



City Research Online

City, University of London Institutional Repository

Citation: Fahey, E. (2017). Casenote - European citizens initiative 'Stop TTIP' can proceed says General Court. *European Journal of Risk Regulation*, 8(4), pp. 787-790. doi: 10.1017/err.2017.68

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/18744/>

Link to published version: <https://doi.org/10.1017/err.2017.68>

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk

CASENOTE- EUROPEAN CITIZENS INITIATIVE ‘STOP TTIP’ CAN PROCEED SAYS GENERAL COURT

Dr. Elaine Fahey*

Case T-754/14 *Efler and Others v Commission* ECLI:EU:T:2017:323.

The General Court of the European Union in T-754/14 annulled a European Commission decision refusing the registration of the proposed European Citizens initiative ‘STOP TTIP’

Facts

On 10 May 2017, the General Court of the European Union in T-754/14 annulled a European Commission decision refusing the registration of a proposed European Citizens Initiative (ECI).¹ The proposal had as its objective to prevent negotiations on an international agreement between the EU and US and EU and Canada, the Transatlantic Trade and Investment Partnership (TTIP) and EU-Canada Economic and Trade Agreement (CETA), for reasons relating to the procedures for the resolution of disputes between investors and States and its provisions on regulatory cooperation because they were alleged to threaten democracy and the rule of law. An ECI allows EU citizens to request the Commission to consider an idea as a possible basis for a legislative procedural pursuant to Article 11(4) TEU, 24 TFCEU and Regulation 211(2011). The Regulation affords organisers of an ECI one year to collect one million signatories from seven different member states. It is an important decision on the place of civil society in international trade negotiations with respect to new provisions in the Treaty of Lisbon.

2013 saw the launch of the agreement by the US to begin negotiations between the EU and US on a TTIP. The scale of the collaboration between two of the world’s leading economies with an ambitious time frame for negotiations, to be completed before the end of 2014. The opening of negotiations on a TTIP was commenced after the Report of the EU-US High Level Working Group on Jobs and Growth (HLWG).² It purported to develop a multilevel postnational marketplace which would deepen and prospectively institutionalise EU-US relations in a range of fields. The TTIP negotiations however managed to generate substantial fears at national and EU level, as to the transfer of authority to a new living entity as a form of global governance.³ It mobilised civil society in unprecedented ways against global governance. The EU-Canada Economic and Trade Agreement (CETA) has been heralded by leading EU actors as the best, most ambitious and most progressive form of trade agreement that the EU has ever concluded, the so-called ‘gold-plated’ trade deal.⁴ The CETA negotiations were completed in 2014 and a legally reviewed or ‘scrubbed’ text was published in 2016. The CETA Negotiations began in 2006 initially in 12 areas, before the Treaty of Lisbon and after many pivots in EU trade policy, reputedly after Canada was unhappy to be left off the list in 2006 for new preferential trade agreements. The European Parliament voted in favour of CETA on 15 February 2017. The EU national parliaments must approve CETA before it can take full

* Reader in Law & Associate Dean (International), City Law School, City, University of London Elaine.fahey.1@city.ac.uk.

¹ Case T-754/14 *Efler and Others v Commission* ECLI:EU:T:2017:323. See <https://stop-ttip.org/the-eci-result-in-numbers/> and <https://stop-ttip.org/sign>, accessed 18 August 2017.

² Established after the EU-US Summit in 2011, followed by an Interim Report on 19 June, 2012. See Final Report High Level Working Group on Jobs and Growth, February 11, 2013, http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

³ E.g. F De Ville and G Siles-Brugge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership*. (Polity, 2015); M Cremona, ‘Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)’ (2015) 52 CMLRev 351.

⁴ See http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm, accessed 18 August 2017. See such descriptions in many press releases and EU official briefings on CETA: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1570>, accessed 18 August 2017) (e.g. EU Council president, or from EU Commissioner for Trade).

CASENOTE- EUROPEAN CITIZENS INITIATIVE 'STOP TTIP' CAN PROCEED SAYS GENERAL COURT

effect. Ironically, CETA was intended to be the forerunner to TTIP but changes in the US administration have altered this context.⁵

On 10 September 2014, the European Commission refused to register a European Citizens Initiative (ECI) proposal from the applicant citizens committee, pursuant to Article 11(4) TEU and Articles 2(1) and 4(2)(b) of Regulation No. 211/2011. Registration was refused on the basis that the ECI's proposals were outside the framework of the Commission's power to submit proposals for legal acts of the EU for the purpose of implementing the Treaties. It held that the authorisation did not come within that concept of a legal act precisely because it was preparatory and due to the absence of effects vis a vis third parties.⁶ The decision had the effect of putting international relations negotiations *outside* of the scope of EU law and in particular new initiatives to increase participation in EU law-making.

The applicants argued principally that the refusal to register the ECI infringed Article 11(4) TEU and Articles 2(1) and 4(2)(b) of Regulation No. 211/2011, and breached the principle of equal treatment. They argued firstly that there was no basis upon which the concept of a legal act had to be given such a narrow interpretation. Secondly, they argued that the principle of democracy and the provisions of Article 288-292 TFEU applied beyond the institutions. Thirdly, the general right of citizens to participate in the democratic life of the EU included the power to take action to amend secondary legislation in force. By contrast, the Commission argued that the Council decision in question was purely preparatory and that a systematic and teleological interpretation of Article 2(1) and 4(2)(b) of the Regulation showed that a purely preparatory act was not a 'legal act' in this instance. In fact, the ECI proposal was argued to circumvent the rule that the Commission could not propose a particular legal act whereas an ECI requesting that a Council decision not be adopted was no longer capable of carrying out the function in question. Rather, it was an inadmissible interference in an ongoing legislative procedure, which could not succeed whereby it would amount to the stimulation of a democratic debate without having to await the adoption of the legal act whose modification or withdrawal was ultimately sought.

Judgement

The General Court in paragraph 35 held that the concept of a 'legal act' could not be understood to be limited to such an extent, in the absence of any such limiting indicators. The Court held in paragraph 37 that the concept of democracy was a fundamental value pursuant to Article 2 TEU, which required the interpretation of the concept of a legal act to include a decision to open negotiations with a view to concluding an international agreement. The Commission's position had the consequence of considerably limiting recourse to the ECI as an instrument of citizen participation (paragraph 38). The Court held (in paragraph 44) that the ECI could only relate to the Council decision to conclude or authorise the signing of international agreements at an advanced procedural stage, obliging the authors of an ECI proposal to await the conclusion of an agreement.

⁵ E Fahey, "CETA and Global Governance: What Kind of Model Agreement is it in Law?" (2017) 2(1) *European Papers, European Forum, Insight* of 9 February 2017, 293-302; E-U Petersmann, "Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?" (2015) 18(3) *J Int Economic Law* 579.

⁶ Such a proposal would not deploy any autonomous legal effect beyond the fact of the legal act at issue not being adopted.

CASENOTE- EUROPEAN CITIZENS INITIATIVE 'STOP TTIP' CAN PROCEED SAYS GENERAL COURT

The General Court thus held that it was important that such actions would not be excluded from democratic debate, given the intention of the petition to prevent the evolution of the agreement. It was thus more in conjunction with the 'spirit' of the ECI to allow its development and advancement rather than its hindrance, a matter discussed here further below. The General Court thus held that its decision did not infringe the principle of institutional balance.

Comment

There has been a huge surge in the EU in the use of citizens' participatory mechanisms and national judicial review of international agreements across Europe.⁷ Referendums took place in the Netherlands, the UK, and Hungary on EU related matters (associated agreements with third countries, EU membership and migrant quotas) to enable citizens participate in politics, with many difficult results.⁸ The European Union has also been a major innovator in terms of developing a concrete form of citizen participation in transnational law-making, thus beyond voting, so as to foster transnational democracy in the form of its European Citizens Initiative, pursuant to Articles 9-12 of the Treaty on the European Union. Some have argued that the newly enacted Articles 9-12 TFEU introduced by the Treaty of Lisbon are of note because they provide a promising way to conceptualise and develop the democratic legitimisation of international organisations through participation.⁹ There are as of yet, however, few successful ECI's so far:- some high-profile examples include 'Right2Water' and '30 km/h:-making the streets liveable'.

The legislative framework introduced to support the Treaty provision is burdensome to say the least. However, there is the potential for the ECI to foster an emerging public sphere and to impinge upon the hitherto legislative monopoly of the Commission. Judicial review thereof has only recently been successful and *Effler* represents an important starting point. The General Court in 2017 has annulled the Commission's decision to refuse to register the 'Minority Safepak' ECI on the basis of the first of the organisers claims, that the Commission did not in its decision provide sufficient elements to enable the applicants to ascertain the reasons for the refusal to register the proposed ECI.¹⁰ Several decisions on ECI's are anticipated shortly. Nevertheless, ECI's so far have not led to legislation because the Commission considered that there was no need to propose legislative acts or that the proposals contradicted the objectives and purpose of legislation recently adopted.¹¹ Still, the ECI mechanism as interpreted in *Effler* affords offers distinctive possibilities for transforming the meaning of participation, beyond its current approach. It constitutes a significant challenge to the powers of the Commission and makes the conditions for citizen participation much more 'real' within EU law and governance.

Conclusion

⁷ A Karatzia, "The European Citizens' Initiative and the EU institutional balance: On realism and the possibilities of affecting EU lawmaking" (2017) 54(1) CMLRev, 177; S Schill, "The Constitutional Frontiers of International Economic Law" (EJIL Talk, 7 March 2017, <https://www.ejiltalk.org/the-constitutional-frontiers-of-international-economic-law/>)

⁸ Karatzia, *ibid*.

⁹ A Van Bogdandy, "The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organisations" (2012) 23(2) EJIL 315; J Mendes, "Participation and the role of law after Lisbon: A legal view on Article 11 TEU" (2011) 48 (6) CMLRev 1849.

¹⁰ Case T-646/13 *Bürgerausschuss für die Bürgerinitiative Minority SafePack* [2017] ECLI:EU:T:2017:59.

¹¹ Karatzia, n 6 above.

CASENOTE- EUROPEAN CITIZENS INITIATIVE 'STOP TTIP' CAN PROCEED SAYS GENERAL COURT

The TTIP negotiations have arguably been both important and effective because they have 'politicised' entities or agencies in foreign affairs, previously only mere-sub-units of the larger political process without an express mandate in international relations (e.g. Committee of the Regions, Ombudsman and organised civil society).¹² These bodies have notably insisted upon more input, participation and openness in the TTIP negotiations.¹³ Civil society in particular appears increasingly politicised through law. For example, the gathering of 3,284,289 million signatories for a European Citizens Initiative (ECI) on the TTIP, from a range of Member States marked an important step in the mobilisation of ordinary citizens against the TTIP itself as an act of politicisation through activist networks and NGOs, expressing transnational protest. Although the ECI was rejected for ostensibly procedural reasons, this new ECI, supported by the President of the European Parliament, STOP TTIP and CETA with over 3 million signatories has now succeeded. It provides further evidence of ongoing politicisation through law. These actions, practices and procedures have thus brought TTIP within the public domain, in a manner in which international relations was not previously. This new decision has thus put vibrancy into the idea that citizens can meaningfully contest global governance at European level and has restored confidence to some degree in the new provisions of the EU treaties on the democratic life of the Union. There cannot be a more important outcome than this at this difficult juncture in the contemporary global legal order.

¹² See E Fahey, "On the Benefits of the TTIP Negotiations for the EU Legal Order: Legal Perspectives" (2016) (43)(4) LEIE 327.

¹³ Fahey, *ibid.*