy; Art. 25 TFEU on additional rights for Union citizens; Art. 223(1) TFEU on a uniform electoral procedure for the EP; Art. 262 TFEU on ECJ jurisdiction over European IPRs; Art. 311 TFEU, third para on the initial decision on Union own resources. The only one not included in the Schedule 1 EUA list of articles that would require a referendum if there is a change in their voting process is Art 262. s6(2) EUA provides that decisions taken in accordance with Art 42(2) TEU must be approved by referendum. s7(2) EUA provides that decisions taken in accordance with the treaty articles of the other four organic laws require an Act of Parliament for their approval.

⁴⁴ s6(3)EUA.

⁴⁵ s6 (5)(f), (g) and (h) are three passarelle clauses in the Treaties. The passarelle clauses not included in the Schedule 1 list are Art 81 and Art 31.

⁴⁶ Quoted from Art 223 TFEU.

[Member State] constitutional requirements”, in to the treaty articles specified in s6 EUA. This phrase has also been impliedly added to any decision to alter the voting procedure in any of the list of treaty articles in s6(5) EUA and Schedule 1 EUA, such as appointment of judges to the ECJ,⁴⁷ measures to combat discrimination,⁴⁸ and police co-operation.⁴⁹

The changes resulting from the EUA challenge the distribution of competences between the UK and EU institutions in the sense that the s6 requirements repatriate, to a degree, power over certain areas of policy making and changes in voting arrangements to national decision-making processes in the UK, and increase the intergovernmental nature of the EU policy making process. It also means that the decision-making in relation to EU competences for the UK is different to other Member States that have not altered the manner in which their representatives participate in the EU legislative processes covered by s6 EUA. If other Member States were to follow the approach taken by the UK and require national referendum approval for decisions taken as part of the supranational EU law and policy making process, possibly to protect their own national interests or simply to maintain parity with the UK, then agreement in the Council would be more difficult to reach, and the approval of relatively minor legislative issues could end up taking far longer than at present. It could also leave the UK, and other Member States, potentially with a series of expensive referendum votes on quite specific or technical issues, such as whether to change the voting basis for decisions relating to ‘the protection of workers where their employment contract is terminated’,⁵⁰ or in relation to the excessive deficit procedure,⁵¹ or for decisions of limited public interest, such as the list of military products exempt from internal market provisions.⁵² This could lead to low turnouts and results that are difficult to implement in full, which could then undermine the democratic value of holding referenda in the first place. This also means that on the one hand any decision to remove a UK veto over policy decisions in these policy areas, which cover almost all the SLPs in the treaties, must be approved in a referendum, but on the other hand the government remains free to support any actual Council policy decisions in these areas without needing approval in a UK referendum.⁵³

The binding nature of a Member State level referendum about a decision taken in the council could have been problematic for the UK Government, if they were unable to apply the result at EU level.

⁴⁷ Art 19(2) TEU.

⁴⁸ Art 19(1) TFEU.

⁴⁹ Art 87(3) TFEU.

⁵⁰ S6 (5)(f) requires a referendum when the ordinary legislative procedure is applied to the relevant issues in Art 153 TFEU, of which this is one such issue.

⁵¹ Art 126(14). Referendum required by Schedule 1, Part 2 EUA.

⁵² Art 346(2) TFEU. Referendum required by Schedule 1, Part 2 EUA.

⁵³ SLPs not covered by Schedule 1 EUA are Art 23 TFEU, 31 TEU, 64(3) TFEU, Art 118(2) TFEU, Art 262 TFEU, and Art 308 TFEU. Also passerelle clauses Art 31 TEU and Art 81 TFEU are not included.

The difficulty of using Member State level referenda has been reduced, though, by the fact that s6 EUA is only applicable to policy areas that use a SLP. If a referendum were held in the UK to approve a decision in the Council taken under OLP and this decision was rejected by UK citizens in the referendum vote, then this result in the referendum would be able to influence the vote of the UK representative in the Council, but could ultimately be ignored by the rest of the Council and the decision before them could be passed using the majority OLP voting procedure. If this fairly unlikely scenario were to occur, the UK would be subsequently obliged to implement any resulting EU legislation contrary to the wishes that had been expressed by its citizens in a referendum. This potential conflict between a Council decision and the directly expressed democratic wishes of UK citizens is avoided by s6 EUA policy areas all relating to an SLP, where the UK is able to veto a Council decision, rather than the OLP.⁵⁴

For SLP issues, s6 EUA could trigger a referendum in the UK to seek approval for a draft Council decision and UK citizens approve that decision, but there could be political ramifications when the UK government tries to apply this positive Member State level referendum result in the Council because they are still reliant on the political representatives from other member states for the decision to be passed and the referendum result to be implemented. This could be problematic, for example, if during the time it took to hold a referendum in the UK, economic or political changes, such as a new Government being voted in to another Member State, led to Member States wanting to veto the decision or reopen negotiations in relation to the draft decision that was voted on in a UK referendum. In this situation the veto of another Member State takes precedence over the UK referendum result, which would mean that the UK government is unable to apply a binding expression of the wishes of the UK electorate. These provisions for referenda in s6 EUA could, therefore, lead to tension between Member State level direct democracy and EU level decision-making, and also to repeat referenda on similar issues that could lead to voter fatigue and falling turnout that undermines democratic participation over the longer term. The alternative of holding a referendum on a general policy position to inform negotiations in the Council, which might avoid some of these problems, would not comply with the requirement in s6(1) EUA that a 'draft decision is approved by an Act of Parliament'. This is because there must be a draft Council decision agreed by all Member States for the UK Parliament to approve, and the referendum condition needs to be met not so that a Minister has a mandate to negotiate and seek agreement in the Council, but so that a Minister can approve an already agreed 'decision' in the Council after that decision has been put before UK citizens to vote on in a referendum.

⁵⁴ An attempt to introduce a Member State level approval process in to the OLP, even though, it could be ignored because of voting processes, would still be a clear, strong challenge to the agreed supranational processes of the EU that would move the specific policy areas from the OLP to some form of SLP for the UK.

Despite the challenge that the EUA makes to the EU democratic paradigm, its practical impact is likely to be limited. The s6 EUA referenda provisions have added to the small number of exceptions to the general rule that EU level institutions and EU level democratic processes control the EU legislative agenda and its direct legitimisation, but even this impact is qualified by a number of factors, such as the limited likelihood of a referendum being triggered and ultimately the ability of the UK Parliament to change the legislative provisions in the EUA or to repeal the legislation altogether.⁵⁵ It is also limited by the fact that it is only one Member State needing to be accommodated and there are likely to be political options that can be taken to avoid any conflict with EU law, such as avoiding the need for a referendum through exercising the UK veto. If the issues in s6 EUA are accommodated on a number of occasions in other ways, though, such as providing the UK further opt outs in policy areas, then it could also lead to an increase in the flexibility of the EU in applying policy decisions unanimously, and the most significant impact could be the implications for any further reduction of Member State veto opportunities in legislative decision-making.

In conclusion: the key issue in relation to the manner in which the s6 EUA referenda challenge the EU democratic paradigm is that the UK has in effect instigated a unilateral change to EU level legislative processes and that in so doing Member State level democratic processes have effectively been inserted, where there is no provision for them in EU law. The issues that this could bring in relation to Member State level legitimisation of EU level law and policy making, which are discussed in detail in chapter 3, are not the result of direct democracy per se, but the consequence of both the nature of the EU dual institutional framework and the EU legislative process,⁵⁶ and also the manner in which direct democracy has been implemented by the UK government. For its part, the ECI raises questions about the supranational legitimisation of the EU treaties and challenges the existing democratic framework of intergovernmental legitimisation of the EU's constitutional framework.

The EUA and ECI together indicate where the lines of tensions are in the EU paradigm but they are likely to bring little change, particularly because the institutions with most influence over the implications they might have for the EU democratic paradigm appear to prefer the status quo. The Commission have highlighted the legitimacy that the ECI could provide for the EU, by bringing citizens closer, and the current UK Government have highlighted the increase in legitimacy that the EUA referenda bring for its policy of limiting further developments in EU competences. The Commission interpretation of the ECI, though, appears to be trying to avoid it unsettling their policy preferences, and the drafting of the EUA suggests that the UK government priority is re-election and

⁵⁵ See discussion of this issue on pgs 138-141 above.

⁵⁶ The organic laws show that it is possible to use direct democracy in some circumstances in the EU in relation to EU level legislative decision making.

party politics rather than democratic participation. In their own way and from different political perspectives each institution would seem therefore to be protecting the EU status quo. The ECI and EUA are nudging the boundaries within the dichotomies of the EU democratic paradigm, but there appears to be little political will for them to make a significant long term impact by allowing direct democracy to be used beyond the bounds set by the current, largely representative process for democratic legitimisation. The restriction of the democratic potential of the ECI and EUA through the control of these institutions is discussed next in the second part of this chapter.

Implications of the ECI and the EUA for the dual democratic legitimacy of the EU

In the previous section we looked at the implications of the ECI and the referenda of the EUA for the framework for the democratic legitimisation of the EU's constitutional order and its daily policy making, and the issues that challenge the EU democratic paradigm. The concluding section of this final chapter focuses on the following question: *What is the potential influence together of the ECI and EUA on the democratic legitimacy of the EU?* Comment on this question is informed by the analysis in chapters 2 and 3 of the legislative design and implementation of the ECI and EUA, and uses the democratic criteria of *effective participative opportunity*, *citizen agenda influence* and *citizen outcome influence* that were explained in detail in chapter one.⁵⁷ I will argue that one of the key factors for both the ECI and EUA in limiting their democratic influence is the extent of institutional mediation, and that the strength of this mediation is indicated by the fact that the ECI and EUA provide little extra opportunity for citizens to challenge the policy preferences of the existing institutions. As a result they are unlikely to have a significant impact on the EU's democratic legitimacy in the short term, although the possibility remains for these new instruments to open the way to further, more significant evolution in the EU's democratic legitimacy through using direct democracy. The final section of this chapter, therefore, starts with a summary of the democratic criteria used to assess direct democracy. Secondly, the extent that the ECI and EUA are mediated by existing institutions is discussed. Thirdly, the discussion focuses on the impact that institutional mediation has on the ability of the ECI and EUA to facilitate a challenge to the policy preferences of the existing institutions at Member State and EU level. The final part of the chapter contains some concluding remarks about what the analysis of the ECI and EUA together tells us about the EU's democratic legitimacy.

⁵⁷ These criteria are described above in detail in chapter one pgs 35-39.

Democratic criteria

Effective participative opportunity

An *effective participative opportunity* is an equal and accessible opportunity to engage directly in a specific policy area and which acts as a gateway to facilitate the possibility of citizen impact on the content and outcomes of the political agenda. The ECI and EUA meet this criterion sufficiently for citizens to be able to use them to participate in a manner that has the potential to increase citizen influence over the EU policy agenda, but with some potential limitations. The legislative design of referenda in the EUA does not raise any specific equality issues, but there may be implications for the effectiveness of participation using referenda; particularly for the willingness, capacity and capability of citizens to engage with specific policy issues as a result of the selection of referenda subject matter.⁵⁸ Attention was paid to making the ECI easy to use for both campaigners wishing to make a proposal and citizens wishing to support a proposal during the drafting of its Regulatory framework.⁵⁹ This was relatively successful, as the high number of early ECI proposals indicated, but concerns have been raised about issues such as identification requirements, data security rules and resources, which have an impact on the willingness of citizens to organise or support an ECI campaign.⁶⁰ One equality issue that has arisen due to the dual nature of the EU is the exclusion of some EU citizens from supporting an ECI because of the difference across Member States of a combination of franchise rules and identification requirements.⁶¹ There is increasing standardisation for the supranational ECI as states such as Spain and Luxembourg have modified their requirements for citizen identification, but without an EU level administration of the ECI, these equality issues are unlikely to be completely eliminated. Despite these issues that affect a relatively small number of citizens, the ECI and EUA in general do provide citizens with an *effective participative opportunity*.

Citizen agenda influence

Although the ECI and EUA do provide citizens with an opportunity to participate, the democratic potential of this opportunity depends also on the extent to which the other two criteria are met. The second criterion, *citizen agenda influence*, is met when an instrument of direct democracy provides a formal means for citizens to add issues to the political agenda and to influence public and

⁵⁸ This is discussed in relation to the criteria and subject matter in the EUA on pgs 146-151.

⁵⁹ For details on the progress of the ECI through the legislative process see S Aloisio etc. 'The European Citizens Initiative: Perspectives and Challenges' ch 3 in R Matarazzo (ed.), *Democracy in the EU after the Lisbon Treaty* (Edizioni Nuova Cultura, 2011), available at <http://pubblicazioni.iai.it/pdf/Quaderni/iairp_02.pdf> accessed 8 July 2015.

⁶⁰ The practical campaign issues that have acted as barriers to participation for the ECI are discussed in detail in C Berg and J Thompson (eds) *An ECI that Works: Learning from the first two years of the ECI* (2014). Available at <<http://ecithatworks.org>> accessed 8 July 2015.

⁶¹ This is discussed in more detail above on pgs 83-85 ch 2. The other inequality that exists between EU citizens is that Austrian nationals can support an ECI at the age of 16, but in all other states it is 18.

institutional debates connected to it. The ECI has the potential to meet this criterion by giving EU citizens the opportunity to propose a legal act of the Union, which can put a new policy issue on the agenda, as long as it is not manifestly outside the framework of the Commission's powers, or to support ECI proposals of other citizens. As discussed in chapter two, the ECI has had a high number of ECI proposals refused registration and this has led to a significant reduction in the number of issues citizens have been able to promote as part of the EU political agenda and in the amount of public debate that the ECI can generate.⁶² The legislative design of the ECI, in principle, allowed for wider citizen influence over the EU policy agenda than the Commission's interpretation of the legal provisions has led to in practice. The EUA would need to provide frequent voting opportunities on a wide range of significant or salient issues, or allow citizens to propose subjects for a referendum vote to strongly meet this criterion. The EUA does not provide for citizen influence over the issues that may be voted on in a referendum as a result of the EUA, and the analysis in chapter 3 indicates that public debate, and therefore indirect influence over the content of the UK's EU policy agenda, is likely to be infrequent and may not always be on issues of public salience.

Citizen outcome influence

The third criterion of *citizen outcome influence* is met when the democratic instrument enables citizens to have a direct impact on the legislative or policy outcomes of the political agenda. The ECI imposes some weak obligation on the Commission to act in response to citizen proposals and support; only requiring the Commission to consider making a proposal for a legal act. The ECI would need to regularly lead to legal acts of the Union to strongly meet this criterion, but the two ECIs that the Commission has responded to so far have not led to a legal act, with the Commission showing in the process that it will exercise its discretion to block a legal proposal that meets the support thresholds. The EUA, on the other hand, strongly meet this democratic criterion relatively strongly through giving citizens the opportunity of a binding vote in a referendum in relation to an area of the UK's EU policy, the result of which the UK government would be expected to implement. The EUA is not likely to lead to frequent opportunities for citizens to influence the outcomes of the policy agenda, but when citizens do get the opportunity to vote in a referendum they have the opportunity to veto an EU decision in Council or the ratification of a treaty amendment and strongly influence the UK's EU policy, and in the process influence the policy of the EU as a whole. This formal position reflected in the EUA, however, should be read in conjunction with the number of political factors

⁶² The restriction through the Commission's decision-making at ECI registration is discussed above on pgs 100-111.

that could vitiate the opportunity given to citizens, particularly the need to consider the referendum result in light of the UK's membership of the EU.⁶³

These two democratic instruments have been implemented at different levels in the EU and have the potential to influence the EU's democratic legitimacy in very different ways. However, my analysis in chapters two and three of the ECI and EUA, respectively, has shown that what they have in common is that institutional mediation is an important factor that has limited their democratic potential and is likely to continue to limit it in the future. This chapter turns next to the form and extent of this institutional mediation in relation to the ECI and EUA.

Institutional mediation of EU direct democracy

Direct democracy is a political mechanism for passing influence over policy and legislation to citizens, but not total control. Some institutional mediation of direct democracy is inevitable in the liberal democratic Member States and the EU because representative institutions are central to their political legitimisation.⁶⁴ The ECI and EUA have been introduced in this vein, so that the dual EU democratic framework is evolving to supplement, not replace, representative democratic mechanisms with direct democracy at both Member State and EU level.⁶⁵ The discussion below focuses, therefore, not on whether there should be institutional mediation, but on the form the institutional mediation takes in these two examples of EU direct democracy and the extent to which it impacts on the potential of direct democracy to legitimise the EU. Two forms of institutional mediation are discussed in this section: first, the institutional control over the drafting of legislation introducing direct democracy, which is most clearly seen in relation to the EUA; and secondly, institutional control over the interpretation of the provisions for direct democracy in the legislation, which is clearly seen in relation to the ECI, but may also become apparent in relation to the EUA in the future.

For the ECI institutional mediation clearly occurs when the Commission decides whether to register an ECI proposal at the start of the ECI process, and also when the Commission decides whether the ECI proposal is to lead to a legal act of the Union at the end of the process. At registration the requirement that an ECI proposal 'not be manifestly outside the framework of the Commission's

⁶³ See comment on the impact of EU membership on implementing a referendum result on pgs 159-160 and below on pgs 190-191.

⁶⁴ For comment on the manner in which representative and direct democracy combine see typology in ch 1 pgs 50-53.

⁶⁵ Art 10(2) TEU confirms the continuing importance of representative democracy for the EU and parliamentary sovereignty remains central to the UK constitution.

powers' has led to all of the refusals to register ECI proposals.⁶⁶ At the end of the ECI process the Commission is only required to consider proposing a legal act of the Union.⁶⁷ The analysis in chapter two showed that the Commission decision-making, at registration and when deciding its legal response, has led to significant restrictions over the frequency and scope of public debate generated by the ECI, and over the likelihood and strength of legal outcomes that a proposal might lead to. Arguably the Commission interpretation of Art 4(2)(b) is closer to requiring ECI proposals to be *clearly inside* the framework of the Commission's powers than *not manifestly outside*. The Commission has also exercised its discretion to not propose a legal act of the Union following an ECI proposal being presented to them. The Commission interpretation and implementation of the ECI legislation has therefore had a significant impact on the ECI's democratic potential through restricting citizen influence over agenda content and agenda outcomes.

The Commission may have acted in accordance with the legal provisions of Regulation 211/2011 in deciding whether to register an ECI proposal or propose a legal act in response to one, certainly the Commission argues that it is legality that restricts the democratic impact of the ECI not their interpretation, but that is not the issue here.⁶⁸ Although there are five legal challenges pending to decisions by the Commission in relation to the ECI and the European Ombudsman has called for more consistency in their decision making,⁶⁹ the important point here is that even though the Commission interpretation of the ECI legislative provisions are probably lawful, it could have chosen an alternative lawful interpretation that places greater emphasis on democratic participation.⁷⁰ The Commission could have proposed a legal act of the Union in response to the ECIs that successfully gathered support, but it chose not to, and it could have registered a number of ECI proposals that were on the borderline of being within the Commission's powers, but it chose not to. A future Commission, therefore, could prioritise citizen participation over controlling policy preferences more strongly without changing the existing legislation. The new Commission under President Juncker, though, is not showing any more inclination to do so than the previous President and the restriction

⁶⁶ Art 4(2)(b) Reg. 211/2011.

⁶⁷ The Commission is only invited to propose a legal act in Art 11(4) TEU.

⁶⁸ Vice president Timmermans at European Parliament hearing on ECI on Feb 26th, for example, expressed regret that the Commission was not able to do more because of the legal limitations. Speech available at <<http://www.europarl.europa.eu/news/en/news-room/content/20150220IPR24229/html/Committee-on-Constitutional-Affairs-and-Committee-on-Petitions-Defence>> accessed 8 July 2015.

⁶⁹ Ombudsman report is available at <<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/59205/html.bookmark>> accessed 8 July 2015.

⁷⁰ The ECI registration decisions by the Commission are discussed in detail in chapter 2, pgs 98-117. See also J Organ, 'Decommissioning Direct Democracy? A critical analysis of Commission decision making on the legal admissibility of European Citizens Initiative proposals', (2014) EU Const 422.

on the ability of citizens to influence the policy agenda through the ECI is likely to remain limited as a result.⁷¹

The institutional mediation of the EUA is different in nature to that of the ECI. One way of distinguishing between the two could be to refer to the type of institutional mediation exercised by the Commission as *mediation by interpretation*, and to the institutional mediation of the EUA as *mediation by legislation* because it is the actual provisions of the statute, rather than the interpretation of the legislation, at least so far, that have restricted the democratic impact of introducing referenda through the EUA. The nature of a referendum as a democratic instrument that gives citizens a veto over a policy proposal without approval in a referendum is, on the face of it, a clear promise of citizen impact on the outcomes of the policy agenda. However, as strong as the opportunity is at the point when citizens vote, the legislative provisions of the EUA that contain the referenda triggers and that give citizens this moment of influence have limited the scope of this opportunity and its democratic impact. First, there are no provisions to overcome the referendum's inherent democratic weakness of having no citizen influence over the policy areas that require referendum approval.⁷² Secondly, there are gaps in the criteria that trigger a referendum: no referendum is required if the Government wants to take the UK out of the EU, for the accession of new Member States, or if the UK joins a group of enhanced cooperation. Thirdly, a referendum will only be held to approve Government decisions that would increase EU institution competences or remove a Member State veto in the Council. As a result there are limitations on the scope and frequency of the direct democratic opportunity built in to the legislative design of the EUA by the UK government.

As well as the mediation through the legislative design that is already apparent, there is also the possibility that the EUA will give us further evidence of institutional mediation by interpretation. A future UK government that is pro-European, for example, may want to avoid the risk of holding a referendum and try to interpret the legislation accordingly to avoid needing to hold one. The analysis of the EUA has shown that there may be some limited opportunity to interpret the referenda provisions to restrict the initiation of referenda through, for example, the significance condition,⁷³ interpreting the meaning of competence increase, or to avoid a referendum through negotiation in the Council.⁷⁴ This possibility of control, though, should be considered in light of the

⁷¹ See Commission report on the first 3 years of the ECI at

<http://ec.europa.eu/transparency/eci_report_2015_en.pdf> accessed 8 July 2015.

⁷² See further comment above in relation to the points made in this paragraph on pgs 146-155.

⁷³ See comment on significance clause above on pg 152.

⁷⁴ See comment on the possibility of government avoiding the initiation of a referendum above on pgs 155-157.

fact that the significance condition only applies to a limited number of referenda and that there has been an attempt to catch an extensive range of competence increases within the provisions of the EUA. The UK government and politicians in opposition have promised referenda on a number of occasions in relation to the EU, albeit ones that are not legally obliged, but they have managed to find circumstances that allow them to rescind the promise.⁷⁵ For now though we are still waiting to see how the UK government will interpret the EUA provisions and respond to the possibility of a referendum being triggered, and whether in fact future governments are able to pick the 'referendum locks' promised in the EUA and avoid a popular vote, or indeed whether they decide to exercise their ultimate control of amending or repealing the EUA legislation and remove the promise of a referendum.⁷⁶

The ECI legislation itself has not strongly shackled the democratic potential of the ECI, and allows for an interpretation that could give a relatively wide scope for democratic participation. The influence of the European Parliament is probably one reason for this as they pushed for a simpler to use instrument that would allow for further public debate.⁷⁷ One motivation for the European Parliament, perhaps, is that, as an institution that relies on democratic legitimacy, they will benefit more strongly from an overall increase in EU democratic legitimacy. It is possible that the Commission and the Council were happy to allow the ECI legislation to have broad potential given the weakness of the legal obligations and the ease with which citizen preferences could be ignored.⁷⁸ On the other hand the Commission have stated they want strong democratic participation,⁷⁹ and there is no indication of the Commission trying to impose significant restrictions in to the ECI legislation. However, given that the rhetoric of participation is not born out in practice, that as a technocratic institution the Commission probably have less to gain from increased democratic participation and legitimacy in the EU than the European Parliament, and that they have more to lose because the ECI, if developed, would pass influence over the Commission's role of legislative initiative to citizens, it may be that the more consensual approach to legislation at EU level lends

⁷⁵ For example Prime Minister Gordon Brown decided not to hold a referendum on the Lisbon Treaty because it was not a fundamental change.

⁷⁶ The political situation is likely to make it difficult to amend the EUA to remove the referenda provisions completely. The only promised change is from the Labour party that a referendum triggered due to a transfer of competences will also be on membership. See footnote 714 below.

⁷⁷ Draft report on the proposal for a regulation of the European Parliament and of the Council on the citizens' initiative, Committee of Constitutional Affairs - COM(2010)0119 – C7-0089/2010 – 2010/0074(COD).

⁷⁸ For a detailed overview of the progress of the ECI Regulation through drafting see S Aloisio etc. 'The European Citizens Initiative: Perspectives and Challenges' ch 3 in R Matarazzo (ed.), *Democracy in the EU after the Lisbon Treaty* (Edizioni Nuova Cultura, 2011). Accessed at http://pubblicazioni.iai.it/pdf/Quaderni/iairp_02.pdf

⁷⁹ See for example speech given by Vice President of the European Commission Maros Sefcovic, 'The Lisbon Treaty: Enhancing Democracy' 30 Sept 2010, 2. Available at europa.eu/rapid/press-release_SPEECH-10-502_en.htm, accessed 13 Apr 2015.

itself more easily to drafting less politicised legislation to introduce direct democracy. The indication from the UK, albeit from just one piece of legislation, is that where the executive has a strong degree of control over the drafting of legislation, the introduction of direct democracy is likely to be qualified by the party political preferences that are written in to the legislation.

It will be interesting to see in 2015 whether the review of the ECI that is underway will lead to significant reform of the ECI process and legislation to increase democratic participation and citizen influence, as the European Parliament seem to intend, or whether the Commission's apparent reluctance to make changes will limit the development of the ECI in participative terms.⁸⁰ The ECI legislation is developed through a three way discussion between the EU institutions, whereas any changes to the EUA are more strongly dependent on party political preferences and the results of the general election. The Conservative party is unlikely to change the EUA and its further commitment to an EU membership referendum has surpassed the provisions of the EUA to some extent. The Labour party on the other hand has committed to amend the EUA to include an extra referenda provision that a transfer of competence will also trigger a referendum on the UK's membership of the EU.⁸¹ It seems highly likely therefore that the EUA referenda provisions will remain part of the approval process for the UK's EU policy, even if some minor changes are made.

The UK government could seek to justify its mediation of the EUA with reference to its political legitimacy that rests on a demos and democratic legitimisation. The Commission, however, as a technocratic institution, cannot justify its mediation of the ECI in these terms. The Commission is also not influenced by the sort of party political democratic pressure that was partially responsible for the implementation of the EUA and the subsequent promise of a referendum on UK membership.⁸² The Commission's lack of democratic legitimacy means that it is in a position to allow the ECI to wither and fall in to desuetude through its approach to its implementation with little immediate impact on its legitimacy. Democracy is not the only normative justification for institutional mediation and the Commission is not the only difficulty the ECI faces, if it is to increase its democratic impact, but the analysis of the institutional mediation of the ECI and EUA highlights

⁸⁰ This depends in large part on the stance taken by AFCO and PETI in relation to the ECI in the coming months. This is being demonstrated in the current review of the ECI. Compare the Constitutional Affairs Committee of the European Parliament report (PA\1054485EN Apr 2015) and the Commission report for the ECI review in 2015 at http://ec.europa.eu/transparency/eci_report_2015_en.pdf. Accessed 13 Apr 2015. At the time of writing the position of the Council in relation to the ECI review is not clear.

⁸¹ Ed Miliband, speech at the London Business School, 12 March 2014, <http://press.labour.org.uk/post/79351017940/speech-by-ed-miliband-to-the-london-business>, accessed 12 Jan. 2015.

The Liberal Democrats have also promised an in/out referendum. Liberal Democrats, Manifesto 2010, http://www.astrid-online.com/Dossier--R3/Documenti/Elezioni-2/libdem_manifesto_2010.pdf, accessed 5 Jan. 2015.

⁸² For discussion of political motivation behind EUA implementation see pgs 141-145.

the difficulty of having a non-democratic institution such as the Commission influencing the application of direct democracy in the EU.

Institutional mediation, to some degree, is inevitable. The issue that has been highlighted by the ECI and the EUA, however, is that the potential for direct democracy to meet the democratic criteria of *effective participative opportunity*, *citizen agenda influence* and *citizen outcome influence* is strongly conditioned by the decisions taken by the existing institutions in relation to their legislative design and by the institutional control over the interpretation and application of the legal provisions. The extent of institutional mediation and the impact it has on the democratic potential of the ECI and EUA is indicated by the degree to which citizens can challenge established policy preferences. It is to a consideration of the ability of citizens to use the ECI and EUA to introduce their own policy preferences that this chapter turns next.

Ability of direct democracy to challenge established policy preferences in the EU

A crucial test of any democratic instrument, particularly those being incorporated in to a representative governing system, is that it provides the opportunity for citizens to challenge the established policy preferences of the political institutions. Without this challenge citizen participation through direct democracy will not have an impact and the democratic criteria of citizen agenda and outcome influence will not be met. The democratic value of an instrument of direct democracy, at least in terms of the extent to which it reinforces popular sovereignty, correlates to the extent that it allows for challenge to the existing policy choices of the institutions it addresses, and the increased citizen influence that this reflects.⁸³ This is because an instrument of direct democracy that is only able to support existing policy preferences, and confirm policy and legislative decisions already taken by another political actor, may provide some extra legitimacy to decisions already taken, but it will have little impact in changing the degree to which these decisions are aligned with citizen preferences. From a citizen perspective there is little incentive in participating through a democratic instrument that does not strengthen their influence over the political direction of the polity. Therefore, if the challenge to established policy preferences through the ECI and EUA is weak, the levels of democratic participation they instigate and their democratic potential are likely to be reduced.

Direct democracy potentially leads to a challenge to established policy preferences through providing a formal opportunity to place items on the political agenda, through generating public debate that can indirectly increase citizen influence over policy decisions, and through the

⁸³ R Blaug, 'Engineering Democracy', [2002] *Political Studies* 102.

obligations to act in response to public support that are included in the legislative design of the instrument. The ECI should be strong in the first area by offering citizens a formal opportunity to influence the political agenda and to generate debate about a wide range of policy issues that would not otherwise be debated as part of the EU agenda.⁸⁴ The EUA should be strong in the second area because of the strong legal obligation on the existing institutions to implement the policy preference expressed by citizens in a referendum, irrespective of whether it supports established policy preferences or not. Next there is discussion about the indirect challenge to established policy preferences from public debate, and secondly from the obligation to implement citizen opinion expressed in a vote.

Challenge to policy preferences from citizen initiated public debate

Despite the possibility of public debate provided by the ECI legislation, there appears to be a tendency developing for the Commission to restrict it by being more likely to register an ECI proposal the less it challenges policy preferences. It is too early for this tendency to register ECI proposals that support current Commission policy to be clearly demonstrated, but the majority of the ECI proposals registered so far have been affirming or extending the Commission's existing legislative programme or policy preferences, such as initiatives relating to the ERASMUS programme,⁸⁵ the environment,⁸⁶ or speed limits.⁸⁷ The most striking registration refusal that limits challenge to existing policy preferences is the decision of the Commission in October 2014 to refuse registration of the *TTIP initiative*, on the grounds that the ECI process cannot be used to request the Commission to not do something, which excludes some of the most important areas of Union activity.⁸⁸

The TTIP decision means that once a course of action is initiated by the Commission, citizens are not able to use the ECI to challenge the policy preference inherent in this action, in this case it was transatlantic trade negotiations whose negotiation parameters citizens wanted to challenge and whose ratification they wanted to stop.⁸⁹ If this position of the Commission in relation to registering ECI proposals is maintained, citizens can only use the ECI process to propose that a concluded EU

⁸⁴ Art 4(2)(b) Reg 211/2011 states that all ECI proposal should be registered that are not manifestly outside the powers of the Commission.

⁸⁵ The *Teach for Youth -- Upgrade to Erasmus 2.0* initiative. For description of proposal go to <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2013/000005>, accessed 13 Apr 2015.

⁸⁶ See <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000012>, for information on the *Ecocide* initiative, accessed 13 Apr 2015.

⁸⁷ The initiative titled *30 km/h - making the streets livable*. For description go to <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000014>, accessed 13 Apr 2015.

⁸⁸ Commission refusal available at <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041>. For further comment on the refusal see J Organ 'Commission blocks TTIP ECI and Public Debate', (ECI Campaign 23 Oct 2014) available at <http://www.citizens-initiative.eu/commission-blocks-ttip-eci-and-public-debate/>. Accessed 13 Apr 2015.

⁸⁹ Further information on the TTIP ECI proposal is available at <https://stop-ttip.org/>.

trade agreement does go on to be ratified. An ECI proposal that seeks support for ratifying a treaty would be a largely empty gesture that is unlikely to generate high levels of citizen support because of the likelihood that the treaty will be ratified anyway, with or without direct citizen participation. One of the most important policy areas of the EU institutions, and one in which the non-democratic Commission has an important role to play, has therefore been removed from the ECI process through the Commission's questionable interpretation of the ECI regulation and restricted the ability of citizens to challenge EU policy preferences as a result.

Although the majority of initiatives do not challenge existing policy preferences, there are a small number registered that have evidenced some challenge to EU policy, such as the proposal to suspend the EU climate and energy package.⁹⁰ Most notably the two initiatives, the *One of Us* and *Right to Water* initiatives, which achieved the levels of support needed to ask the Commission to consider a legal act of the Union, were a challenge to the EU policy on embryo research and the commercialisation of utilities, respectively.⁹¹ As a result the ECI has led to some public debate about policies generally unsupported by the Commission, despite the number of initiatives refused registration by the Commission. The Commission has also demonstrated the ECI's weakness in challenging policy preferences by being willing to use its veto at the end of the ECI process, when it refused to initiate a legal act of the Union in response to the *One of Us* and *Right to Water* initiatives despite their levels of public support.⁹² For its part, the EUA does little to formally extend public debate, and challenge established policy preferences as a result, because it does not give citizens the choice of what subjects to hold a referendum on and the Government is able to exercise a degree of control over whether they are initiated. However, on the probably rare occasions that a referendum is triggered as a result of the EUA there will be public debate about the EU and there will be an opportunity for a citizen veto of established government policy. The UK government might try to minimise the risk of an EU policy or a treaty it has negotiated being rejected in a referendum, but the legal provisions of the EUA have increased the chance of a referendum being held and UK citizens will control their approval once a referendum is triggered.

⁹⁰ Information about *EU climate and energy package* initiative available at <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000010>, accessed 13 Apr 2015.

⁹¹ *One of Us* initiative information available at ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000005, accessed 13 Apr 2015. *Right to Water* initiative available at ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003, accessed 13 Apr 2015.

⁹² Commission response to *One of Us* is available at http://ec.europa.eu/research/eci/one-of-us_en.pdf and response to *Right to Water* is available at <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-177-EN-F1-1.Pdf> accessed 13 Apr 2015.

Challenge to policy preferences from citizen initiated outcomes

Previous experience in the EU indicates that the consequences of an EU policy or treaty being rejected at Member State level are not clear cut. A referendum vote in a member state has rejected an EU treaty five times. After the 'no' votes on the Constitutional Treaty in France and the Netherlands,⁹³ the Constitutional Treaty was abandoned and after renegotiation all member states ratified the Lisbon Treaty, with only Ireland holding a referendum (twice).⁹⁴ After the Danish rejection of the Maastricht treaty and Irish rejection of the Nice and Lisbon Treaties there were periods of analysis and reflection, and then declarations and assurances were made by the EU institutions and the member states to address the concerns of voters.⁹⁵ Each treaty was then presented without change for a vote in another referendum and on each of the three occasions the referendum result approved ratification of the treaty.⁹⁶ There has been some policy response, therefore, to referendum results, but three times the treaty rejected has not been changed and although the Constitutional Treaty was abandoned the Lisbon Treaty was quickly agreed and retained much of what had been contained in the Constitutional treaty.⁹⁷

The response so far to the rejection of EU treaties seems to imply that when a challenge comes from citizens in a referendum, as happened in Denmark, Ireland, France and the Netherlands, the political elites of the members states and the EU institutions will join together to 'resolve' the challenge to their policy preferences from citizens of a particular state. This response to rejection of treaties in popular votes indicates the difficulty in the EU context of a citizen challenge to decisions that reflect the policy preferences of not only their own governments, but also other Member State governments and the EU institutions. It also exemplifies the tension between Member State level democracy and democracy viewed from an EU level perspective. For the Member State government concerned it exacerbates the pressure of having to respond to both the wishes of other Member State governments and the EU as a whole, and to the wishes of their citizens as expressed in a popular vote. An EUA triggered referenda that rejects an EU treaty is likely to be responded to in the same way by the political institutions, and the EUA has extended these political difficulties in to areas of EU policy as well. It will be interesting to see how the institutional response to a challenge to established policy preferences in relation to the constitutional framework of the EU differs from the response to a challenge to the established policy preferences in relation to legislative and policy

⁹³ L Besselink 'Double Dutch: The Referendum on the European Constitution' [2006] European Public Law 345.

⁹⁴ G Hogan, 'The Lisbon Treaty and the Irish Referendum', [2009] European Public Law 163.

⁹⁵ C Costello, 'People's Vengeance: Ireland's Nice Referendum', [2005] EU Const 357.

⁹⁶ G de Búrca, 'If at first you don't succeed: vote, vote again: Analysing the second referendum phenomenon in EU treaty change' [2010] Fordham International Law Journal 1472.

⁹⁷ The IGC was convened in July 2007 and agreement was reached in Oct 2007 on the new treaty text.

decision-making of the EU. It will also be interesting to see what impact the expected political pressure might have on decision-making by the UK Government.

Notwithstanding the qualifications above, the EUA will give citizens influence over the outcomes from the UK's EU policy agenda, albeit on infrequent occasions. For its part, the ECI provides far less opportunity for citizen influence over the outcomes of the EU policy agenda because there is no obligation on the Commission to initiate a legal act in response to an initiative that is presented to it, and the extent to which it meets the democratic criteria of *citizen outcome influence* is almost entirely in the hands of the Commission. The final part of this section on the ability of citizens to challenge policy preferences comments on the impact of the EU framework on how strongly citizens are able to use direct democracy to meet the two democratic criteria of *citizen agenda influence* and *citizen outcome influence*.

Impact of EU political structure on citizen ability to challenge policy preferences

In the national context the challenge to established policy preferences can be viewed as being between citizens through direct democracy and the political institutions that these same citizens have legitimised through indirect, representative democracy. However, this characterisation of the direct democratic challenge to policy preferences as a bilateral one between citizens and a political elite only partially explains the institutional mediation and protection of policy preferences in the dual democracy of the EU. The ECI gives citizens the potential to challenge the policy preferences of the Commission and the other EU institutions, but it may also challenge the policy preferences of any one, or several, of the EU Member States. The EUA may facilitate UK citizen challenge of future UK government policy preferences, but in doing so it may also lead to a challenge to the preferences of the EU level institutions, and also other Member States. As well as the multiple institutions in different, but overlapping, polities that may resist citizen initiated policy preferences, there is also contestation between the institutions of the EU and its Member States that may reinforce the policy status quo and add to the difficulties for citizens to use the ECI or EUA to influence the agenda content or its outcomes and the established policy preferences that they reflect. These challenges to the ability of citizens to use the ECI and EUA to challenge policy preferences in the dual EU democracy are commented on further in the next paragraphs, first from a UK and then an EU perspective.

First from a UK perspective, the contestation between the EU and its Member States is reflected in the EUA referendum provisions and reduces their democratic potential because they are underpinned by a desire to reinforce the traditional sovereignty of the state and restricted to decisions that transfer powers or sovereignty to the EU level institutions. This is indicated by the

provisions that require referendum approval for decisions at EU level that would remove the UK's veto in that policy area, and the fact that referendum approval is not required when EU competences are being reduced.⁹⁸ Future governments may be cautious towards triggering referenda to avoid possible loss of political capital resulting from a no vote in a referendum, but when a referendum is triggered it creates the possibility of a clash between UK sovereignty and the consensual approach to decision making at EU level.⁹⁹ If UK citizens vote to not approve a treaty or a decision taken in the Council and there is significant pressure from other Member States and the EU institutions on the UK Government to identify and address the concerns of UK citizens and hold another referendum, when necessary, it will be interesting to see how the UK responds to the demands of being a member of an EU polity that must accommodate the democratic wishes of each individual Member State, including the UK, and also the democratic wishes of the Member States as a whole.

The UK government might have had one eye on the EU institutions when drafting the EUA, but they also had one eye on future UK governments that might have a different policy position to theirs. Having written in to the legislation an increased resistance to a UK policy position that wishes to extend EU competences, the extent to which this limits citizen ability to challenge policy preferences depends on the position of the government of the time. The EUA referenda cannot lead to a citizen vote that vetoes the EU policy preference of the current government or a future government with the same policy position, but it does provide the possibility of a citizen vote that could veto differing policy preferences of a future government. The ability of citizens to challenge policy therefore appears to be incidental to the political motivations behind the enactment of the EUA, which are a desire to protect the policy preferences of the current Government against future institutional challenge, to stop an increase in powers of the EU institutions, and also to resolve party political difficulties.¹⁰⁰

Secondly from an EU perspective, the ECI allows for formal democratic deliberation on any issues 'not manifestly outside the framework of the Commission's powers', and wide discretion in terms of legal outcomes, but the possible wide scope that this allows has been restricted by the Commission's

⁹⁸ The s18 EUA 'sovereignty clause' also intended to make clear the strength of Member State sovereignty in relation to the EU by stating that the status of EU law was dependent on its continuing statutory basis in UK law. S18 EUA is titled "the status of EU law dependent on continuing statutory basis". It is questionable whether it has any significant impact but its political message is clear. For discussion of sovereignty clause see M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3.

⁹⁹ For comment on the political implications of a no vote in a treaty referendum in Ireland see C Costello, 'People's Vengeances: Ireland's Nice Referenda' [2005] *EU Const* 357 or G Hogan, 'The Lisbon Treaty and the Irish Referendum' [2009] *European Public Law* 163.

¹⁰⁰ These political motivations were discussed further in chapter three pgs 141-145.

application of the ECI legislation. The Commission's limitation of the ability of EU citizens to challenge existing policy preferences does not appear to be a consequence of trying to strengthen the supranational institutional powers in contestation against Member State interests, as the UK Government has done from the opposite perspective. Instead, the Commission's limitation of public debate by registering only those ECI proposals that are clearly inside the competences of the Commission appears more likely to be a defensive reaction to avoid the risk of contestation with Member State institutions.¹⁰¹ If this is the case then protection of the political position of the Commission would be being prioritised over giving citizens an enhanced opportunity to influence the EU policy agenda. Furthermore, if the Commission is taking a restrictive approach to ECI registration because of concerns over an appearance of competence creep and to protect its position, this might in fact be counter-productive in terms of protecting the status quo, if the repeated refusal to allow democratic engagement through the ECI, or to initiate legal outcomes as a result of ECIs, comes to be viewed as an example of an institution that is adverse to democratic legitimacy and needs further democratic reform.

It is possible that the requirement in EU law for the Commission to protect the 'general interests of the Union' has also influenced the Commission's restriction of the number and impact of citizen initiated policy preferences.¹⁰² It could be argued that the protection of the general interests of the Union requires the Commission to consider initiatives from a supranational perspective of the Union population as a whole, and that this legal obligation is not superseded by a proposal backed by one million or so EU citizens. An indication of this position and that it will be difficult for even a well supported ECI proposal to shift the Commission's policy preferences was given by the previous Commission President Manuel Barroso when he said in relation to the TTIP ECI in interview that there is no obligation to accept a petition (sic) because "two or three million petitioners does not mean a position of a majority".¹⁰³ This argument, though, is undermined by having an EU political environment where the need for stronger democratic legitimisation is recognised and where the Commission itself is not democratically legitimised.¹⁰⁴ It is too early to make a claim that the Commission is deliberately prioritising its own perceived Union interests over those of EU citizens and there is no clear statement to that effect, but the tendency to prioritise institutional preferences

¹⁰¹ See discussion of shift from 'manifestly outside' to 'clearly inside' the powers of the Commission on pgs 101-108.

¹⁰² Art 17(1) TEU states that the Commission shall promote the general interest of the Union.

¹⁰³ Jonathan Brunert, 'Can Democracy Work?' (BBC Radio 4 Jan 2015).

¹⁰⁴ There is some accountability to the European Parliament. See footnote 45 for detail.

over citizen preferences does seem to be developing.¹⁰⁵ This discussion of the difficulties facing EU/UK citizens in using direct democracy to influence the EU policy agenda and its outcomes and to challenge a wide range of institutional policy preferences highlights an inherent difficulty in introducing direct democracy in to EU democracy at both EU and Member State level.

Direct democracy is principally a step towards increased popular sovereignty and increased influence of citizens over the law and policy decisions that institutions take. The next step in the political typology that was outlined in chapter one would be directly mediated representative government,¹⁰⁶ where political representatives facilitate political debate and continue to take policy decisions, but citizens have frequent opportunities to influence the agenda policy and its outcomes, and to impose their own policy preferences through instruments of direct democracy.¹⁰⁷ This is a long way off as party politics and institutional mediation based on established policy preferences still have a strong influence over the impact of direct democracy and the possibility of citizen influence on the policy agenda and its outcomes. The existence of supranational and Member State level institutions in the dual EU democracy means that this institutional mediation brought to bear on citizen participation through direct democracy is not just bilateral, but a more complex contestation between citizens and the interests of Member State level and EU level institutions. Moreover, it means that the contestation between these sets of institutions strengthens the institutional reluctance to reduce their control and allow a corresponding increase in citizen influence over the EU for fear of the other institutions strengthening their position. Paradoxically, however, the political motivations that reflect these same concerns about institutional weaknesses and strengths have led to the introduction of the ECI and EUA.

The impact of contestation with and between different sets of institutions is not the only difficulty for direct democracy in the EU that the ECI and EUA indicate. It is also conditioned by the institutional and democratic framework. The legitimisation of the constitutional framework remains anchored in the Member States, but, as was found in chapter 3, it is difficult for Member State level direct democracy to have an impact on decision making in the EU institutions. Conversely, supranational direct democracy can be used to provide citizen influence over EU level law and policy making, but, as was demonstrated in chapter 2, it is unlikely that citizens will be able to use direct

¹⁰⁵ This tendency is discussed in detail in chapter 2, pgs 98-117 and in J Organ, 'Decommissioning Direct Democracy? A critical analysis of Commission decision making on the legal admissibility of European Citizens Initiative proposals', (2014) EU Const 422.

¹⁰⁶ This the phrase I introduced to the Weale typology discussed in ch 1 pgs 51-54.

¹⁰⁷ See B Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984) for discussion of a political system that would fit within this category.

democracy to influence treaty amendment. These are limitations on the scope of direct democracy that are inherent to the structure of the EU's dual democracy.

A further limitation on direct democracy due to the EU's duality is the distance of citizens from the impact of their specific policy vote through direct democracy. For EU level instruments there is the geographic distance of the EU and its status as a partially independent polity, and there is also the distance an initiative has to travel through the legislative process to achieve a legal outcome. At Member State level there is the political distance of voting to influence national policy in relation to the EU that is then negotiated with the Member States before final decisions are taken. Both instruments are also affected by the need to take the interests of all Member States in to consideration. The ECI has unusual triple support thresholds that reflect a need for a representative number of citizens and also a representative number of Member States, which add to the complexity of collecting support.¹⁰⁸ The initiation of an EUA referendum will be influenced by the UK's negotiations with other Member States in the Council, and the implementation of a citizen veto given through an EUA referendum will be influenced by UK membership of the EU. As a result, even if the political institutions were to more strongly prioritise democratic participation of the ECI and EUA, there will still be limitations on their ability to enhance EU democratic legitimacy as a result of the current institutional framework and democratic paradigm of the EU.

Conclusion

The ECI and EUA are notable steps in the gradual, piecemeal evolution of the dual EU democracy, potentially moving it towards stronger popular sovereignty and enhanced democratic legitimacy through increased citizen influence over EU treaties, law and policy making. The rhetoric from the political institutions of 'bringing citizens closer to the Union' and 'giving citizens the final say over the most important decisions' promises such an impact, and it implies that EU democracy will continue to evolve a legitimacy that is less reliant on representative democracy or, for the Commission, on performance legitimacy and outputs. The ECI is the first supranational instrument of direct democracy and part of a move towards a seemingly more participatory democratic approach in the EU, which has been described as being "of potentially enormous significance".¹⁰⁹ The EUA referenda are the first instruments of direct democracy provided for in UK legislation on an ongoing basis and give citizens the opportunity to veto government policy when a referendum is held. However,

¹⁰⁸ Support thresholds are set out in Art 7 Reg. 211/2011.

¹⁰⁹ A Warleigh, 'On the Path to Legitimacy? The EU Citizens Initiative Right from a Critical Deliberativist Perspective' in C Ruzza and V Della Sala (eds), *Governance and civil society in the European Union*, (Manchester University Press 2007) 65.

looking behind these headlines, my analysis of the ECI and EUA has shown significant limitations on their potential to have an impact on the democratic paradigm and legitimacy of the EU.

The limited democratic potential of the ECI and EUA is reflected in the degree to which they meet the democratic criteria of effective participative opportunity, citizen agenda influence and citizen outcome influence. There is a new opportunity for citizens to engage directly in specific policy matters rather than through the selection of representatives, but the influence citizens exert from participating through the ECI or EUA has been qualified on a number of fronts, so that control of the EU agenda and its outcomes remains largely with the existing political institutions. It is possible that the institutions that drafted the ECI and EUA and that are responsible for their implementation did so to move towards a form of directly mediated representative government through increasing the effective participation of citizens; but it seems more likely that, having introduced direct democracy to resolve party political difficulties and to reinforce their authority in the contested EU polity, democratic participation is not the priority in the design or implementation of the ECI and EUA. This is most clearly demonstrated through the choice of referenda triggers by the UK government in the EUA and the control exerted over the ECI by the Commission at registration. As a result of this institutional mediation, the impact of direct democracy on the ability of citizens to influence EU related policy preferences and therefore EU democratic legitimacy has been significantly diminished.

Despite their limited impact so far on the dual democratic legitimacy of the EU, the ECI and EUA may in the long run be more than just interesting democratic experiments. The principal objective for the institutions that have drafted and implemented the ECI and EUA may be their own self preservation, but in defending their own position they could have inadvertently taken a step towards significant institutional change. The EUA may still lead to referenda that have an impact on the UK's EU policy or the EU political framework itself, and strengthen citizen influence over the political agenda in the process, but the frequency, significance and government attitude to implementing the EUA legislation will be crucial in this respect. The ECI is in greater need of resuscitation, if it is to become a well-used means of democratic participation that strengthens citizen influence over EU decision making. With the 3 year review of the ECI underway and the first challenges to Commission decision making in relation to the ECI due to be heard by the ECJ,¹¹⁰ 2015 could be a crucial year for this innovative democratic instrument. Any revival, though, will depend mainly on the outcome of discussions between a cautious Commission and a European Parliament that is pushing to effect significant change to the ECI process and legislation. Direct democracy in the dual democratisation

¹¹⁰ The first case ECJ 11 Oct 2012, Case T-450/12, Anagnostakis v Commission is due to be heard on 5 May 2015. 6 other cases are pending. A list of the cases is available at <http://www.citizens-initiative.eu/legal-section>.

of the EU therefore remains in an embryonic stage, with the scope and impact of citizen participation still heavily dependent on future decisions of Member State and EU level institutions.

Bibliography

Cases

Anagnostakis v Commission (ECJ 11 Oct 2012, Case T-450/12)

Jackson and Others v. Attorney General [2005] UKHL 56

R v Secretary of State for Transport, ex parte Factortame Ltd and others [1990] 2 AC 85, House of Lords

R v Secretary of State for Transport , ex parte Factortame Ltd (No. 2) [1991] 1 AC 603, House of Lords

Wheeler v The Office of the Prime Minister [2014] EWHC 3815 (Admin)

Legislation and Official Documents

European Union Act 2011

Political Parties, Elections and Referendums Act 2000

Consolidated Versions of the Treaty on European Union and Treaty on the Functioning of the European Union OJ C 326/01

Regulation (EU) No. 211/2011 of 16 Feb 2011 on the citizens' initiative [2011] OJ L 65/1

Decision of the European Ombudsman closing her own-initiative inquiry concerning the European Commission (OI/9/2013/TN Mar 2015)

Draft report on the proposal for a regulation of the European Parliament and of the Council on the citizens' initiative, Committee of Constitutional Affairs (PR\837295EN 2010)

European Commission Green Paper on a European Citizens Initiative COM(2009) 622

European Commission proposal for a regulation on the European Citizens Initiative COM(2010) 119 final 2010/0074 (COD)

European Governance, A White Paper COM(2001) 428

European Parliament request for the Commission to submit a proposal for a Regulation implementing the ECI, OJ C 212E (2010)

House of Lords Select Committee on the Constitution, 2009-10. *Referendums in the United Kingdom*, 12th Report of Session 2009-10 (HL Paper 99)

The Coalition: Our Programme for Government (HM Government 2010)

Secondary Sources

Adams W (ed), *Singular Europe: Economy and polity of the EC after 1992* (University of Michigan Press 1992)

Arnulf A and Wincott D (eds) *Accountability and legitimacy in the European Union*, (OUP 2002)

Auer A, 'European Citizens Initiative' [2005] *EU Const* 79

Auer S 'New Europe: Between Cosmopolitan Dreams and Nationalist Nightmares' [2010] *JCMS* 1163

Banchoff T and Smith M (eds) *Legitimacy and the European Union: the contested polity* (Routledge 1999)

Barber B, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984)

Barrett G, "Creation's Final Laws: The Impact of the Treaty of Lisbon on the 'Final Provisions' of Earlier Treaties" (2008) 27 *YEL* 3

Baykal S, 'Unity in Diversity? The Challenge of Diversity for the European Political Identity, Legitimacy and Democratic Governance: Turkey's EU Membership as the Ultimate Test Case', Jean Monnet Working Paper 09/05

Beaumont P, Lyons C and Walker N (eds), '*Convergence and Divergence in European Public Law*' (Hart 2002)

Beetham D, *The legitimation of Power* (Macmillan 1991)

-- *Democracy: a beginner's guide* (One World 2005)

Beetham D and Lord C, *Legitimacy and the European Union* (Longman 1998)

Bellamy R and Weale A, 'Political legitimacy and European monetary union: contracts, constitutionalism and the normative logic of two-level games' [2015] *JEPP* 2577

Berg C and Thompson J (eds) *An ECI that Works: Learning from the first two years of the ECI* (2014). Available at <http://ecithatworks.org/>.

Besselink L, 'Double Dutch: The Referendum on the European Constitution' [2006] *European Public Law* 345

Blaug R, 'Engineering Democracy', [2002] *Political Studies* 102

Bogdandy A, 'The European Lesson for International Democracy: The significance of Articles 9-12 EU Treaty for international organisations'. *EJIL* 23 (2012)

Bogdandy A and Bast J (eds), *Principles of European Constitutional Law* (Hart 2010)

Bogdanor V, *The people and the Party System: The referendum and electoral reform in the UK* (CUP 1981)

-- 'The Future of the European community: Two models of democracy' [1986] *Government and Opposition* 161

-- *The New British Constitution* (Hart 2009)

Bomberg E and Stubb A (eds) *The European Union: How Does it Work?* (OUP 2003)

Brunert J, 'Can Democracy Work?' (BBC Radio 4 Jan 2015)

Burnheim J, *Is Democracy Possible*, (University of California Press 1988)

Butler D and Ranney A, *Referendums Around the World: The Growing Use of Direct Democracy* (Macmillan 1994)

Carlson C, 'European Union: participants assess first year of the European Citizens' Initiative - Regulation 211/2011', [2013] *Public Law* 669.

Chavenal F and Schimmelfennig F, 'The case for Democracy in the European Union' [2013] *JCMS* 334

Costello C, 'People's Vengeances: Ireland's Nice Referenda' [2005] *EU Const* 357

Craig P, 'The European Union Act 2011: Locks, Limits and Legality' [2011] *CMLRev* 1915

Craig P and de Búrca G (eds) *Evolution of EU Law* (OUP 2011)

Cuesta Lopez V, 'The Lisbon treaty's provisions on democratic principles: a legal framework for participatory democracy' [2010] *European Public Law* 123

Cygan A, 'National Parliaments within the EU Polity - no Longer Losers but Hardly Victorious' [2012] *ERA Forum* 517

-- *Accountability, Parliamentarism and Transparency in the EU: The Role of National Parliaments* (Edward Elgar 2013).

Dahl R, *Democracy and its critics*, (YUP 1989)

-- *On Democracy*, (YUP 2000)

Dashwood A, *Reviewing Maastricht, Issues for the 1996 IGC*, (Sweet and Maxwell 1996)

De Búrca G, 'The Quest for Legitimacy in the EU' [1996] *MLR* 59 349.

-- 'Developing Democracy Beyond the State', [2008] *Columbia Journal of Transnational Law* 221

-- 'If at first you don't succeed: vote, vote again: Analysing the second referendum phenomenon in EU treaty change' [2010] *Fordham International Law Journal* 1472.

De Clerck-Sachsse S, 'Civil Society and Democracy in the EU: The Paradox of the European Citizens Initiative', [2012] *Perspectives on European Politics and Society* 299

Della Sala V and Ruzza C (eds), *Governance and civil society in the European Union*, (Manchester University Press 2007)

Dicey A V, *Introduction to the Study of the Law of the Constitution* (Macmillan 1985).

Dougan M, 'And Some Fell on Stony Ground... A Critical Reading of Giandomenico Majone's Dilemmas of European Integration' [2006] EL Rev 865

-- 'The treaty of Lisbon: winning minds, not hearts' [2008] CML Rev 617.

-- 'What are we to make of the Citizens' Initiative?' [2011] CML Rev 1807

Dougan M, Shuibhne N and Spaventa E (eds) *Empowerment and Disempowerment of the European Citizen*, (Hart 2012)

Dougan M and Gordon M, 'The United Kingdom's European Union Act 2011: "Who won the bloody war anyway?"' [2012] EL Rev 3

Dryzek J, *Discursive Democracy: Politics, Policy and Political Science*, (CUP 1990)

Ehin P, 'Competing Models of EU Legitimacy: the Test of Popular Expectations' [2008] *JCMS* 619, 624: "

Eleftheriadis P and Nicolaidis K, et al. [2011] 'Foreword: The changing landscape of European constitutionalism' *International Journal of Constitutional Law* 673

Follesdal A and Hix S, "Why there is no democratic deficit in the European Union: A response to Majone and Moravcsik" [2006] *JCMS* 533

Fossum J and Menendez A, 'The Constitution's Gift: a constitutional theory for a democratic European Union' [2005] *ELJ*

Fukuyama F, *The end of history and the last man* (Penguin 1992)

Glencross A, 'First or second order referendums? Understanding the votes on the EU constitutional treaty in four EU Member States', [2011] *Western European Politics* 755

Gordon M, 'The United Kingdom and the Fiscal Compact: Past and Future' [2014] *EU Const* 28

-- *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015).

Greenwood J, 'The European Citizens Initiative and EU Civil Society Organisations' [2012] *Perspectives on European Politics and Society* 325

Habermas J, 'The European nation state. Its achievements and its limitations. On the Past and future of sovereignty and citizenship' [1996] *Ratio Juris* 125

Habermas J, 'A constitution for Europe?' [2001] *New Left Review* 5

Habermas J, *The Postnational Constellation* (MIT Press 2001)

Halter U, Mayer F and Weiler J, 'European Democracy and Its Critique', [1995] *West European Politics* 4

Harris E and Lord C, *Democracy in the New Europe* (Macmillan 2006)

Held D (ed), *A globalizing world? Culture, Economics, Politics* (Routledge 2000).

-- *Democracy and the Global Order* (Polity 2007)

Heritier A, 'Elements of Democratic Legitimation in Europe: An alternative perspective' [1999] *Journal of European Public Policy* 269

Hix S, 'What is Wrong with the European Union and how to fix it', [2008] *Polity* 70

Hobolt S, *Europe in Question: Referendums on European Integration* (OUP 2009)

Hodson D and Maher I, 'British Brinkmanship and Gaelic Games: EU Treaty Ratification in the UK and Ireland from a Two Level Game Perspective' [2013] *BJPIR*

Hogan G, 'The Lisbon Treaty and the Irish Referendum', [2009] *European Public Law* 163

Horeth M, 'No way out for the Beast? The Unsolved legitimacy Problem of European governance' [1999] *Journal of European Public Policy* 249

Howse R and Nicolaidis K (eds) *The federal vision: legitimacy and levels of governance in the United States and the European Union* (OUP 2001)

Hug S, 'Some thoughts about referenda, representative democracy and the separation of powers' [2009] *Constitutional Political Economy* 251.

Hyland J, *Democratic Theory: The Philosophical Foundations* (Manchester University Press 1995)
Fishkin J and Laslett P (eds), *Debating Deliberative Democracy*, (Wiley 2008)

Kaufmann B and others, (eds) *Direct democracy in Europe* (VS Verlag für Sozialwissenschaften 2007)

Kaufmann B and Pichler J (eds) *The European Citizens'Initiatives – Into new democratic territory*, (Intersentia 2010)

Kliver P, *The National parliaments in the European Union* (2006)

Kohler-Koch B and Rittberger B *Debating the Democratic legitimacy of the EU*, (Rowman & Littlefield 2007)

Laisney M, 'The Initiation of Local Authority referendums: participatory momentum or political tactics? The UK case', [2012] *Local Government Studies* 639

Lipjhart A, *Democracies: patterns of majoritarian and consensus government in 21 countries*, (YUP 1984)

Lord C, 'Assessing Democracy in a contested polity' [2001] *JCMS* 641

Lord C and Maignette P, 'E Pluribus Unum? Creative Disagreement about legitimacy in the EU' [2004] *JCMS* 183

Macartney H, *The Debt Crisis and European Democratic Legitimacy* (Macmillan 2013)

MacCormick J, *Weber, Habermas and the Transformations of the European State Constitutional, Social, and Supranational Democracy*, (CUP 2007)

Maignette P, 'European Governance and civic participation: Beyond elitist citizenship?' [2003] *Political Studies* 144

Majone G, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*. (OUP 2005)

-- 'Legitimacy and Effectiveness: a response to Professor Michael Dougan's review article on Dilemmas of European Integration' [2007] *ELRev* 70

-- *Europe as the Would-be World Power – The European Union at fifty* (CUP 2009)

-- 'From Regulatory state to democratic default' [2014] *JCMS* 1216

Matarazzo R (ed), *Democracy in the EU after the Lisbon Treaty* (Edizioni Nuova Cultura, 2011).

Mendelsohn M and Parkin A (eds) *Referendum Democracy: Citizens, elites and deliberation in referendum campaigns* (Macmillan 2001)

Mendez F, Mendez M, and Triga V, *Referendums and the European Union: a comparative enquiry* (CUP 2014)

Menon A and Weatherill S, 'Democratic Politics in a globalising world: supranationalism and legitimacy in the European Union, LSE, Law society and economy working papers 13/2007.

Meny, Y, 'Can Europe be Democratic? Is it Feasible? It is necessary? Is the present situation sustainable?', [2011] *Fordham International law Journal* 1287

Mincheva E and Szeligowska D, 'The European Citizens' Initiative – Empowering European Citizens within the institutional triangle: A legal and political analysis', [2012] *Perspectives on European Politics and society* 270

Monaghan E, 'Assessing Participation and Democracy in the EU: The Case of the European Citizens' Initiative', *Perspectives on European Politics and Society* [2012] 285

Moravcsik A, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998)

-- 'In Defence of the 'Democratic Deficit': Reassessing legitimacy in the European Union', 40 *JCMS* (2002)

-- 'The European Constitutional Compromise and the Neofunctionalist Legacy', [2005] *Journal European Public Policy* 349

-- 'The European Constitutional Settlement' *World Economy* (January 2008)

-- 'The Myth of Europe's Democratic Deficit', *Intereconomics: Journal of European Public Policy* (2008)

Morel L, 'The Rise of 'Politically Obligatory Referendums': The 2005 French Referendum in Comparative Context' [2007] *West European Politics* 1041.

Murkens J, 'The European Union Act: A Failed Statute' [3/2013] *LSE Working Papers* 2

Nikolaidis K, 'The New Constitution as European Demoi-crazy?' [2004] *Critical Review of International Social and Political Philosophy* 1

Organ J, 'Decommissioning Direct Democracy? A critical analysis of Commission decision making on the legal admissibility of European Citizens Initiative proposals', (2014) *EU Const* 422

-- 'Commission blocks TTIP ECI and Public Debate', (ECI Campaign 23 Oct 2014)

Pateman C, *Participation and Democratic theory* (CUP 1970)

Peers S, 'The Future of EU Treaty Amendments' [2012] *YEL* 17.

Pinelli C, 'The Discourses on Post-National Governance and the Democratic Deficit Absent an EU Government', [2013] *Eu Const* 185

Qvortrup M, 'Are Referenda Controlled and Pro hegemonic?' [2000] *Political Studies* 821

-- 'Democracy by Delegation: The decision to hold referendums in the UK' [2006] *Representation* 59

Rubini and Trybus (eds) *After Lisbon: the Future of European Law and Policy* (Edward Elgar, 2012)

Scharpf F, *Governing in Europe: Effective and Democratic?* (OUP 1999)

Schiller T (ed), *Local Direct Democracy in Europe* (Springer 2011)

Schiller T and Setala M (eds) *Referendums and Representative Democracy: Responsiveness, Accountability and Deliberation* (Routledge 2009)

-- *Citizens Initiatives in Europe; procedures and consequence of agenda setting by citizens* (Macmillan 2012)

Schmitter P, *How to Democratise the EU – and why bother?* (Rowman 2000).

Schumpeter J, *Capitalism, Socialism and Democracy* (Allen and Unwin 1954).

Schorkopf F, 'The European Union as an association of sovereign states: Karlsruhe's ruling on the Lisbon Treaty' [2009] *German Law Journal* 1219

Setala M, *Referendums and Democratic Government: Normative Theory and Analysis of institutions* (Macmillan 1999)

Setala M, 'On the Problems of Responsibility and Accountability in Referenda.' [2006] *European Journal of Political Research*, 699

Shu M, 'Referendums and Political Constitutionalisation of the EU' [2008] *ELJ* 423

Smith G, *Democratic Innovations - Designing Institutions for Citizen Participation* (CUP 2009)

Smith G, 'The Functional properties of the Referendum' [1976] *European Journal of Political Research* 4

Smith J, 'The 1975 Referendum' [1999] *Journal of European Integration History* 41

Steiner J, *The Foundation of Deliberative Democracy*, (CUP 2012)

Tierney S, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (OUP 2012)

Verhoeven A, *The European Union in search of a democratic and constitutional theory* (Kluwer Law International 2002)

Warleigh A, *Democracy and the European Union: theory, practice and reform* (Sage 2003)

Weale A, *Democracy* (Macmillan 1999)

Weale A and Nentwich M (eds) *Political Theory and the EU: Legitimacy, Constitutional choice and Citizenship* (Routledge 1998)

Weber M, *The theory of social and economic organization* (Free Press New York 1964), translated [from the German] by A.M. Henderson and Talcott Parsons; edited with an introduction by Talcott Parsons

-- *Economy and society: an outline of interpretative sociology* (University of California Press 1978)

Weiler J, 'Does Europe need a constitution? Reflections on demos, telos and the German Maastricht decision' [1995] *ELJ* 219

Weiler J, *The Constitution of Europe 'Do the New Clothes Have an Emperor?' and Other Essays* (CUP 1999)

Weiler J and Wind M, *European Constitutionalism beyond the State* (CUP 2003)