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## **LEGAL OPINION**

regarding the admissibility of a European Citizens' Initiative  
against TTIP (Transatlantic Trade and Investment  
Partnership) and CETA (Comprehensive Economic and  
Trade Agreement)

30 April 2014

## Overview

I.	Preliminary remarks	03
1.	Client	03
2.	Appraisal Order	03
3.	Expert	04
II.	Appraisal	05
1.	TTIP and CETA as "mixed agreements"?	05
2.	EU procedure for negotiating and concluding agreements	07
3.	European citizens' initiative against TTIP and CETA?	08
a)	Legal foundations of the European Citizens' Initiative	08
b)	ECI scenarios and requirements	10
aa)	Institutional powers of the European Union	11
bb)	"Proposal for a legal act"	11
cc)	"Implementing the Treaties"	15
4.	Registration practice for ECI – the "swissout" initiative	17
5.	Combination of TTIP and CETA Initiative	18
6.	Version 1 or Version 2?	20
7.	Alternative ECI formulations	20
III.	Conclusions	22

## I. Preliminary remarks

### 1. Client

The Client for the present Opinion is the "Mehr Demokratie e.V.", Greifswalder Straße 4, 10405 Berlin, an association registered in the German Register of Associations. This association is the world's largest non-governmental organisation advocating direct democracy.

### 2. Appraisal Order

The Client plans, in conjunction with partners in civil society from other EU Member States, to prevent the conclusion of TTIP and CETA by way of a European Citizens' Initiative (hereinafter: ECI). The Client has asked the undersigned to answer the following questions based on his legal expertise:

- a) Is it admissible to demand, by means of a European Citizens' Initiative (hereinafter: ECI), that the Commission recommend to the Council to repeal or change the negotiating mandate for TTIP?
- b) Is it admissible to also incorporate demands in relation to CETA or other agreements into the same ECI?
- c) If there any other way of formulating an admissible ECI on the matter of TTIP with the same or similar objectives?

The Client has submitted two draft versions of an ECI (as of 30 March 2014)

Version 1:

"Wir fordern die EU-Kommission auf, dem Rat zu empfehlen, das Verhandlungsmandat über die Transatlantische Handels- und Investitionspartnerschaft (TTIP) sowie das Umfassende Wirtschafts- und Handelsabkommen (CETA) aufzuheben"

"We invite the European Commission to recommend to the Council to repeal the negotiating mandates for the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA)"

Version 2:

"Wir fordern die EU-Kommission auf, dem Rat zu empfehlen, die Verhandlungsmandate über die Transatlantische Handels- und Investitionspartnerschaft (TTIP) aufzuheben sowie das Umfassende Wirtschafts- und Handelsabkommen (CETA) nicht abzuschließen"

"We invite the European Commission to recommend to the Council to repeal the negotiating mandate for the Transatlantic Trade and Investment Partnership (TTIP) and not to conclude the Comprehensive Economic and Trade Agreement (CETA)"

3. Experts

The undersigned is the Director of the Institute of International Law and Comparative Public Law at the University of Cologne and has been dealing with EU issues in this capacity for many years.

## II. Appraisal

### 1. TTIP and CETA as "mixed agreements"?

The German government assumed most recently in January 2014 that TTIP and CETA were so-called mixed agreements and not exclusive EU agreements.<sup>1</sup> The difference is that declarations of ratification from all Member States are additionally required along with the concluding declarations by the EU Institutions only for a mixed agreement.<sup>2</sup>

The crucial distinction lies in the content of the agreement to be concluded. If it governs only regulatory matters falling within the sole jurisdiction of the EU, it is an exclusive EU agreement. If the agreement also concerns individual regulatory matters that remain within the jurisdiction of the Member States, it is a mixed agreement.

No binding formal opinion has been delivered to date by the Commission or other EU institutions in order to qualify TTIP and CETA. However, it is questionable whether the German government's assessment is accurate. The fundamental characteristic of the legal situation under the present Lisbon Treaty is that, particularly in the area of

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<sup>1</sup> Response by the German Government to an enquiry of 22 January 2014, German Bundestag Printed Matter, [BT-Drucks], 18/258, p. 10; see also the website of the German Ministry of the Economy and Energy:

<http://www.bmwi.de/DE/Themen/Aussenwirtschaft/Handelspolitik/Europaeische-Handelspolitik/freihandelsabkommen,did=630990.html>.

<sup>2</sup> Here, the declaration process for ratification by Member States is based on the relevant constitutional law. In Germany, ratification would require a federal law adopted by the Bundestag and the Bundesrat.

Common Commercial Policy, little scope remains for mixed agreements<sup>3</sup>, as the German Federal Ministry of Foreign Affairs also correctly acknowledges in a memorandum on the Lisbon Treaty<sup>4</sup>.

Ultimately, it will depend on the content of the TTIP and CETA agreements negotiated. Given the at best vague notions as to the content of the two agreements, they cannot be clearly categorised in legal terms into "exclusive EU agreement" and "mixed agreement", albeit that this inability speaks volumes about the transparency of agreement negotiations.

What is crucial in the context at hand, however, is that the TTIP and CETA are certainly not, in any event, agreements that fall within the sole jurisdiction of the Member States. If this were the case, the EU would not have any jurisdiction over the agreements in the first place. The Common Commercial Policy, the area of EU jurisdiction under which TTIP and CETA fall, establishes a far-reaching external jurisdiction on the part of the EU (Article 207, paras 3 and 4 TFEU). What is questionable, therefore, is only whether individual elements of the agreements fall outside the EU's jurisdiction and under the shared or exclusive jurisdiction of the Member States. Even if this cannot be ascertained conclusively at the present time, it is clear that a specific procedure for negotiating and concluding agreements under EU law must take place in both categories of agreement, i.e. including in the mixed agreement category.

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<sup>3</sup> *Bungenberg*, Außenbeziehungen und Außenhandelspolitik [Foreign Relations and Trade Policy], EuR 2009, Supplement 1, pp. 195 et seqq. (204 et seq.)

<sup>4</sup> German Foreign Office, memorandum on the Treaty of Lisbon of 13 December 2007, p 111, available at <http://www.auswaertiges-amt.de/cae/servlet/contentblob/358382/publicationFile/3093/Denkschrift-lissabon.pdf>.

Only conclusion of agreements under EU jurisdiction gives rise to legally binding effects under international law. TTIP and CETA would not come about without being concluded under EU jurisdiction (Art. 216 para 2 TFEU).

## 2. EU procedure for negotiating and concluding agreements

The TTIP and CETA can only be concluded on the primary legal basis of Art. 207, paras 3 and 4 in conjunction with Article 218 TFEU. On the basis of these provisions, the Commission firstly recommends to the Council that it authorise the Commission to open agreement negotiations (Art. 207 para. 3 sub-para. 2 TFEU). Once the Council has granted authorisation, the Commission negotiates "in consultation" with a Special Committee specifically appointed by the Council ("207 Committee") and based on guidelines issued by the Council<sup>5</sup> (Art. 207 para. 3 sub-para. 3 TFEU). In the final phase, the Council must decide on whether to conclude the agreement at the proposal of the Commission and with the agreement<sup>6</sup> of Parliament,

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<sup>5</sup> In the case of the TTIP, the Council issued these guidelines on 14 June 2013 in the form of the "Directives for the Negotiation on a Comprehensive Trade and Investment Agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America". See European Commission Press Release, EU Doc. No 10862/13. The "Directives" that were classified as confidential later appeared in numerous places on the internet.

In the case of the CETA, the Commission submitted the corresponding proposal for negotiation, "Recommendation from the Commission to the Council in order to authorize the Commission to open negotiations for an Economic Integration Agreement with Canada", SEC (2009) 413 final/2 on 2 April 2009.

<sup>6</sup> The requirement for consent arises from Article 218, para. 6 sub-para. 2 a) clause v) TFEU, according to which the consent of the Parliament is required if the agreement concerns an area to which the ordinary legislative procedure is applicable. The ordinary legislative procedure laid down in Art. 289 para. 1 in conjunction with Art. 294 TFEU is to be explicitly regulated for the Common Commercial Policy in Article 207, para. 2

(Art. 218 para. 6 TFEU) where this determination is preceded by a Council Decision on the signing and, where appropriate, provisional application of the agreement taken at the proposal of the Commission (Art. 218 para. 5 TFEU).

Both agreements are currently in the negotiation phase. In the case of CETA, the negotiations are apparently so far advanced that the final text of the agreement is to be presented at a meeting of the EU Foreign Affairs Council on 8 May 2014. As for TTIP, there is as yet no official draft text of the agreement. Isolated sections have merely reached the public domain unauthorised.

### 3. European citizens' initiative against TTIP and CETA?

#### a) Legal foundations of the European citizens' initiative

The primary legal basis of the ECI is Art. 11, para. 4 TEU, Art. 24 para. 1 TFEU. In terms of secondary law, the ECI is shaped by Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on citizens' initiatives.<sup>7 8</sup> The ECI, only introduced with the Lisbon Treaty, places another slice of democratic participation in the hands of EU citizens, in addition to the rights of petition and appeal

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TFEU. The same conclusion is reached by *Wouters/Coppens/De Meester*, *The European Union's External Relations after the Lisbon Treaty*, in: Griller/Ziller (eds), *The Lisbon Treaty - EU Constitutionalism without a Constitutional Treaty?*, 2010, pp. 143 et seqq. (185).

<sup>7</sup> OJ 2011 L 65/1, reported in OJ 2012 L 94/49, last amended by Del. Commission Regulation (EU) No 887 /2013 of 11 July 2013, OJ 2013 No 247/11.

<sup>8</sup> For details on the secondary legal structure *Tiedemann*, *Die sekundärrechtliche Ausgestaltung der europäischen Bürgerinitiative durch die Verordnung (EU) Nr. 211/2011* [The secondary legal structure of the European Citizens' Initiative by Regulation (EU) No 211/2011], *NVwZ* [New Journal on Administrative Law] 2012, pp. 80 et seqq.

to the European Ombudsman. The potential for impact of the ECI is limited, however, in that it can only nudge<sup>9</sup> the Commission in its intended direction, and this impetus is also tied to several conditions. In addition to the quorum of one million supporters (Art. 11 para. 4 TEU) and the requirements placed on the organisation taking the initiative (Article 3, ECI Regulation), there is also the substantive consideration – of particular interest in the present case – that citizens can only legitimately use an ECI to invite 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" (Art. 11, para 4 TEU). This material condition is clarified in Art. 4, para. 2 b) of the ECI Regulation to the effect that the proposed citizens' initiative may 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".

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<sup>9</sup> See BVerfGE [Decision of the federal Constitutional Court] 123, 267 (377): "without obligation"; the distinction will need to be made, however, between a legal obligation on the part of the Commission to take action in the first place following a successful ECI and the Commission's scope for discretion regarding the specific way in which it wishes to take action; see *Ruffert*, Art. 11 TEU para. 19, in *Calliess/Ruffert*, TEU/TFEU comment, 4th edition 2011; *Huber*, Article 11 TEU para. 42, in *Streinz* (ed.), EUV/AEUV Kommentar [Commentary on the TEU/TFEU], 2nd edition, 2012; *Epiney*, Europäische Verfassung und Legitimation durch die Unionsbürger [European Constitution and Legitimation by EU citizens], in: *Kadel Bach* (ed.), Europäische Verfassung und direkte Demokratie [European Constitution and Direct Democracy], 2005, pp. 33 et seqq. (50); *Guckelberger*, Die Europäische Bürgerinitiative [The European Citizens' Initiative], DÖV [Journal of Public Administration] 2010, pp. 745 et seqq. (753).

b) ECI scenarios and requirements

An ECI could be used, according to the initial consideration of the Client, to prompt the Commission to propose the repeal of the negotiating mandate for both TTIP and CETA to the Council. If the Council were to follow this proposal, the consideration goes on to state, the Commission would have to terminate the agreement negotiations, meaning that the two agreements would not come into being. This scenario is based on the draft ECI identified at the outset as Version 1.

Version 2 differs from Version 1 to the extent that it is no longer seeking an end to the negotiations for this agreement but rather, in view of the advanced stage of the CETA negotiations, to prevent ratification by the Council after the negotiations are concluded. This is based on the consideration that attempting to have the negotiating mandate taken away by the Council does not make sense once agreement negotiations have finished. It may, however, make sense to prompt the Commission to propose that the fully negotiated CETA agreement not be ratified, which would also ultimately result in the scuppering of this agreement.

Both versions are only legally tenable, though, if they satisfy the material condition of an ECI referred to above. The material condition can be fanned out here as follows. Firstly, the Commission may only be requested to take an action that lies within the institutional powers of the European Union (aa). The citizens' initiative must hence target a

"proposal for a legal act" (bb), which should serve the purpose of "implementing the Treaties" (cc).

(aa) Institutional powers of the European Union

The Commission's intended action would specifically concern the procedure for negotiating and concluding the TTIP and CETA agreements, applied on the legal basis of Art. 207, para. 3 and 4 in conjunction with Art. 218 TFEU. The rights of the Commission to make proposals in the various stages of the proceedings are part of the institutional embedding of jurisdiction for the planned agreements within the Common Commercial Policy pursuant to Part Five (II) TFEU. It is unlikely, in view also of the remaining uncertainty over their content, that both agreements as a whole are outside the institutional powers of the EU. Rather, it can be assumed that the conclusion of the agreements and, hence, the steps to be taken by the Commission by way of cooperation fall within the jurisdiction of the European Union. Consequently, it can be assumed that the proposed ECI will not prompt the Commission to engage in conduct outside the EU's jurisdictional framework.

(bb) "Proposal for a legal act"

The situation is more complicated in relation to the further condition that the ECI should aim at having the Commission propose a legislative act. Art. 4 para. 2 b) of the ECI Regulation states verbatim: "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 ...". In the primary legal basis of

Art. 11, para. 4 TEU, the ECI is ascribed the function of "[inviting] the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where ... a legal act of the Union is required".

For all of the differences in their details, Art. 11, para. 4 TEU and Art. 4 para. 2 b) of the ECI Regulation concur that an ECI with the aim of prompting purely de facto behaviour on the part of the Commission would probably not be admissible. Initiatives with the aim of inducing a public announcement, disclosure or release from the Commission are, in all probability, just as inadmissible as initiatives aimed at a general political behaviour – certain HR policy measures, careful spending of the EU budget etc. The ECI should not discernibly enable any form of influence by citizens on the Commission, only on legal regulations.

The point of orientation for the legislative relevance of the ECI is Art. 288 TFEU, which describes the legal acts of the EU. An ECI which amounts to an initiative for a new regulation or policy is not problematic here because and insofar as these forms undoubtedly concern legislative acts. However, the legislative acts also include the decision (Art. 288 para. 4 TFEU), whether in the version with or without an addressee<sup>10</sup>.

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<sup>10</sup> For this broad interpretation, see also *Guckelberger*, Die Europäische Bürgerinitiative [The European Citizens' Initiative], DÖV 2010, pp. 745 et seqq. (752); *Epiney*, Europäische Verfassung und Legitimation durch die Unionsbürger [European Constitution and Legitimation by EU citizens], in: Kadel Bach (ed.), Europäische Verfassung und direkte Demokratie [European Constitution and Direct Democracy], 2005, pp. 33 et seqq. (47); *Weber*, Europäischer Verfassungsvertrag und partizipative Demokratie [The European Constitution and Participatory Democracy], FS Rengeling, 2008, pp. 661 et seqq. (673).

The actions to be undertaken by the Council pursuant to Art. 207 para. 3 and 4 TFEU in conjunction with Art. 218 TFEU prepare the Council acts are decisions within the legal meaning of Art. 288 para. 4 TFEU<sup>11</sup>. Their characteristic feature is that they are legally binding.

In the context of the procedure for negotiating and concluding foreign agreement, decisions of the Council are binding on the Commission to which they are addressed. Nor is the legally binding effect called into question in the negotiation phase, for example, by the fact that, at the level of international law, agreement negotiations of necessity presuppose a certain degree of negotiating flexibility. The legally binding nature of the authorising Council decision is evidenced by the fact that the opening of contract negotiations by the Commission is only authorised in the first place by the decision (without the Council decision, the Commission would be acting *ultra vires*) and that, secondly, the range of possible matters for negotiation and essentials of formulating the agreement are already prescribed in binding form with the stipulation of negotiating guidelines. The Council decision, as a legislative act that opens the negotiations, does not provide an unrestricted negotiating mandate but one that is determinate in its content and possibly also conditional.

In the two draft versions submitted by the Client (with reference only to TTIP in the second version), the ECI does not target a proposal for an authorising decision but rather, on the contrary, a proposal for a decision to repeal a previously granted authorisation. Such a decision is not provided *expressis verbis* in Art. 207 and 218 TFEU.

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<sup>11</sup> See *Mögele*, Art. 218 paras 6 and 13 in: Streinz (ed.), *EUV/AEUV Kommentar* [Commentary on the TEU/TFEU], 2nd edition, 2012.

This does not mean, however, that such a decision could not be taken by the Council and that the Commission could not propose such a decision. There is no automatism associated with the opening of agreement negotiations authorised by the Council. The negotiations do not, of necessity, have to lead to a conclusion of an agreement of whatever type. There are readily conceivable situations in which the Commission may recognise during the course of negotiations that the original negotiation objectives clearly cannot be achieved, or that the agreement as a whole no longer makes sense due to a change in political or economic circumstances in the meantime<sup>12</sup>. In such situations, the Commission is at liberty to propose terminating the negotiations to the Council. Whether the Council also has the power in these cases to repeal the previously granted negotiating mandate without a proposal by the Commission can be left unanswered here. What matters is that agreement negotiations may be terminated if the Council repeals the negotiating mandate at the proposal of the Commission.

The proposal by the Commission to the Council to repeal the negotiating mandate of the Commission for the TTIP and CETA negotiations would be a proposal for a decision within the meaning of Art. 288 para. 4 TFEU, that is, a proposal for a legal act. In the same way as the granting of the mandate is a legally binding decision for the Commission, the termination

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<sup>12</sup> Thus, for example, the termination of the TTIP negotiations was considered at different political levels in between times due to the activities of the US National Security Agency (NSA) coming to through whistle-blower Edward Snowden.

of the mandate is a legally binding decision for Commission.

(cc) "Implementing the Treaties"

Even the intended Commission proposal is a proposal for a legal act, this does not, of itself, mean that this legislative act also serves to "[implement] the Treaties".

This restrictive phrase, contained in both the primary and secondary law basis of the ECI alike, can be variously interpreted. It can be understood as a barring clause to prevent initiatives that aim to amend the primary law of the Treaties. Indeed, there is something to be said for this understanding of the implementation clause<sup>13</sup>, even if it is not imperative.<sup>14</sup> However, this interpretation would be irrelevant in the present context, since the ECI directed against TTIP and CETA does not concern an amendment to the Lisbon Treaty.

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<sup>13</sup> *Robertson*, Elemente der direkten Demokratie im Vertrag von Lissabon [Elements of Direct Democracy in the Lisbon Treaty], *Journal für Rechtspolitik* [Journal of Legal Policy], 18 (2010), pp. 133 et seqq. (141); *Obwexer/Villotti*, Die Europäische Bürgerinitiative [The European Citizens' Initiative], *Journal für Rechtspolitik*, 18 (2010), pp. 108 et seqq. (111); *Guckelberger*, Die Europäische Bürgerinitiative [The European Citizens' Initiative], *DÖV* 2010, pp. 745 et seqq. (752); *Huber*, Art. 11 TEU para. 39 et seq., in: *Streinz* (ed.), *TEU/TFEU Kommentar*, 2nd edition 2012; *Mader*, Bürgerinitiative, Petitionsrecht, Beschwerde zum Bürgerbeauftragten [Citizens' initiative right to petition, appeal to the Ombudsman], *EUR* 2013, pp. 348 et seqq. (355).

<sup>14</sup> See *Efler*, European Citizens' Initiative – die Europäische Bürgerinitiative. Rechtswirkung und Kriterien für die Umsetzung [Legal implications and criteria for implementation], 2008, available at <http://www.mehr-demokratie.de/fileadmin/pdf/2008-10-eci-kriterien-dt.pdf>; *ders.*, Die Europäische Bürgerinitiative [European Citizens' Initiative]. Legal options for introduction below constitutional level, 2006, p. 4, available at [www.mehrdemokratie.de/fileadmin/di/pdf/papers/2007-04-eci-studie-ger.pdf](http://www.mehrdemokratie.de/fileadmin/di/pdf/papers/2007-04-eci-studie-ger.pdf).

What would be highly relevant, however, would be the interpretation that the implementation clause should exclude those initiatives amounting to an amendment or repeal of existing legislation. However, it will not be possible to read Article 11, para. 4 TEU as a ban on "destructive" citizens' initiatives.

The interpretation of primary and secondary legal foundations must be based on authentic interpretive methods under European law, no recourse is permitted to interpretive methods of the Member States' legal systems. The guiding principle of EU legal interpretation is the teleological method, based on the meaning and purpose of legal term requiring interpretation.

It should be noted at this juncture that the lengthy preamble to Regulation 211/2011 provides very precise information regarding the telos of the ECI. The very first recital discusses in general terms the "right" of citizens of the Union "to participate in the democratic life of the Union by way of a European citizens' initiative". There is not a single word in the preamble to indicate that only constructive initiatives are admissible. Participation in the democratic life of the Union may mean modifying, amending or completely repealing secondary legal acts that have already been adopted. The same also applies, however, to the repeal of mandate decisions opening negotiations within the meaning of Article 207 para. 3 TFEU. These acts of repeal are also an expression of democratic life of the Union. The phrase "for the purpose of implementing the Treaties" does not prevent an ECI from working towards such negative or destructive decisions. Any other view would result in an inappropriate privileging of normatively determined status quo, which cannot be justified. The will of active citizenship to achieve political influence may pertain to the creation

of new, additional substantive regulations or to the partial or complete removal of existing regulations.

The phrase "for the purpose of implementing the Treaties" is by no means redundant in this – self-evident – interpretation. It makes clear that initiatives can only ever be admissible where they remain, on the whole, within the EU programme of integration. An ECI that aimed to dissolve the EU and repeal the Treaties of the EU would clearly no longer serve the purpose of "implementing the Treaties". Conversely, all measures that amount, in whatever form, to operationalising the jurisdictional foundations under primary law will serve the purpose of "implementing".

#### 4. Registration practice for ECI – the "swissout" initiative

On its web platform on ECIs, the Commission makes reference, *inter alia*, to an ECI that was officially registered on 19 November 2012 under registration number ECI(2012)000015 and hence satisfies the requirements of Article 4, para. 2 of the ECI Regulation, entitled "Termination of Freedom of Movement of Persons from Switzerland"<sup>15</sup>. This initiative, launched by several EU citizens, was aimed at having the European Union terminate the "Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the

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<sup>15</sup> Available at <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2012/000015?lg=de>.

free movement of persons" of 21 June 1999, which entered into force on 1 June 2002.<sup>16</sup> The initiative was withdrawn by the initiators on 4 February 2013.

This process is to be viewed as an example of Commission practice with a heavily prejudicial significance for future citizens' initiatives and also for the TTIP and CETA initiative. This is because by registering this initiative, which also became known as "swissout", on the basis of Article 4 of the ECI Regulation, the Commission implicitly effected several clarifications.

Firstly, it fundamentally and generally affirmed the admissibility of such initiatives, which are aimed at shaping the agreement-based foreign relations of the EU. By registering swissout, the Commission clearly rejected a restrictive reading of the legal foundations of the ECI that would amount to allowing only initiatives aiming at the adoption of secondary legislation (regulations or directives) under the ordinary legislative procedure (Art. 289 TFEU).

Secondly, it decided, by virtue of this registration, that destructive initiatives may be undertaken and that such initiatives do not founder on account of the phrase "implementing the Treaties".

Thirdly, it recognised that an ECI can also relate to legislative acts of the Commission that do not have a jurisdictional basis, *expressis verbis*, in current primary law. This is because the Commission's proposal to the Council to authorise the Commission to terminate the agreement on free movement with Switzerland does

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<sup>16</sup> Text available at <http://www.admin.ch/opc/de/classified-compilation/19994648/201309010000/0.142.112.681.pdf>.

not have any explicit basis in the relevant Art. 218 TFEU. Obviously, it is generally not assumed that the termination of a contract, as *actus contrarius* to the conclusion of the agreement, must follow the same rules as the earlier conclusion<sup>17</sup>. This view of the law is once again confirmed in the termination practice of the EU<sup>18</sup>.

## 5. Combination of TTIP and CETA Initiative

It may be questioned whether two different concerns may be pursued in a single initiative and, specifically, whether a single ECI can seek to scupper both TTIP and CETA simultaneously. The only clue that fuels those doubts lies in the wording of Art. 11, para. 4 TEU and Art. 4 para. 2 b) of the ECI Regulation if the emphasis in those provisions is placed on "a" (i.e. one) legal act. However, a formalistic interpretation is excluded in view of the *telos* of the citizens' initiative already described. It must be written in such a way that the political will of its supporters in relation to a particular EU topic is sufficiently identifiable, and this also presupposes a degree of homogeneity in the subject matter. However, the primary and secondary legal foundations for the ECI do not even require a fully formulated text of the intended legal act from the initiators. It is entirely sufficient to mention the subject matter in the initiative. However, this would then also make it possible to undertake an ECI on a set of thematically related topics, thereby

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<sup>17</sup> *Schmalenbach*, Art. 218 para 13, in Calliess/Ruffert (eds), *AEUV/EUV Kommentar*, 4th edition, 2011.

<sup>18</sup> An example is the termination of the ACP Sugar Protocol in 2007,

necessitating the adoption of several legislative acts during the subsequent implementation<sup>19</sup>. TTIP and CETA have this internal thematic relationship. Based on all evidence, both agreements have partly identical wording, but about largely identical regulatory subject matter in any event. This justifies covering them jointly in a single ECI.

## 6. Version 1 or Version 2?

From the foregoing explanations, it is clear that the two versions of the ECI drafted by the Client are, in principle, legally admissible and thus registrable. However, the first version could not be chosen if the negotiating mandate for CETA has been fulfilled. If the negotiation phase is complete, i.e. a signed agreement text exists, the negotiating mandate is fulfilled and the final phase will begin. The negotiating mandate that has expired due to fulfilment can no longer be repealed, and an ECI to this effect would therefore be inadmissible. Choosing the "right" draft version thus depends entirely on how far the negotiations on CETA have progressed. Based on current information (as of April 2014) there is a lot to be said for favouring Version 2.

## 7. Alternative ECI formulations

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<sup>19</sup> See also *Maurer/Vogel*, Die Europäische Bürgerinitiative, 2009, p. 23; *Epiney*, Europäische Verfassung und Legitimation durch die Unionsbürger, in: Kadelbach (ed.), Europäische Verfassung und direkte Demokratie, 2005, pp. 33 et seq. (48 et seq.).

The ECIs previously registered show that the Commission rightly has no strict requirements regarding the formulation of initiatives. Based on the primary and secondary legal foundation, it is sufficient to formulate the subject matter and the objectives of the initiative. The initiators are not expected to pre-empt the Commission's powers to propose legislative acts and, to some extent, do the Commission's job for it. Therefore, in relation to TTIP and CETA it should suffice for prevention of the conclusion of TTIP and CETA to be specified as the objective of the initiative. Whether this then happens by repealing the negotiating mandate or by non-ratification of the signed agreement can initially be left open. For all that, It should also be remembered also means that an initiative text which, although legally correct, sounds too technocratic will not necessarily increase the chances of mobilisation.

### III. Conclusions

1. An ECI with the aim of preventing TTIP and CETA is legally admissible.
2. Due to their internal thematic relationship, it is admissible to cover both agreements in a single ECI
3. Of the two versions submitted, preference should be given to Version 2, based on the current status of negotiations on CETA.
4. As an alternative to the submitted draft texts, it should suffice for the ECI to be formulated in such a way that only the aim of preventing the conclusion of the international agreements is made clear.



Remagen, 30 April 2014 Professor Dr. Bernhard Kempen