

29 THE SZEKLER NATIONAL COUNCIL'S EUROPEAN CITIZENS' INITIATIVE

for the Equality of the Regions and Sustainability of the Regional Cultures at the Court of Justice of the European Union

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29.1 INTRODUCTION

The Szekler National Council decided¹ to lodge a European Citizens' Initiative (ECI) with the objective of initiating EU legislation concerning the rights of autochthonous people and ethnic groups living in the European Union, and in particular, their right to self-determination. The ECI is a new tool of participatory democracy introduced by the Lisbon Treaty. The first initiatives could be launched beginning with 2012, therefore, the Szekler National Council specified the aim of the initiative already in 2011. The title of the proposed citizens' initiative was *Cohesion policy for the equality of the regions and sustainability of the regional cultures*. The subject matter of the initiative is that the cohesion policy of the EU should pay special attention to regions with national, ethnic, cultural, religious or linguistic characteristics that are different than those of the surrounding regions. The initiative was rejected by the European Commission with reference to the fact that there is no appropriate legal basis in the Treaties for adopting the respective legislation, i.e. the initiative falls outside the scope of the EU. The ECI initiators brought an action for the annulment of the European Commission's decision before the Court of Justice of the European Union (CJEU). The General Court rejected² the applicants' submission to annul the decision, but there is still room for the initiators to appeal to the Court and continue fighting on the EU level for the recognition of a special status for autochthonous national minorities.

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1 www.sznt.sic.hu.

2 Decision of the First Chamber of the General Court in case T-529/13 on the 10th May 2016. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=177961&pageIndex=0&doclang=HU&mode=req&dir=&occ=first&part=1&cid=632830>.

29.2 PARTICIPATORY DEMOCRACY IN THE EU AND THE EUROPEAN CITIZENS' INITIATIVE

Article 10 of the Treaty on European Union (TEU) considers representative democracy to be the general rule in the EU, however, a certain form of direct democracy is also recognized. According to Article 8 (3) TEU “every citizen shall have the right to participate in the democratic life of the Union.” The legal framework of the ECI is set out by Article 11(4) TEU and Article 24 (1) of the Treaty on the Functioning of the European Union (TFEU) under primary law, and by Regulation 211/2011 on the European Citizens’ Initiative (ECI Regulation)³ and the Commission Implementing Regulation⁴ in secondary law. According to Article 11 (4) TEU “not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties”.

The ECI is an invitation to the European Commission to propose legislation on matters where the EU has competence to legislate. A special characteristic of the EU decision-making process is the exclusive right of the European Commission to submit a legislative proposal in the ordinary legislative procedure.⁵ This means that if the Commission does not propose a legislative act there is no possibility to launch the ordinary legislative procedure. The ECI Regulation clarifies that the initiative must be launched by a citizens’ committee composed of at least 7 EU citizens old enough to vote in European Parliamentary elections and living in at least 7 different member states of the EU. They do not have to be nationals of 7 different member states, although they do have to hold the nationality of an EU member state. However, a minimum number of signatories⁶ is required in each of those 7 member states.

The idea of introducing participatory instruments in the EU decision-making processes originates from the concept of the EU’s democratic deficit, that is the conviction that European integration lacks democratic legitimacy.⁷ The ECI is considered as a unique and

3 Regulation (EU) No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative (OJ L 65/1, 11.03.2011).

4 Commission Implementing Regulation 1179/2011 of 17 November 2011 laying down technical specifications for online collection systems pursuant to Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the citizens’ initiative.

5 TFEU Art. 289, Art. 294.

6 <http://ec.europa.eu/citizens-initiative/public/signatories>.

7 László Komáromi, ‘Participatory democracy: International and European tendencies, constitutional framework in Visegrad countries, Hungarian instruments and experiences’, *Iustum Aequum Salutare* XI. 2015.3, p. 53.

innovative instrument of transnational participatory democracy.⁸ It allows citizens to connect directly with EU institutions to discuss key issues at EU level, aiming to strengthen the democratic legitimacy of the European Union.⁹ However, some scholars¹⁰ argue that the potential of the ECI as an instrument expected to increase democratic legitimacy in the EU should be evaluated in light of the post-Lisbon Community method and not as an additional “opportunity structure for citizens’ participation.”¹¹ In this context, another issue is whether the ECI is a hard, primarily legal instrument, or rather a soft, mainly political tool for raising issues of concern to citizens. The European Parliament referred to the ECI as a “means of exercising public sovereign power in the area of legislation.”¹² On the other hand, the White Paper on European Governance¹³ expresses the need for reforming the Community method with a ‘less top-down approach’, characterized by openness, clarity and interaction with the regional level, in order to help reduce the state of alienation between the citizens and the EU.¹⁴

An emerging theoretical approach regarding the use of the ECI is whether it could be used for the benefit of national minorities. Some scholars¹⁵ are of the opinion that focusing on language rights could be a real solution, while others believe that Article 2 TEU and Article 21 of the EU Charter of Fundamental Rights could be important legal bases for initiating EU legislation.¹⁶ The Federal Union of European Minorities (FUEN) launched an ECI¹⁷ in 2013 calling upon the EU to strengthen the protection of persons belonging to national and linguistic minorities and enhance cultural and linguistic diversity within

8 Irmgard Anglmayer, *Implementation of the European Citizens’ Initiative. The experience of the first three years*. European Parliamentary Research Service, Ex-Post Impact Assessment Unit. February 2015, p. 3.

9 Report from the Commission to the European Parliament and the Council – Report on the application of Regulation (EU) No. 211/2011 on the citizens’ initiative. COM (2015) 145 final. Brussels, 31 March 2015, p. 2.

10 Nikos Vogiatzis, ‘Is the European Citizens’ Initiative a Serious Threat for the Community Method?’, *European Journal of Legal Studies*, Vol. 6, No. 1. Spring/Summer 2013, pp. 91-107.

11 See Michael Nentwich, ‘Opportunity Structures for Citizens’ Participation: The Case of the European Union’, in: Albert Weale and Michael Nentwich (Eds.), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*. Routledge 1998, pp. 125-140.

12 European Parliament resolution of 7 May 2009 requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the citizens’ initiative (2008/2169(INI)).

13 Commission of the European Communities, ‘European Governance: A White Paper’ [2001] COM 428.

14 Vogiatzis 2013, p. 117.

15 Balázs Vizi, *Európai Kaleidoszkóp. Az Európai Unió és a kisebbségek*. Budapest: L’Harmattan Kiadó, 2013, p. 48; Tihamér Czika, ‘A kisebbségi jogok kérdése az EU-jogban Lisszabon után’, *Sapientia Tudományos periodikák*, 2011.20013:98-118; Kinga Gál, ‘European Citizens’ Initiative for the lingual rights of national minorities’, Kossuth Rádió, 25th March 2011.

16 European Citizens Initiative: a legal (political) instrument for advocating the protection of national minorities in the European Union? Research Institute for Hungarian Communities Abroad, Analyses, July 13 2015.

17 See: “Minority SafePack – one million signatures for diversity in Europe” <https://www.fuen.org/key-topics/european-citizens-initiative/>.

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the Union.¹⁸ On the other hand, Balázs Izsák, the President of the Szekler National Council admits that the objective of the ECI cannot be a general measure serving minority protection, since the EU Charter of Fundamental Rights and the Union's core values set forth under Article 2 TEU do not grant legislative powers to the Union's institutions in this matter.¹⁹

29.3 THE ECI OF THE SZEKLER NATIONAL COUNCIL

The Szekler National Council lodged an ECI with the objective that the cohesion policy of the EU should pay special attention to national regions. Cohesion policy targets EU regions and cities, boosting economic growth and improving quality of life through strategic investment, it is an active form of solidarity which focuses support on the less developed regions.²⁰ As Europe's main strategic investment policy aim is to make Europe's regions and cities more competitive, fostering growth and creating jobs.²¹ It was recognized that great economical and social disparities in the Community hamper the proper functioning of the internal market. For instance, if the purchasing power does not permit the inhabitants of a region to buy the goods they need, more prosperous regions are also affected, since they cannot sell their products there and expand their markets. As a result, strong economic disparities are barriers to further economic integration.²² Accordingly, the aim of the European Union is to reduce the economic and social differences between the different regions so that the inhabitants do not migrate to a more developed region and leave behind a declining area with low purchasing power and productivity.

The Szekler National Council's ECI focuses on an additional factor within cohesion policy, namely, the 'national regions'. According to the Szekler National Council, national regions are "geographical zones that exhibit unique national, ethnic, religious or linguistic characteristics, through being inhabited by an indigenous national minority that forms a majority on this particular territory, and is historically linked to it."²³ The initiators state that the concept of national regions is not a brand new terminological and dogmatical

18 The Commission refused the registration of this initiative on the grounds that it has fallen manifestly outside the framework of its powers to submit a proposal for an EU legal act for the purpose of implementing the EU founding treaties. The FUEN brought proceedings to the CJEU seeking the annulment of the Commission's decision on rejection (Case T-646/13).

19 Balázs Izsák, 'Special status for national regions'. Source: www.izsakbalazs.blogspot.hu.

20 www.europa.eu.

21 Art. 174 of the TFEU: "In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions".

22 P.S.R.F. Mathijesen, *A Guideto European Union Law*, 9th edn. London, Sweet and Maxwell, 2007. 456.

23 Izsák, Id.

invention since its substantial elements may be found in international legal documents, and have been, in particular, defined by the Council of Europe. According to the initiators, these regions are defined by Article 11 of the Recommendation 1201/1993 of the Council of Europe and the European Charter for Regional or Minority Languages, when referring to “territory in which the regional or minority language is used”, but it is also referred to in multiple provisions of the Framework Convention for the Protection of National Minorities.²⁴ Moreover, Article 28(2) of Recommendation 1811/2007 of the Council of Europe speaks of “regions with national ambitions.” The initiators also emphasize in the Detailed Information, which was attached as an addendum to the ECI (later: Detailed Information)²⁵ that the inhabitants of these regions

form a local majority or are present there in substantial number, but are in minority in the member state itself, and are therefore treated by the state as a minority, are keepers of old European cultures and languages and are significant sources of the cultural and linguistic diversity of the EU, and in a broader sense of Europe.

Based on the above, the Szekler National Council's initiative argues that the cohesion policy of the EU should pay special attention to national regions to help them sustain their culture and to promote the equality of regions in Europe. The description of the main objectives of the initiative reads:

For such regions, including geographic areas with no administrative competencies, the prevention of economical backlog, the sustainment of development and the preservation of the conditions for economic, social and territorial cohesion should be done in a way that ensures their characteristics remain unchanged. For this, such regions must have equal opportunity to access various EU-funds and the preservation of their characteristics and their proper economical development must be guaranteed, so that the EU's development can be sustained and its cultural diversity maintained.²⁶

The question arises: what is the benefit of paying special attention to national regions for cohesion policy and the EU? The initiators claim that “cultural characteristics have a bearing on the economy and development of the respective regions, the member states, the EU, and the cohesion policy of the EU could be a key factor in the sustainability of

24 “[A]reas inhabited by persons belonging to national minorities traditionally or in substantial numbers” – Art. 10(2) Framework Convention for the Protection of National Minorities.

25 Detailed Information, source: www.nationalregions.eu/detailed-information.php.

26 <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/1488>.

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these regions' culture, and by extension, of Europe's cultural diversity, as these are the regions where said cultural diversity is the most endangered."²⁷ The initiators also reveal the potential that "through proper cohesion policy, the additional economical potential hidden in the social and territorial cohesion of the national/ethnic minority regions can be released, and transformed into a valuable economical resource, for the good not only of the regions, but the member states and the EU."²⁸

Even though we cannot find precise definitions in the legal framework of the EU on national minorities, there are some legal bases which can be applied while arguing for the need for cohesion policy to pay special attention to national regions. Besides the above mentioned legal documents of the Council of Europe, the initiators also invoked Article 3 TEU, which declares that the EU shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced. Furthermore, Article 167 TFEU prescribes that the Union contribute to the flowering of the cultures of Member States, while respecting their national and regional diversity. The ECI further refers to the EU's cultural diversity which is enforced by Article 22 of the Charter of Fundamental Rights: "The Union shall respect cultural, religious and linguistic diversity".

From a legal perspective the most relevant legal bases are Articles 174-179 TFEU regulating the economical, social and territorial cohesion in the EU. Article 174 defines the objectives of cohesion policy, that is "reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions." Article 174 lists six categories of regions which are afforded particular attention. According to the reasoning put forward by the initiators, this list is not exclusive, leaving open the possibility to include new categories, such as regions with national, linguistic and cultural characteristics. In their interpretation the EU shall pay special attention to regions with national, ethnic, cultural, religious or linguistic characteristics, "due to being inhabited in a significant percentage (or even in majority) by an autochthonous European community, where they have created their own historically rooted culture."²⁹ Furthermore, they refer to the NUTS Regulation's³⁰ requirement that when creating the NUTS regions, socio-economic, historical and cultural circumstances must also be considered.³¹

27 Detailed Information.

28 Ibid.

29 Ibid.

30 Regulation 1059/2003/EC on the establishment of a common classification of territorial units for statistics (NUTS).

31 NUTS Regulation Preamble (10).

29.4 THE NATIONAL REGIONS ECI BEFORE THE COURT OF JUSTICE OF THE EU

29.4.1 *Antecedents of the Trial*

Balázs Izsák and Attila Dabis launched the ECI *Cohesion policy for the equality of the regions and sustainability of the regional cultures*.³² The initiators also attached an annex entitled Detailed Information.³³ The Commission refused to register the ECI due to jurisdictional problems arguing that the initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the EU for the purpose of implementing the Treaties.³⁴ Thus, the Szekler National Council and its European partners could not even start collecting signatures.

The Commission interpreted the main goal of the initiative on the basis of the Detailed Information. They emphasized that the requested legal act shall include three main points, namely (i) ensuring that Member States entirely fulfil their international commitments regarding national minorities, (ii) defining the concept of 'national' regions, (iii) identifying the 'national' regions name-by-name, taking into account the criteria in the listed international documents, and the will of the relevant communities.³⁵ The Commission stated that neither the TEU, nor the TFEU provide a legal basis for adopting a legal act to ensure that Member States fulfil their international commitments. On the other hand, the Commission underlined: to fulfil the main objective of the ECI the second and third points are necessary to accomplish. The Commission also argued that the list of 'disadvantages' set out in Article 174(3) TFEU that trigger an obligation to pay 'particular attention' to a given region is exhaustive. Accordingly, promoting the conditions of national minorities cannot be understood as helping to reduce "disparities as to the level of development between regions" or the underdevelopment of certain regions. Therefore, Articles 174-178 TFEU cannot constitute the appropriate legal bases for the adoption of the proposed legal act.³⁶ Moreover, the Commission acknowledged that the Union institutions are bound to respect 'cultural and linguistic diversity' and to refrain from discrimination based on 'membership in a national minority', emphasizing that none of these provisions constitute a basis for legal action. In addition, neither Article 2 TEU, nor Articles 153, 167 or 170 TFEU may be a legal basis for proposing legislation, because the proposal would not contribute to the objectives of the EU.

32 The ECI was filed at the Commission on the 18th of June 2013.

33 The Annex II of the ECI Regulation defines the compulsory requirements of the ECIs. According to this, to register the filed ECI it shall contain its name, objective and the main goal of the initiative. The Annex foresees the right of the initiators to attach detailed information as an addendum, but this is not obligatory.

34 C(2013) 4975 final.

35 Ibid.

36 Ibid.

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The two initiators lodged an action for annulment at the General Court of the CJEU.³⁷ The Commission submitted its defense requesting the Court to reject the action and uphold the decision of the European Commission.

29.4.2 *The Applicants' Submissions*

The applicants of the lawsuit, Balázs Izsák and Attila Dabis requested that the CJEU annul the European Commission's decision rejecting to register the ECI and compel the Commission to register their initiative. The applicants argued that the Commission's justification for refusing to register the ECI due to the described jurisdictional flaws is unfounded.³⁸ In fact, the applicants initiated the adoption of a legal act with the content of economical, social and territorial cohesion, which is a shared power of the EU laid down in Article 4 TFEU, thus, the initiative cannot manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act. According to the applicants, the Commission's standpoint according to which the list of disadvantages set out in Article 174(3) TFEU is exhaustive is also unsubstantiated, since this should be considered an open list.³⁹ Furthermore, the applicants argue that regardless of whether the list is exhaustive or exemplative, regions with national, linguistic and cultural characteristics should be considered as regions falling under the Preamble (10)⁴⁰ and Article 3(5)⁴¹ of the NUTS Regulation, which imposes the obligation of taking into consideration historical and cultural characteristics when organizing non-territorial units.⁴² As far as the Commission's statement regarding the missing authorization for legal action under Article 2 TEU and Article 167 TFEU is concerned, the applicants conclude that it is unsubstantiated and mistaken. It is mistaken, because according to Article 4(1) of the ECI Regulation the initiators do not have to refer to the legal basis for the right to initiate a legal act as the Commission claims, but rather the provisions of the Treaties considered relevant by the organizers for the proposed action.

37 *Izsák and Dabis c. Commission* (T-529/13.).

38 Application IV./1.

39 *Ibid.* IV./2.

40 Preamble (10) NUTS Regulation: "The actual political, administrative and institutional situation must also be respected. Non-administrative units must reflect economic, social, historical, cultural, geographical or environmental circumstances."

41 Art. 3(5) NUTS Regulation: "If for a given level of NUTS no administrative units of a suitable scale exist in a Member State, in accordance with the criteria referred to in para. 2, this NUTS level shall be constituted by aggregating an appropriate number of existing smaller contiguous administrative units. This aggregation shall take into consideration such relevant criteria as geographical, socio-economic, historical, cultural or environmental circumstances. (...) In accordance with the regulatory procedure referred to in Article 7(2), individual non-administrative units may however deviate from these thresholds because of particular geographical, socio-economic, historical, cultural or environmental circumstances, especially in the islands and the outermost regions".

42 Application IV./3.

On the other hand, the applicants also claimed that the statement is unsubstantiated, because the initiative would help fulfil the requirement laid down in Article 167 TFEU, therefore the legal guarantees for the fulfillment of these provisions shall be ensured.⁴³ The applicants also argue that the Commission's interpretation that the ECI's main goal is to foster the legal status of the national minorities is wrong, because in fact they are initiating a change of perspective in the cohesion policy of the EU so it could not be used as an indirect tool for impairing the rights of national minorities.

29.4.3 *The Defendant's Statement*

The European Commission, as defendant, states that the application focuses on one single legal question, whether the ECI in question complies with the requirement expressed under Article 4(2) of the ECI Regulation, that is the proposed citizens' 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.⁴⁴ The applicants put forward seven pleas in law to substantiate their claim. In its defense the Commission explains the seven pillars of its argumentation reflecting on the pleas in law put forward by the applicants.

Firstly, the Commission assessed the alleged breach of Article 4(2)b) ECI Regulation in the light of Article 4(2)c) TFEU. According to the defendant, this article cannot be invoked as an independent plea, because it does not constitute a legal basis for adopting a legal act. The Commission argued that article only lists the competences of the EU while the transfer of power in the field of economic, social and territorial cohesion is explained in detail in Articles 175, 177-178 TFEU, which shall be interpreted in light of Article 174 TFEU.⁴⁵ Secondly, the Commission underlined that the cohesion policy of the EU is neutral in the sense that it does not consider whether the population of a given region belongs to a national minority or not, whether it has linguistic or cultural characteristics. Consequently, the cohesion policy of the EU cannot aim at eliminating or weakening regions with special national, linguistic or cultural characteristics.⁴⁶ The Commission emphasized that the socio-economic development of a given region, as the goal of the cohesion policy must be distinguished from the conditions of the linguistic and cultural development of a national minority. The Commission alleged that from this aspect the special linguistic, national or cultural characteristics of regions shall not necessarily be taken into account, as it is not necessarily the presence of these characteristics that cause the disadvantage of these regions

43 Ibid. IV./4.

44 Statement of defense 2.7-9.

45 Ibid., 2.1. 13.

46 Ibid., 2.2. 16-17.

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compared to others.⁴⁷ Thirdly, the Commission expressed its conviction that the list of disadvantages under Article 174(3) TFEU cannot be interpreted as an open list. Said Article requires paying particular attention to (i) rural areas, (ii) areas affected by industrial transition, and (iii) regions which suffer from severe and permanent natural or demographic handicaps. According to the Commission, the second part of this paragraph provides additions only for the latter territorial category, that is regions which suffer from severe and permanent natural or demographic handicaps exemplatively clarifying these regions.⁴⁸ Consequently, the list in its entirety is an exhaustive enumeration. In closing, the Commission added: the fact that the population of a region belongs to a national minority cannot be interpreted as a demographic handicap, consequently the applicants' arguments are unfounded and should be dismissed.⁴⁹

29.4.4 *Supporters of the Case*

Intervenors joined the trial on both sides. Romania, Slovakia and Greece intervened on the side of the defendant, while Hungary joined the trial supporting the applicants. The Member States have a subjective right to intervene, thus, the CJEU had to accept their intervention without examining their legal interest in the case. Other legal entities also wanted to join the trial supporting the applicants: Covasna county (Romania), the municipality of Debrad (Slovakia), the Basque national party, Euzko Alderi Jeltzalea – Partido Nacionalista Vasco (EAJ-PNV) and the association Bretagne réunie (France).

At this point it is worth noting that in Greece national minorities do not have a constitutional status, despite the fact that a significant national minority is registered in the Northern part of the country. In Slovakia, national minorities possess several rights, but in fact, the Southern part of the country, where Hungarian and Roma communities form a remarkable percentage of the population, suffers from economic discrimination.⁵⁰ The standpoint of Romania in the case appears in the intervention submitted, as well as the official response letter written to Balázs Izsák, the president of the Szekler National Council, who previously asked Romanian Prime Minister Victor Ponta to withdraw their application to intervene in the trial. The Public Relations and Communication Directorate underlined: Romania does not want the CJEU to broaden the powers of the EU, because the Member States have the right to define the limits of EU competences, and since these were not transferred to the EU, the CJEU cannot change this status quo. The Prime Minister also expressed that Romania highly appreciates the ECI as a new tool of direct

47 Ibid., 2.2. 24-25.

48 Art. 174(3) TFEU “such as the northernmost regions with very low population density and island, cross-border and mountain regions.”

49 Statement of defense 2.3. 34-39.

50 See the Baross Gábor Plan and the application of Debrad to the case.

democracy in the EU, however, the state cannot accept the use this tool to broaden the powers of EU beyond what is defined in the Treaties.⁵¹

The CJEU rejected all applications to intervene filed by legal entities other than the Member States.⁵² The application of the EAJ-PNV was rejected, because the party was represented by its officer, not an attorney at law, despite the relevant provision of the Statute of the CJEU.⁵³ The application of Covasna county and the municipality of Debrad was rejected due to non-compliance with Article 40 of the Statute of the CJEU which provides the right to intervene if the given entity “can establish an interest in the result of a case submitted to the Court”. The General Court stated: the legal arguments of Covasna county and the municipality of Debrad about their territories being inhabited by national minorities are not particular enough, thus, neither of them could prove their interest in the result of the case.⁵⁴ In fact, both entities were arguing the anomalies of regional policy. Covasna county stated that the creation of administrative units in Romania is counter-productive, because the wealthier and more developed regions around Covasna county prevent the county from developing. According to Covasna county, these problems could be solved or mitigated, if the EU’s cohesion policy would pay a special attention to national regions, like Covasna county, because the fact that it is inhabited by a national minority also influences the county’s economic position. The municipality of Debrad also argued with redistributive problems of the Southern regions of Slovakia. In its submission, Debrad put forward that in Slovakia there is an economic discrimination against regions, where minorities are the majority. The lack of interest in the result of the case was the reason for rejecting the application of the association Br tagne r unie as well. The association pursues the aim of reuniting the historical Bretagne; according to the General Court, this objective is unrelated to the ongoing case concerning the cohesion policy of the EU.⁵⁵

29.4.5 *The Decision of the Court*

The General Court published its decision on the case on the 10th of May 2016 rejecting the applicants’ action.⁵⁶ Summarizing the legal background of the case, the judgement recalled the applicants’ points on national regions set forth in the Detailed Information, also pointing out the possible key points of the initiated legal act.⁵⁷ The judgement underlined that in order to file the initiated legislative act the Court must define the term ‘national

51 www.nationalregions.eu/news.php.

52 Order of the President of the First Chamber of the General Court, May 18 2015.

53 *Ibid.*, 14-23.

54 *Ibid.*, 26-32.

55 *Ibid.*, 33-37.

56 The report for the hearing was published on the 11th November 2015.

57 Judgement, points 4-5.

regions' and also list all existing regions in the EU, which fulfil the requirements of this definition. Furthermore, this legislative act must declare that Member States shall fulfil their obligations deriving from their international commitments and any eventual breach would be concomitant with the breach of the values listed in Article 2 TEU.⁵⁸

Hereinafter, the judgement elaborated on the merits of the case. It concluded that the applicants established their argumentation on a single plea that is that the Commission breached Article 4 (2) point b), since the initiative does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act. The applicants put forward several pleas in their submission to substantiate this statement. Firstly, the judgement examined the applicant's statement that the Commission mistakenly took into consideration the Detailed Information. The Court stressed the Commission's obligation to examine all information submitted by the applicants, pointing out that in this respect it is irrelevant whether it is for or against the applicants' interest.⁵⁹ Consequently, the Court had to take into consideration all statements contained in the Detailed Information, including "the legislation should also pronounce that the Member States must, without delay, fulfill their international commitments regarding the national minorities", and "the legal act elaborated by the Commission must also identify them in an appendix, taking into account the criteria in the listed international documents, and the will of the affected communities." The applicants' argumentation that these requirements of the initiated legal act were only simple examples without giving rise to any obligation was disproved. The Court underlined that the initiators had clearly described their claims in respect of the initiated act, and as such, these shall be taken into consideration when deciding upon the merits of the case.⁶⁰

Another key issue was the interpretation of 'national regions'. In this context, the applicants stated that the objective of the initiative was not the protection of national minorities, nor to guarantee them an autonomous status, but much rather that EU cohesion policy pay a special attention to national regions, consequently, it is related to the implementation of cohesion policy. The applicants also argued that being a national region in itself constitutes a disadvantage, accordingly, it should be considered as falling under the scope of Article 174(3) TFEU. Applicants argue that these regions are in a disadvantageous situation from the aspect of their economic development compared to other regions, because the cultural, linguistic and ethnic differences curb investments in these regions. This has a negative effect on employment and in consequence, the poverty rate in these regions is higher. Contrary to this line of reasoning, the Commission consistently advocated that the economic development of a region is not necessarily related to its cultural, ethnic

58 Ibid., pp. 8-9.

59 Ibid., pp. 49, 50, 54-57.

60 Ibid., p. 53.

and linguistic characteristics. Thus, the cohesion policy of the EU cannot be used to strengthen or to weaken the above mentioned characteristics of these regions, because it cannot be generally claimed that regions inhabited by national minorities would be put at a serious demographical disadvantage.⁶¹ The Court underlined: when talking about 'regions' in the context of the cohesion policy of the EU, it shall be defined in light of the actual political, administrative and institutional situation. Regions must be comparable – this goal is implemented through the creation of the NUTS regions, which constitute the point of reference for the cohesion policy of the EU. The Court stated that Article 174-178 TFEU cannot be a legal basis for the initiated legislative act, because it foresees defining national regions in a different way than the existing administrative units. Consequently, a new definition of 'regions' should be established providing real legal status to these national regions regardless of the existing political, administrative and institutional order of the Member States. Obviously, this claim cannot comply with the provisions of the TEU demanding that cohesion policy respect the existing legal order of the Member States and the EU cannot adopt such a legal act defining the national regions without breaching the above mentioned requirement.⁶² As regards the other issue, that is the parties' arguments on whether being inhabited by national minorities should or should not be interpreted as a serious demographic disadvantage, the Court stated that the applicants could not *a fortiori* prove their statements. Particularly, the applicants did not prove that the implementation of the cohesion policy would threaten the special characteristics of national regions. Accordingly, Article 21(1) of the EU Charter of the Fundamental Rights and Article 2 TEU does not allow the Commission to accept the initiated legislative act on the cohesion policy of the EU.⁶³ The Court also referred to the Commission's argument that these characteristics can even constitute an advantage for a region by boosting tourism and offering the benefits of multilingualism.⁶⁴

Another issue was the misinterpretation of Articles 19 and 167 TFEU. The applicant argued that their initiative would indirectly foster preserving and promoting the cultural diversity of the Member States, while the Commission did not agree that the Article invoked could be a basis for a legislative act, since Article 174(1) TFEU on promoting the EU's "overall harmonious development" refers to the economic and social development of a given region, not to its cultural development.⁶⁵ The Court accepted the Commission's reasoning that the initiated act would not have fostered the objectives of Article 167 TFEU.⁶⁶ Regarding the Article 19 TFEU on the prohibition of discrimination the Court pointed

61 Report, p. 24.

62 Judgement, *ibid.*, pp. 68-76.

63 *Ibid.*, pp. 80-84.

64 *Ibid.*, pp. 85-89.

65 Report, pp. 25-26.

66 Judgement, p. 99.

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out that it is not at issue whether the discrimination of national minorities falls under the scope of this article, because the objective of the initiated act is not the protection of national minorities or the fight against their discrimination, but much rather the above described goals of reforming cohesion policy. Accordingly, there is no possibility to initiate a legislative act connected to these objectives.⁶⁷

Finally, it is worth pointing out, that the Court did not expressly react on the two opposing arguments on the list of disadvantages in Article 174 TFEU, i.e. whether these are exemplative or exhaustive. The Court simply concluded that the applicants did not prove that being inhabited by national minorities necessarily mean constitutes a serious demographical disadvantage for a region. Consequently, if the Court required proof of the disadvantage, then it does not exclude the reasoning that a region with a large proportion of inhabitants belonging to national minority could in principle be at a serious demographical disadvantage. Accordingly, the Court implicitly confirmed that the list constituted an exemplative enumeration.

29.5 ANOMALIES IN THE FUNCTIONING OF THE ECI AS THE TOOL OF PARTICIPATORY DEMOCRACY

29.5.1 *The Effectiveness of the ECI*

The legal and institutional significance of the ECI is eroded thanks to the practical functioning of this new tool. Since April 2012 the Commission has received 51 requests for registering proposed ECIs, 31 of them were registered.⁶⁸ In the first 3 years only three successful ECIs were submitted to the Commission. This means only three initiatives (“Right2Water”, “One of Us”, “Stop Vivisection”) exceeded the minimum threshold of one million signatures from at least seven EU Member States. Around 40% of the ECIs were rejected by the Commission mainly due to problems of competence.⁶⁹ On the other hand, European citizens’ initiatives do not necessarily end with the submission of a legislative proposal despite the successful collection of signatures. In the case of the ECI “One of us”, which is considered the most successful ECI,⁷⁰ the Commission decided not to submit a legislative proposal, given that the EU legal framework was considered to be

67 Ibid., pp. 112-113.

68 See: An ECI that works! Learning from the first two years of the Citizens Initiative. Edited by: Carsten Berg, Janice Thomson. March 2014, pp. 11-72.

69 Report on the application of ECI Regulation, *ibid.*, pp. 3-4.

70 The organizers of the “One of us” ECI collected more than 1.8 million signatures in 20 Member States. – www.oneofus.eu.

adequate.⁷¹ Thus, even if an ECI is successful and has the support of at least one million European citizens, the Commission can simply ignore it and decide not to propose a legal act.

The ECI Regulation requires a “clear, simple, user friendly and proportionate” procedure and conditions for submission. Despite this requirement, the bureaucratic burdens imposed by the Commission are rendering the use of this instrument inefficient. This tendency is in violation of the main objectives of the ECI to bring the European citizens closer to the EU. “What was originally intended to be a simple and user-friendly tool for all EU citizens has turned out to be cumbersome and challenging in its use.”⁷² This reality raises the question: how can the main objectives of the ECI be reached if the Commission inhibits the enforcement of participatory democracy tools? Indeed, the Commission is of the view that the fact that two initiatives have managed to complete the full lifecycle of an ECI confirms that the ECI is operational. At the same time the Commission is aware that there is still room for improvement.⁷³

29.5.2 *Need for Changes for a Fully Operational ECI*

It seems the Commission applies the legal admissibility test too narrowly. In order to pass the test, the proposed initiative shall not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act. In fact, the Treaties do not clarify the meaning of ‘manifestly outside’ the Commission's powers. In the Commission's interpretation these are situations where there is no Treaty provision that allows for a legal act to be adopted following the proposal, which can serve as a legal basis for a Union act.⁷⁴ On the other hand, in a number of cases the decisions refusing registration were arbitrary, because initiatives with similar characteristics were treated differently, and/or the reasons given for the rejection were incomplete.⁷⁵ Another issue is the conflict of interest within the Commission. Some stakeholders see a conflict of interest in the Commission's double role in the ECI process, as it is an information support service and also responsible for deciding about the registration of an ECI.⁷⁶

Several scholars, institutions and other actors of European law and politics have drawn up recommendations for a more smoothly functioning ECI. The ECAS analysis lists the

71 The organisers are seeking the annulment of the Communication before the CJEU. See: *One of Us and Others v. Parliament and Others* – Case T-561/14.

72 Anglmayer 2015, p. 3.

73 Report on the application of ECI Regulation, *ibid.*, pp. 14-15.

74 The European Citizens' Initiative registration: falling at the first hurdle? Analysis of the registration requirements and the “subject matters” of the rejected ECIs. ECAS Brussels, December 2014, pp. 3-4.

75 *Ibid.*, p. 4.

76 Anglmayer 2015, p. 12.

following recommendations for improving the ECI: (i) clarify the nature of the ECI as an agenda-setting instrument through public debate, (ii) define the remit of the ‘legal act’ and/or political actions that the Commission can initiate, (iii) provide a definition of ‘manifestly outside’ that is clear, easy to understand and is not subject to arbitrary interpretation, (iv) clarify the procedure for the legal admissibility test and ensure transparency of the decision-making process, (v) establish an ECI officer, similar to the Hearing Officer in competition law, (vi) and secure adequate legal advice for ECI organisers with regard to the legal basis of initiatives.⁷⁷ If we look at these requirements from the aspect of the currently analyzed case, we can observe these anomalies also in the practice of the ECI. For instance, the Court found that the applicants did not prove that if regions are inhabited by national minorities they would be at a demographical disadvantage. It is not clear, whether the initiated proposal falls manifestly outside the scope of the EU, why require the demonstration of disadvantages in the first place? The European Parliament has been a strong supporter of the ECI. The Petitions Committee together with other stakeholders called on the Commission and Member States to simplify the requirements to render the instrument operational, and urged the Commission to reconsider its rigid admissibility test.⁷⁸ The European Parliament voiced its concerns about the insufficient functioning of the ECI in several resolutions calling for improvements.⁷⁹

29.5.3 *ECI to Protect Minority Rights in the EU?*

The documents of the Council of Europe contain well-described provisions for the protection of national minorities. These treaties could be a decent basis for the establishment of national regions in Europe. However, these documents cannot be considered as generally binding law, because some countries simply did not ratify them yet. Nevertheless, these basic sources of international law should not be ignored, because they clearly demonstrate the legitimacy of affording a special status to national regions. The issue of the CoE documents is rather a legitimacy approach than a legal argument, though.

The trial is often considered as a case on the possibilities of self-governance within the legal framework of the EU. However, while the applicants referred to the freedom of ECI, the Commission and the intervening countries focused on the limitation of the powers of the Union. The protection of national minorities in the EU often emerges in the political discussions, yet the legal framework of the EU does not provide for a sufficient protection and a precise definition for them. Member States of the EU generally do not want to see the broadening of the Union’s scope of action in this field.

⁷⁷ ECAS, *ibid.*, pp. 17-19.

⁷⁸ Anglmayer 2015, pp. 3-6.

⁷⁹ *Ibid.*, p. 27.

29.6 CONCLUSION

The main objective of the EU's cohesion policy is to reduce disparities between the regions, to strengthen less developed regions in order to improve their competitiveness and guarantee their harmonious development. Nevertheless, the Commission is willing to accept only purely social and economic approaches to implement these objectives and ignores the cultural, linguistic and ethnic aspects of European cohesion policy.

The Commission, Parliament and the leaders of the Member States should consider a paradigmatical change in applying the instrument of transnational direct democracy in the European Union to foster integration. The gap between European citizens and the Union is getting wider and wider. As it is clear from the experiences of the past few years, the main objective of the ECI was evidently not fulfilled. Moreover, the total failure and inadequacy of the citizens' initiative constitutes yet another missed opportunity in easing the democratic deficit of the EU. The Szekler National Council offered a solution to improve the situation of autochthonous European communities by promoting regionalism, but the CJEU did not accept the legal arguments of the initiators, notwithstanding the fact that development can be best felt locally, providing an opportunity for securing extra support for European integration and the aim of bringing the EU closer to its citizens.

The initiators appealed to the Court of Justice. This means that there is still hope for the supporters of national regions. The Court shall consider its strict interpretation of the conditions of the use of the ECI, and the objectives related to the proper functioning of the ECI. On the other hand, European legislative bodies should revise the ECI legislation and accept, or at least consider the recommendations of several organizations and scholars. Should the ECI be left unchanged, then the whole instrument of transnational participatory democracy can fall victim to the European bureaucratic maze and the jealousy of the European Commission in protecting its position in the legislative procedure.