Oral argument by Mr Paul Diamond & Roger Kiska, representatives of the European Citizens' Initiative "One of Us"

Court of Justice of the European Union hearing, 16th of May 2017

Honourable Judges,

You will all have read the Commission's communication in reply to our ECI, and our analysis thereof.

Introduction:

This case will determine two important issues.

The *first* is whether the *ECI* is dead; killed off by the *Commission*.

The *second* is whether the *Commission* is subject to the *rule of law,* or has an *unfettered discretion*.

This case is not about the issue of abortion, but whether the ECI is an authentic instrument allowing European Citizens to participate in the sphere of the legislative procedure, or whether *Regulation 211/2011* is a dead letter.

The European Citizens Initiative:

In the *Commission Press Release of 12th March 2012, former Vice President said that the ECI '****was a powerful agenda-setting tool in the hands of citizens****',*

Commissioner Michael Barnier said in relation to the successful *Right to Water* ECI that it was the Commission's duty *'to take into account the concerns expressed by so many citizens'*

Recital (1) of Regulation 211/2011 places the Citizens in an analogous position to the European Parliament and Council.

The Applicants ask the Court:

- what is the minimum standard in dealing with a successful ECI, signed by nearly 2 million citizens?
- Can such an ECI be dealt with essentially in the same way as the Commission would deal with a letter sent to it by one single citizen, or a lobby group, or an industry association?
- Is it possible that a petition supported by 2 million citizens can be arbitrarily turned down by the Commission before it even reaches the decision-making bodies of the EU, the Parliament and the Council?

If so, what is the point of launching an ECI? Why should anyone invest the time, the work, and the money that is necessary to approach millions of other people in 28 countries, hoping to convince 1 million of them to support the initiative?

I think it important for the judges of this honourable tribunal to be given an idea of what a successful ECI looks like in real terms. First, it should be noted that to date only 3 ECI's have been successful. Nearly 7 times this number of ECI's have been rejected at the registration level and nearly 5 times as many have been withdrawn.

One of Us, which garnered more than 1.7 million certified signatures, has been the most supported ECI in history when speaking in terms of citizen participation. The financial cost of the Initiative was more than €150, 000. The initiative involved thousands of volunteers. In Italy alone, there were more than 5000 volunteers gathering signatures. Using the conservative estimate that 10 minutes worth of effort was required to acquire each signature (a little less from electronic signatures, and a little more for paper signatures), between citizen signatories and volunteer time, it would have taken 17 million minutes to collect the signatures gathered by the One of Us ECI. For a single person, working 24 hours a day, non-stop, this would equate to nearly 33 years' worth of work.

The Rule of Law and an Unfettered Discretion:

It is submitted that the Commission's reply is poorly argued, repetitive, and disordered. It fails to intellectually engage with the concern expressed by 2 million European citizens, and comes to patently absurd conclusions.

For example, the egregious affirmation that extra high ethical standards are ensured for the EU's research policy, when in fact that standard is met if the activity that is funded with EU money- is legal in only one out of 28 Member States!

Rather than defending their reasoning, the Commission have chosen to dispute the admissibility of this action in law, and minimize the Commission's responsibilities and obligations under *Regulation 211/2011*.

What they say, essentially, is that:-

(a) the true purpose of their response is only "*to allow for a political debate*", which, they claim, the Commission's Communication does.

(b) there is no substantive quality criteria for the response to a successful ECI; any decision will do, so long as it bears the title "Communication", has a basic argument and is issued within the deadline set out in the Regulation;

To which the Applicants reply:

On **(a)** in *Case T-44/14 Bruno Constanini* on a refusal to register under Article 4, the Court held at paragraph [31]:-

> *Furthermore, the applicants' argument that the Commission adopted an interpretation of Article 14 TFEU that is contrary to the principles underlying Regulation No 211/2011 must be rejected inasmuch as, contrary to the applicants' contentions, the ECI mechanism has as its subject matter or objective not initiating a mere dialogue between the citizens and the institutions but requesting the Commission, within the framework of its powers, to submit a proposal for an act.*

This is a clear error of law in the Commission's reasoning and an error of law that should dispose of this case in favour of '*one of us*'. If the Commission has misunderstood the purpose of the ECI, it has failed to direct its mind towards a relevant consideration and has failed to exercise its discretion according to law (absent resolution of the question of the width of the discretion), the decision must be annulled.

But, even this modest claim is false and erroneous. A public debate on the issues at hand can take place, and indeed does take place, without an ECI being organized, and without the Commission commenting on it.

In fact, the Communication makes no useful and substantial contribution to that debate. And if by "political debate" you mean that the issue be debated in the EU's political institutions – why, then the Communications apparent purpose precisely is to ***not*** allow that debate to take place.

Furthermore, this decision relates to the mandatory purpose of *registration* as illustrated by *Recital (10) of Regulation 211/2011* that citizens should not embark on a labourious registration process, prior to approval by the *Commission*.

As to **(2)**, there is no such thing as an *unfettered discretion* in a Union under the *Rule of Law*. A discretion must be used to promote the policies and objectives of *Regulation 211/2011*; these policies and objective are questions of law for the Court. If the *Commission* (or any executive body) is acting so as to frustrate the policy and objectives of a legal measure of the Union, the Court must intervene. Our legal system would be remiss if such an act could not be annulled.

Powers given to the Commission are conferred on 'trust' for public purposes and not absolutely. The must be used the correct way; the language may be in unrestricted permissive terms, but its use must be determined by the intent of *Regulation 211/2011* as a question of law.

In short, the Commission cannot do what they want and make an arbitrary decision:-

- The *Commission* have not produced any criteria as to indicate how they will exercise their discretion or the factors that are relevant for the making of a proposal;
- The citizen and the Court cannot engage with any decision making process because there are no criteria;
- Accordingly, the decision lacks *'legal legitimacy'* as such a process is arbitrary, unreviewable and unreasoned.

The Role of Registration under Article 4 of Regulation 211/2011:

Article 4(2) Regulation 211/2011 lists the criteria for registration; and it must be at this stage when the Commission must raise any issues that must prevent a legislative proposal. This is support by *Recital (10)*.

On the 3rd of February 2017, only weeks ago, the First Chamber of this Court, in *Case T-646/13 Bürgerausschuss fur die Bürgerinitiative Minority SafePack v. the European Commission*, annulled the Commission Decision rejecting the request for registration of the applicant's ECI.

The Court recognized, [and I quote] that the Commission was obliged to provide:

> *"sufficient elements to enable the applicant to ascertain the reasons for the refusal to register the proposed ECI with regard to various information contained in that proposal and to react accordingly, and to enable the Court to review the lawfulness of the refusal to register."*

The refusal to register is an action that *'may impinge upon the very effectiveness of the right of citizens to submit a citizens initiative'*. It is submitted that the following propositions of law can be deduced from this decision:-

i) The *Commission* should *facilitate* registration by the provision of detailed reasoning to enable Citizens to know what proposals are acceptable;
ii) the process is, in effect, *participatory* and;
iii) one of rational dialogue between the Citizen of the Union and the Commission.

It would be absurd and self-contradictory if such an obligation applied only to an application for an ECI to be registered, but not to the ECI itself (once it is endorsed by 2 million citizens). It would be absurd if such an obligation applied with regard to a mere project that may have cost some effort, but not a very considerable one, to prepare – but not at the final phase of an ECI after the vigorous efforts, time commitment and financial investment involved in having a successful Initiative.

This would create a legal inconsistency in the Regulation which would grossly undermine the spirit and intent of article 11 of the Treaty on the European Union. To ensure consistency, the requirements that, as the Court has recognized, apply to the ECI before its registration must also apply – a fortiori and with greater rigour – to an ECI once it has been successful it garnering popular support.

The meaning of Article 10(1)(c):

At contention in the instant case is the meaning of Article 10(1)(c) of the Regulation, which states:-

> "Where the Commission receives a citizens' initiative in accordance with Article 9 it shall: within three months, set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action."

The obligations and discretion stemming from Article 10(1)(c) are underpinned by the meaning of the phrase *"inviting the Commission to submit an appropriate proposal*" in Article 11 of the Treaty on the European Union.

First, it is self-evident that Article 11's use of the word invite does not simply mean "to make a request". The Commission receives hundreds of letters every day from citizens, lobbyists or civil society inviting the Commission to act. And in fact, the Commission is obliged to respond to the content of these requests through its own code of good administration and Article 41 of the EU charter of Fundamental Rights.

Furthermore, each citizen already has a pre-existing right to even bypass the Commission and go directly to the Parliament through a right of petition established by Article 24 of the Treaty of the Functioning of the European Union. The Petition's Committee thereafter is invited to take action in relation to those requests.

So what added value does Article 11 and the European Citizens Initiative have if the Commission if the Commission can do what it wants with a successful ECI? What is the purpose of establishing burdensome procedures

to initiate legislation if the Commission has unchecked and unfettered power to reject a successful initiative for reasons which do not withstand scrutiny?

It is equally important to note both the legislative intent and the circumstances in which Article 11 of the Treaty on the European Union was drafted, and the continued interest of the European Parliament in ensuring successful Initiatives be transmitted to the Parliament.

This intent is clearly spelled out in the *Schöpflin Report*, which highlights the many deficiencies that have arisen in the implantation of the ECI as a democratic instrument. The report, and I quote:

"*Calls on the Commission, in this connection, to consider Parliament also as a decision-maker, particularly since it is the only institution whose members are directly elected by EU citizens."*

This same request for Parliament participation also came one year earlier from the *Assembly of Community Affairs Committees* of the 28 EU countries. And the European Parliament, this same Parliament which now – rather bizarrely - intervenes on behalf of the Commission against their own stated institutional intent and interests, in its *Resolution of 7 May 2009*, affirmed that….and again I quote:

"the Commission is not free to decide, on the basis of political considerations of its own, whether a citizens' initiative is or is not to be declared admissible."

It continued that any failure to take a decision on the request submitted by the citizens' initiative be subject to the scrutiny of this Court. As said the ECI is designed to be *'a powerful agenda-setting tool in the hands of citisens'*.

The Communication:

The Commission has provided a communication of 18 pages, within the prescribed period of 3 months, setting out its reasons for not taking action on the proposed Initiative.

Upon closer scrutiny, however, this response is flawed in both form and content.

First, political and legal conclusions must be separated. Political conclusions alone cannot be used to justify not taking any action.

Second, any communication not to take action must be subject to logical and judicial scrutiny. This is not the case here: the communication fails to seriously engage in the concerns brought forward by the ECI, and the reasoning it provides is illogical, incoherent, inconsistent and inconclusive.

As our written submissions have set out in significant detail, the premises by which the *One of Us* Initiative are denied do not withstand scrutiny.

The Commission claims that the proposal lacks necessity, but what it really means to say is that it finds the proposal politically undesirable. There would be a lack of necessity for the ECI if there were sufficient protections in EU law for unborn life – but what the Commission really says is that it finds it unnecessary to protect unborn life. That is something different.

As a second ground for not taking action the Commission notes that the proposal, if implemented, would put constraints on its own (i.e., the Commission's) freedom to act. Any act of regulation or implementation of safeguards into legislation is a *de facto* constraint on action. By these standards, no ECI should ever propose new legislation, except legislation that *enlarges* the Commission's powers!

The Commission also states as grounds for not taking action that it did not wish to replace existing legislation that has been "carefully calibrated" by them and adopted as a result of an "agreement democratically reached" by the Parliament and the Council. This too is a non-response. In a democracy, laws and regulations are amended and repealed all of the time. The very essence of the ECI is to give European citizens a voice to propose exactly such changes in the Community's legislative framework – perhaps such changes as the Commission would not initiate on its own initiative.

The *'One of Us'* ECI was registered with the *Commission* on 11th May 2012; and presented on 28th February 2014. Whilst this ECI was progressing, the *Commission* was proposing measures that would be used to refuse the ECI. At no time, did the Commission communicate this potential conflict of interests to the Applicants.

The *Commission* is clearly in breach of *Article 41 Charter of Fundamental* Rights; it is an act akin to negligence and maladministration; and has resulted in unnecessary expense by the Applicants. Further, the argument that the Council and Parliament had only recently voted on relevant legislation would, absent public interest, give rise to an estoppel against the Commission.

It is submitted that because of the onerous nature of meeting the procedural requirements of an ECI, as well as the clear intention of Article 11 of the Treaty, that only 3 conditions would justify a successful ECI from not being proposed to the Parliament:

> (One) that the measures requested by the ECI are no longer necessary; (two) that the measures requested in the ECI have become impossible; or (three) that the ECI does not contain any specific proposal for action but only raises awareness of a problem that should be resolved.

Any other interpretation would give the Commission the power to reject any successful ECI purely and simply because it disagrees with it. It is at the rigourous registration process that unsuitable ECIs can be filtered out.

Conclusion:

We are now at a crossroads in Europe. The very same suspicions, scepticism and apathy that led to the failed referendums in France and the Netherlands regarding the European Constitution, and ultimately to the Brexit vote in Britain, continue to pervade Europe.

The manner in which the Commission rejected the *'One of US'* ECI has made the term *One of Us* a byword for democratic subterfuge. The ECI was rejected out of hand; and no follow has been proposed (as in the case of the other successful ECI on the *'right to water' and 'stop Vivisection'*). And, of course, the subject matter is one that the Commission disapproves of.

The ECI has quickly gone out of fashion. The massive decline in the number of new ECI's being submitted is startling.

What we are asking, is for this tribunal, to give real effect to the ECI by protecting it from arbitrary refusals. We want you to protect the ECI from bureaucratic discrimination, where the voices and tireless effort of European citizens to introduce legislation that matters to them is not thwarted because the Commission finds the subject matter of the proposal irritating. More than 1.7 million citizens spoke to the Commission about a subject matter of deep concern to them in a manner which met all of the incredibly high obstacles set forth in the Regulation….obstacles that only 2 other ECI's have managed to overcome, and neither of those as successful as One of Us. And the Commission answered those citizens with a non-response, dismissing its efforts and its legal rights without every introducing the proposal to the European Parliament and real debate. These same 1.7 million citizens are now speaking to you to ensure their democratic voice is heard. The opportunity to act in in your hands. And that opportunity is now.