



Warsaw, 21.05.2014

José Manuel Barroso
President of the European Commission
Rue de la Loi 200
B-1049, Brussels, Belgium

I. Legal Opinion

1. Submitting organisation:

The *Ordo Iuris* Institute for Legal Culture is an independent legal organization established as a foundation in Poland. *Ordo Iuris* gathers academics and legal practitioners aiming at promotion of legal culture based on the respect for human dignity and rights. *Ordo Iuris* pursues its objectives by means of research and other academic activity as well as advocacy and legal intervention.

Ordo Iuris is among organisations consulted by the Polish Government within the legislative process. Third parties interventions including (*Amici curiae* briefs) by the *Ordo Iuris* Institute were already accepted by Polish courts, including Supreme Court of the Republic of Poland. Our Institute was also allowed by the President of the European Committee of Social Rights to submit observations in a complaint considered by the Committee.

2. Submission object

The **Ordo Iuris Institute for Legal Culture** respectfully presents its written intervention concerning proceedings within the EU Commission upon the ECI "One of Us" which had a public hearing held in the European Parliament on the April the 10th, as well as its criticism by the International Planned Parenthood Federation (IPPF) from the 8th April 2014.

The "One of Us" ECI(reg. no: ECI(2012)000005) calls for the inclusion in European regulation of a clause that excludes from EU funding any activity which destroys, or involves the destruction of, human beings on early (embryonic or foetal) stage of their development. The ECI proposes to amend Regulation (EC, Euratom) N.1605/2002¹, Regulation (EC) N. 1905/2006² as well as the Regulation of the European Parliament and Council that establishes a framework program for research and innovation (2014-2020) - Horizon 2020⁻³.

¹New art. 31: "No budget allocation will be made for the funding of activities that destroys human embryos, or that presumes their destruction."

²New point 5 in art. 2: "5. The assistance of the Union, on the basis of this Regulation, shall not be used to fund abortion, directly or indirectly, through the funding of organizations that encourage or promote abortion. No reference is made in this Regulation to reproductive and sexual health, health care, rights, services, supplies, education and information at the International Conference on Population and on Development, its principles and Program of Action, the Cairo Agenda and the Millennium Development Goals, in particular MDG n. 5 about health and maternal mortality, can be interpreted as providing a legal basis for using EU funds to finance directly or indirectly abortion."

³New art. 16 (Ethical principles) par. 3 (The following research areas are not funded) let. d): "(d) research activities that destroy human embryos, including those aimed at obtaining stem cells, and research involving the use of human embryonic stem cells in subsequent steps to obtain them."

II. General remarks on the ECI "One of Us"

The initiative draws normative consequences from the interpretation of the EU law as provided by the Court of Justice of the European Union in the case *Brüstle v. Greenpeace* C-34/10.

The case originated within the context of patent law and addressed only the issue of patentability. Nevertheless, due to the nature of the preliminary ruling procedure, its primary objective was to interpret the meaning of the term "human embryo" as provided for in art. 6 (2)(c) of the Directive 98/44/EC. The CJEU explained the rationale for this provision by linking it to the recital 16 of the Directive's Preamble, which speaks of the necessary respect for „the dignity and integrity of the person”, as affirmed and required by the art. 1 of the EU Charter of Fundamental Rights as well as the Articles 2 and 21 of the TFUE. Therefore it is perfectly legitimate to draw from the *Brüstle* decision the conclusion that art. 1 of the Charter of Fundamental Rights of the EU, which affirms to the highest degree the value of the inherent human dignity, applies to the human embryo as from the moment of conception. It is particularly instructive as to the legitimate way in which such a constitutional affirmation is to influence specific solutions of EU law, as provided within the limits of competences attributed to it by the Member States.

A crucial finding of the CJUE in *Brüstle* case is that the reason of considering as a "human embryo" (as mentioned by the Article 6(2)(c) of the Directive) any fertilised human ovum is "that fertilisation is such as to commence the process of development of a human being." (C-34/10 § 35), and that the same applies to artificial procedures triggering the same processes (C-34/10 § 36).

The CJUE also emphasised that the reason for this special treatment of the "human embryo" as provided by the article 6 (2)(c), in the light of recital 16 of the preamble to the Directive, is the respect due to human dignity (C-34/10 § 32-34).

From the above it follows that the inherent human dignity, as protected by art. 1 of the EU ChFR, is inherent to every human being originating from fertilisation (or any other procedure inducing the same effects within the human *ovum*). This is the true and unchallengeable reason for the ruling in the *Brüstle* case. In fact, the CJEU decision was only application of a general principle of respect to human dignity to the particular area of the patent law.

Therefore, the case C- 34/10 indeed allows concluding that according to fundamental principles of EU law a human embryo is a human being endowed with the human dignity from the moment of conception.

As the general principle apply to EU patent law, it also must be applied to the rules of spending EU resources, so as to ensure that they will not be used in a way that violates human dignity. To this end are directed the proposed amendments, as already listed above.

III. General remarks as to the accuracy of IPPF submission

First of all *Ordo Iuris* presents an overall evaluation as to the general statements made by IPPF against the ECI "One of Us".

In the first place IPPF argues that there is no connection between the *Brüstle* case and the conclusions drawn from that decision by the ECI "One of Us". Subsequently, the accuracy of two main assertions made by the IPPF as to the alleged content of the "One of Us" ECI will be discussed. It is to be noted, that the analysis by IPPF suffers from a considerable number of inaccuracies. This is why *Ordo Iuris* Institute finds it necessary to address at least some of them in this submission.

1. IPPF claims there is no connection between the ruling of the Court of Justice of the European Union in C-34/10 and the "One of Us" ECI.

In order to confirm this allegation, IPPF indicates that the decision in *Brüstle v. Greenpeace* case „does not prevent scientists from experimenting on human embryos” but only prevents the granting of patents for their research in the European Union. That may be true, but the question that the CJEU was asked to decide was the meaning of the term "human embryo". As we have shown, this question was answered in the sense that the human embryo is to be considered as a bearer of human dignity as from the moment of conception.. The Court made this statement not on the basis of any particular definition in the EU Biopatent Directive; but on the basis of the common meaning of the term, and of the EU Fundamental Rights Charter. The CJEU's findings are therefore of horizontal validity, reaching beyond the sphere of Patent Law.

It should also be noted that the *One of Us* ECI is not aiming at a prohibition of scientific experiments. The ECI only proposes to deny the use of EU resources to finance these research projects. The assertion by the IPPF is therefore irrelevant to the issue raised by the "One of Us" ECI.

Neither can it be said that the ECI "One of Us" has nothing to do with the *Brüstle* case. The context for this decision is the issue of investments in biotechnology. Recalling the main objective of the Directive 98/44/EC, being promotion of investment in the field of biotechnology, the Court as emphasised, that the *"use of biological material originating from humans must be consistent with regard for fundamental rights and, in particular, the dignity of the person."* (C-34/10 § 32). Being clearly related to the issue of investments in biotechnology, the CJEU's decision is within the direct relationship with the problematic of the "One of Us" ECI. As the inventions involving destruction of human embryos are not capable of becoming object of intellectual property rights, there is no economic justification to spend EU financial resources for activities which are prevented from having commercial application.

2. Subsequently it must be clarified that the two main assertions made by the IPPF, as to the alleged content of the "One of Us" ECI are false. By means of selective quotation from the original One of Us proposal, the IPPF has ascribed to the ECI a content that is clearly beyond the scope of its proposal, as well as beyond the EU competences.

a) The IPPF claims: „The «One of Us» initiative demands a stop to «research activities that destroy human embryos, including those aimed at obtaining stem cells, and research involving the use of human embryonic stem cells in subsequent steps to obtain them».

This is **not true**. The ECI „One of Us” proposes that the said „research activities that destroy human embryos, including those aimed at obtaining stem cells, and research involving the use of human embryonic stem cells in subsequent steps to obtain them” should not be funded by the EU. It does not demand that those research activities must be „stopped” by EU!

b) A similar overstatement is made by IPPF in the paragraph relating to abortion: „The «One of Us» initiative demands a stop to «abortion, directly or indirectly, through the funding of organisations that encourage or promote abortion»”.

Again this is **not true**. The "One of Us" ECI proposes **not** "to stop abortion", but to stop financial assistance of the Union to abortion providers.

Apart from those two fundamental misrepresentations by IPPF as to the content of the "One of Us" ECI, there are several other inaccuracies, some of which are clarified below.

IV. Specific observations as to the accuracy of IPPF submission

1. One of Us and the freedom of scientific researches

IPPF invoked in its submission, the Article 15 of International Covenant on Economic, Social and Cultural Rights and Article 27 of the Universal Declaration of Human Rights – referring respectively to *“freedom of scientific research and creative activity”* and *“benefits of scientific advancement”*, claiming the “One of Us” initiative to be contrary to those principles.

It is to be noted, that the rights enshrined in Art. 15 of ICESCR and art. 27 UDHR must be interpreted in light of preambles of both treaties, which based their entire structure on the *“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”*⁴. In this context it is clear that these principles are to be understood as means of authentic advancement of the human family. Therefore, the two texts cannot be understood as allowing the destruction of some human beings for the convenience and profit of others. All human beings, regardless of the stage of their development, are members of that family.

History teaches us that “the advancement of science” and the “welfare of people” can be used as pretexts for the inhuman and degrading treatment of some people by others. For this reason, Nazi-scientific researches as performed in concentration camps justly have been qualified not as the result of *“freedom of scientific research and creative activity”* but as crimes against humanity. The same perspective is relevant in relation to scientific procedures destroying human embryos.

2. Abortion funding within the framework of EU Development Aid

IPPF claims in its submission that „EU must, **in accordance with its international commitments under the ICPD**, support actions in developing countries to protect women’s health including actions for safe and accessible abortion”.

It is particularly audacious to assert the ICPD calls upon provision of financial support „for safe and accessible abortion”. The ICPD clearly aims to discourage abortion and calls for its reduction. The paragraph 7.6 of the *Cairo Agenda* list specific services which are to be included within the notion of „reproductive health care” and it includes prevention of abortion and management of its consequences but not promotion of it. Abortion might only be included within the meaning of reproductive health if it is not „against the law” of a particular nation (§ 8.25). In the first place, ICPD calls upon the governments to take appropriate steps in order to help women avoid abortion (§ 7.24) and to reduce the recourse to abortion (§ 8.25). ICPD clearly deny possibility to consider abortion as a family planning method (“in no case should abortion be promoted as a method of family planning” § 7.24).

The Regulation 1905/2006 which the ECI One of Us is proposing to amend so as to expressly deny possibility of using EU resources in order to finance abortion in developing countries, employs a restrictive (in relation to abortion) definition of sexual and reproductive health within the meaning of Cairo Agenda. In the light of ICPD, the said ECI’s amendment proposal is to be understood as reaffirmation of the Cairo approach towards abortion.

It is also not to be overlooked, that the ICPD is invoked in recital 16 of Regulation (EC) No 1567/2003 which provides for funding the Sexual and Reproductive Health programs in developing countries, and it states very clearly there that: *“No support is to be given under this Regulation to incentives to encourage sterilization or abortion”*. The same approach to ICPD is confirmed by the Commission in its official response to the written question P-0002/04 where it is

⁴Preamble to UDHR recital first.

presented as a base for Community policy in relation to *reproductive and sexual health and rights in developing countries*⁵.

For this reason, the adoption of amendment to Regulation 1905/2006, as proposed by ECI "One of Us" is to be considered as a better fulfilment of EU commitments under ICPD.

3. Horizon 2020 and the ECI "One of Us"

IPPF claims, adoption of the Horizon 2020 **Framework Program for Research and Innovation** should be considered as an implicit refusal of the ECI proposal. This is an unfounded and spurious assertion. On the date of adoption of the Horizon 2020 (21st November 2013) the "One of Us" ECI was not yet verified as fulfilling requirements which empowered it to present its proposal to the Commission - so it was an initiative which only potentially might acquire a formal status authorising it formally to present political postulates which had to be taken in to account in the process of political decision making. Therefore, there was no formal reason to take it in to account on the date of adoption of Horizon 2020 so it is unfounded to claim it had been taken into account and rejected. Indeed, if this had been so, this would have been in clear violation of the rights of the organisers of "One of Us" under Regulation 211/2011, as the right to a fair hearing would have been denied to them. It clearly results from this that it is perfectly legitimate for the organisers of the successful "One of Us" initiative to request an amendment of Horizon 2020.

The EU must not disregard civic initiative which was formally recognised unless it is going to deny its commitment to the principle of democracy.

V. Conclusions

1. The ECI "One of Us" is affirming at least two fundamental principles upon which European Union is based. Being an EU citizen's initiative, it is affirming the principle of democracy and social participation in the formal dimension. Calling for an end of EU funding of the most controversial activities destroying human embryos, it is affirming the principle of respect for, and protection of human dignity in the material dimension.

2. Criticism against ECI "One of Us" as formulated by the International Planned Parenthood Federation in its submission from the 8th of April 2014 is unfounded. It contains material overstatements as to the content of the ECI, as well as to the content of EU international commitments resulting from the ICPD. The said overstatements (amounting sometimes just to misrepresentations) undermine the credibility of IPPF's own submission.

3. Giving effect to the ECI "One of Us" proposal does not infringe any of the fundamental principles of European or international law. On the contrary, it allows reaffirmation of the EU commitment towards the principle of democracy as well as, affirming respect for human dignity, it allows for better fulfilment of EU international commitment under the ICPD.



Aleksander Stępkowski
President of the Board
Ordo Iuris Institute for Legal Culture

⁵ Council response to written question P-0002/04 by Bernd Posselt (PPE-DE) to the Commission, (2004/C 88 E/0693), 9 January 2004, <http://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1397816967039&uri=CELEX:92004E000002>