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Case number T-561/14

European Citizens' Initiative One of Us and Others v. European Parliament, Council of the European Union, European Commission

REPLY

With regard to the submissions made by the European Commission, the European Parliament and the Council, the applicants wish to make the following observations:

I. The Commission's submission

In general

1. As was already observed in the original application, the present lawsuit is not merely about the specific merits of the European Citizens' Initiative ONE OF US, but on the European Citizens' Initiative (ECI) in general. Upon reading the European Commission's conclusions, one cannot help noticing that the European Commission is determined not to let the ECI mechanism have any practical effect. The Commission seems determined to defend a monopoly of power not only against the other EU institutions, but against the citizens. If the interpretation of the Commission were true, the introduction of the ECI procedure would have had no real effect; it would have simply been a fake mechanism of participative democracy, ultimately a demagogic provision.

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2. The Commission's defence in view of the present litigation is weak. No effort at all is made to defend the material content of Communication COM (2014) 355 final, which, as the Commission itself appears to admit, suffers from *"various inconsistencies and misrepresentations"* (§51). Instead, the Commission relies on purely formal arguments, according to which that Communication is *"not an act intended to produce legal effects vis-à-vis third parties"* and therefore not subject to any judicial review. It is argued (however without any basis in law) that the sole purpose of that Communication is *"to allow for a political debate"*, and that therefore the *"various inconsistencies and misrepresentations"* that pervade this Communication are to be considered "*irrelevant*".

3. The idea that seems to emerge from the Commission's position is that citizens organising an ECI should accept to undergo complicated registration procedures and comply with demanding formal requirements, and then spend a lot of time, money, and energy in order to launch a formal procedure that finally leads to something that is *not even a legal act*. Despite all the strict requirements for the registration of an ECI, the certification of the online collection system, and the verification of authenticity of signatures, etc. the result, even if more than one million signatures are collected, would be reduced to a legal nothingness.

4. If the Commission's interpretation of Regulation 211/2011 holds true, then the organization of an ECI would be a complete waste of time: it creates no legal effect. Even in the case of success, an ECI endorsed by more than 1 million citizens would hardly be distinguishable from a letter that any lobbyist could send to the Commission, inviting it to make a legislative proposal. If the Commission agrees with the writer, it will make such a proposal, if it disagrees, it won't. So, what are 1 million signatures needed for? And what good purpose does the complicated registration and verification process serve? Why should citizens use the peculiar mechanism set forth in Regulation 211/2011 rather than finding other, less formal ways of expressing themselves? The decisive weakness in the Commission's defence is that it fails to give any reasonable answer to these questions.

5. We may end these introductory remarks by recalling the public hearing that took place on 26 February 2015 at the European Parliament in Brussels[1] to discuss the implementation of Regulation 211/2011, and in which citizens' representatives, legal academics, technical experts, and Members of Parliament came to the almost unanimous conclusion that the ECI in its current format is unable to fulfil its purpose. One of the reasons for this is the way in which the Commission has reacted to the 2 (out of 60) initiatives that so far have been successful. Among the (current and previous) MEPs who took the word, specific attention should be given to Diana Wallis, at the time the PETI Committee's rapporteur on the Regulation. She considered her involvement in the making of the Regulation as the highlight in her parliamentary career, and recalled that the ECI had been intended to be *"a further step forward"* and to *"deliver real participatory democracy"*. The objective was to ensure that citizens "*not only can complain*

[1] A full-length video recording of that public hearing is available at the European Parliaments website: http://www.europarl.europa.eu/news/en/news-room/content/20150220IPR24229/html/Committee-on-Constitutional-Affairs-and-Committee-on-Petitions-Defence

about something", but to empower them *"to actually push the start button of the legislative process"*.[2]

6. In the light of these remarks, as well as of practically all the interventions made by MEPs in the course of that public hearing, it is truly astonishing that the European Parliament should have requested permission in the present lawsuit to intervene *in support of the European Commission*. By siding with the European Commission, the Parliament appears to endorse the most narrow and citizen-unfriendly of all possible interpretations of Regulation 211/2011, and at the same time deprives itself of its own prerogatives as a legislative organ.

7. As has already been pointed out, the purpose of this lawsuit is not vindication, but clarification – it provides the core institutions of the EU with the opportunity to clarify what an ECI is supposed to be, and how it should be handled. All EU citizens, supporters and opponents of the ONE OF US initiative alike, will appreciate this clarification. If the applicants' claim is upheld, this will be beneficial for democracy and citizens' involvement throughout the EU. The Commission will then have to issue a new reply to the successful ECI, this time (hopefully) of better quality. If by contrast the Commission's position should prevail, shame and condemnation would not fall upon the applicants, but upon Regulation 211/2011, which would then appear to be an irredeemably useless and inept piece of legislation. Ultimately, the Commission (and, with it, the Parliament and the Council) would obtain nothing else but their own condemnation as the drafters and makers of this Regulation, through which they have (intentionally?) created expectations they were not willing to live up to. Regulation 211/2011, touted as a great step forward for citizens' participation in the political process, would finally be revealed to be nothing but an empty shell. Seen from that perspective, the Commission's request to declare the application inadmissible is therefore both self-condemning and self-defeating.

Admissibility

8. The Commission's first and most important line of defence is of a purely formal nature: it consists in contending the inadmissibility of the intended action, both with regard to the request to annul Communication COM (2014) 355 final and the request to annul Article 10 (1)(c) of Regulation 211/2011.

9. With regard to the request to annul Communication COM (2014) 355 final, the Commission claims that *"the contested Communication is not an act intended to produce legal effects vis-à-vis third parties"*, therefore it cannot be the subject matter of an action for annulment. The Commission refers to the first and fourth subparagraphs of article 263 TFEU, which read:

> *1- The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also*

[2] Mrs. Wallis's intervention at the hearing is available as a video on YouTube: https://www.youtube.com/watch?v=_oFcwIhQhHo

review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

4- Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

10. According to this provision, **the Court shall review the legality of all acts of the Commission except recommendations and opinions**. The requirement that, to be subject to review, an act must be "intended to produce legal effects vis-à-vis third parties" applies to acts of the European Parliament and the European Council, but not to acts of the Commission. The case-law referred to by the Commission (especially cases 22/70 and C-316/91) precisely concerns acts of the Council. **The contested Communication is neither a recommendation nor an opinion. Therefore, it is undoubtedly subject to review by the Court**. Given that the Communication has been addressed to the applicants, they may institute proceedings against this act for infringement of Article 10 (1) c) of Regulation 211/2011, article 24 TFEU and article 11 TEU.

11. Should the General Court nonetheless consider that the legal effects condition applies, then the applicants believe to have made sufficiently clear in their initial submission why they consider their action to be admissible: it concerns a decisional act that the Commission was required to set and that produces a legal effect vis-à-vis the applicants, the signatories and indeed EU citizens and people in countries concerned by the matter at stake. The applicants refer to §§29-36 of their initial application. In particular, it must be recalled that the Communication puts a formal end to the ECI process, which definitely is a "legal effect", and that in the total absence of any response to a successful ECI, the organizers would without any doubt have the right to bring a legal action against the Commission for failure to act under Article 265 TFEU. Therefore, the Communication has a legal effect both for the organizers and for the Commission itself.

12. It is, moreover, most unfortunate – and indeed adds insult to injury - that the Commission appears to be insinuating (§22 of its submission) that the situation of a citizens' committee that has collected more 1 million signatures in support of a noble cause is in some way comparable to the situation of a Commission official who has come under suspicion of corruption and bribery and who tries to block the investigation of his case from going forward. Could it be that organizing a successful ECI is, in the Commission's view, something assimilated to a crime? Also, it is not clear where precisely the Commission sees the similarity between *Tillack* and the present case – in the *Tillack* decision, the applicant brought an action in an apparent attempt to prevent his case from being further investigated, whereas in the present case the applicants have brought an action against the Commission because they consider it not to have dealt with the subject-matter of their ECI in a sufficiently thorough and comprehensive manner. These situations differ widely from one another, and the Commission's attempt to draw a comparison between them seems rather far-fetched.

13. In its § 23 the Commission argues that *"a position not to adopt an act does not necessarily share the legal characteristics attached to such act. Moreover, in the present case the*

Commission did not even decide not to adopt an act but rather not to submit a proposal for a legal act, such proposal being of merely preparatory nature and hence not challengeable under Article 263 TFEU." This argument is misguided, given that it draws a false parallel between submitting a proposal for a legal act (which indeed can be said to be of a preparatory nature) and deciding not to submit a proposal for a legal act which, obviously, prepares nothing and therefore cannot be deemed to be a "merely preparatory" act. On the contrary, that decision puts an end to the ECI process. Moreover, the case law concerning preparatory acts is finely balanced: in certain circumstances, a preparatory act can be the subject-matter of an action for annulement, especially if that is necessary to ensure sufficient legal protection for the applicants (for example 13 October 2011, C-463/10 P and C-475/10 P, §§ 52-56).

14. If the Commission's reply to a successful ECI were not a legal act with legal effects both for the organizers of the ECI and the Commission itself, then that would simply mean that the Commission (and by extension the entire EU) is not required to react to a successful ECI in a legally meaningful way. The Commission's position, if followed, would completely eviscerate the instrument that, upon its introduction, was touted a major new achievement for democracy.

15. To avoid this absurd conclusion, it is necessary that the communication it releases in reply to a successful ECI must be understood to be very different in nature from a document that the Commission may release *ex proprio suo motu* and which it might well intend to be just an expression of opinion on whatever subject may have caught its fancy. From the wording of Art. 10(1)(c) of Regulation 211/2011 it is very clear that giving a meaningful and adequate reply to a successful ECI is an *obligation* for the Commission, and to be an obligation it must be *enforceable*.

16. In the same vein, it is not clear what sense the Commission's obligation to provide reasons for its decision to take action, or to take no action, could have if those reasons, as well as the decision itself, were not subject to judicial review.

17. The theory according to which for the Commission to comply with Art. 10 (1) (c) is not an obligation, but just one option among others, and the quality of the reply plays no role at all, is apparently too daring even for the Commission's own taste. This is why, in § 48 of its submission, it relativizes that theory, stating that: *"Only in extreme cases of manifest incorrectness of ... factual assumptions or legal interpretations the Commission could be said not to have discharged its obligation..."*

18. Thus, the Commission *itself* recognizes that there is an obligation to provide a reply to a successful ECI, and that, if the quality of that reply remains below the standards that the Commission can legitimately be expected to comply with, such obligation must be deemed not to have been fulfilled. But this is *exactly* what the applicants have exposed in their initial application: the Commission's reply to ONE OF US represents precisely such a case of manifest incorrectness of factual assumptions and legal interpretations.

19. The Commission's request to declare the application to annul Communication COM (2014) 355 final inadmissible must therefore be rejected.

20. Insofar as the initial application is directed at the annulment of Article 10 (1)(c) of Regulation 211/2011, the Commission prefers to re-qualify that head of claim as an exception of illegality. For the applicants, the importance of that claim is to have the three defendant institutions answer the question whether an ECI that, despite having been endorsed by nearly 2 million signatures, can be turned down by an unelected executive body that is not even obliged to give reasons for that decision is really what they wanted to create through Regulation 211/2011 and whether, if indeed this was their intention, they really believe that this corresponds to what Art. 11 (4) of the TEU foresees. The form in which this issue is addressed (*i.e.*, whether as a separate head of claim or as an exception of illegality) is, by contrast, of lesser importance.

Substance

Illegality of the Commission's refusal to submit a proposal for a legal act after receiving the ECI (both under Art. 10(1)(c) of Regulation 211/2011 and under Art. 11(4) TEU

21. To be separated from the question of the admissibility of the present action is the question whether, as the applicants contend, the Commission is obliged (except under the circumstances that have been enumerated in the initial application, but which are not of relevance in the present case) to respond to a successful ECI by submitting a legislative proposal that allows the legislative organs of the EU, *i.e.* the European Parliament and the Council, to decide whether the measure proposed by the ECI should be enacted or not.

22. The Commission claims that it is not obliged to submit a proposal for a legal act in reaction to a successful ECI. In more practical terms, the Commission claims that it is itself, and not the European Parliament and the Council, who should make the final decision on the matter.

23. Under a very narrow literal interpretation of Article 10 (1)(c) of Regulation 211/2011 and Art. 11 (4) TEU, such as in §§ 29-36 of the Commission's submission, this point of view is certainly defendable. However, the weakness of this position becomes quickly apparent when in subsequent paragraphs the Commission attempts to build a theory to explain how the ECI, despite the restrictive interpretation it proposes, can still be useful for citizens. It is this aspect of the Commission's reasoning that the applicants recommend to the Court's critical attention.

24. In § 37 of its submission, the Commission argues that *"the right of citizens to participate in the democratic life of the Union ... is to be seen not in isolation but rather together with the principle of representative democracy ... in accordance with which citizens are directly represented at Union level in the European Parliament"*. This may be so, but as an argument in favour of the Commission's position in this lawsuit this comment appears out of place, and indeed quite self-defeating. The applicants are not claiming that their right to participate in the democratic life of the Union must be seen in isolation. On the contrary, what they are saying is the exact opposite: it is the European Parliament and the Council, both of which have a stronger claim to "democratic representativeness" than the Commission, who should decide on the outcome of their initiative – and it is the European Commission who, by not submitting a legislative proposal, is blocking that process.

25. The argument can therefore be turned against the Commission. Precisely because the Commission is not the institution in which citizens "are directly represented at Union level", the principle of representative democracy *requires* that the matter be brought to the institutions that have a stronger claim than the Commission to represent the citizens, *i.e.* to the Parliament and the Council. In other words, the principle of representative democracy provides support to the applicants' claim, not to the Commission's defence.

26. In § 38 of its submission the Commission makes two claims. The first is that *"the Commission is not an "administrative body", but an institution which by virtue of the procedure for its appointment ... enjoys an – albeit indirect – democratic legitimacy and which is responsible to the European Parliament ... and thereby, albeit indirectly, to the citizens of the Union"*. Secondly, the Commission suggests that, if dissatisfied by the manner in which the Commission has reacted to a successful ECI, *"the Parliament may make use of the various instruments at its disposal for exercising political control ... over the Commission, including notably, requesting itself that the Commission submit an appropriate proposal, pursuant to Article 225 TFEU."*

27. With regard to the first claim, it can be reiterated that the "democratic legitimacy" that the European Commission is claiming for itself, if one really considers this term appropriate, is certainly more "indirect" than the legitimacy of any of the other institutions involved. The European Parliament is directly elected and the composition of the Council changes in function of the outcomes of elections at national level. The members of the Commission are, by contrast, appointees of their national governments.

28. The "democratic legitimacy" of the European Commission is thus considerably weaker than those of the other two institutions involved, which is why the applicants consider that it is *these other two institutions*, and not the Commission, who should decide whether new legislation should be enacted as a result of a successful ECI. The Commission, however, claims a veto right for itself, thus effectively preventing the other two institutions from having a say.

29. With regard to the Commission's hint that the Parliament, if dissatisfied by the Commission's answer to a successful ECI, might itself request that the Commission submit an appropriate proposal pursuant to Article 225 TFEU, it must be observed that this suggestion seems rather pointless, given that (as the Commission itself has observed § 36) *the Parliament cannot oblige the Commission to submit a legislative proposal.* In other words, if the Commission is not willing to listen to citizens, why would it then listen to the European Parliament? Is it not obvious that in this way the Commission is thus rather cynically suggesting that the organizers of a successful ECI should be walking in circles from one institution that is not *willing* to help them to another institution that is not *able* to help them? How is such a frivolous idea going to strengthen participatory democracy?

30. In § 39 of its submission, the Commission tries to explain why, despite its narrow interpretation of Article 10(1)(c) of Regulation 211/2011 and Article 11(4) TEU, it still considers the ECI to be a useful instrument for citizens, *i.e.* to have an *"effet utile"*. That *"effet utile"*, the Commission says, *"resides in the obligation for [the] Commission to examine the issue raised by the citizens' initiative and to address it publicly"*. The Commission goes on to say that *"the function of a communication presented by the Commission after receiving a citizens' initiative – including and notably where such a communication does not announce a proposal for a legal*

act – is to allow for a possible political debate both publicly, among citizens' and within the institutions including, notably, those entitled to request themselves that the Commission submit a proposal, i.e. the European Parliament and the Council."

31. With regard to "*the obligation for [the] Commission to examine the issue raised by the citizens' initiative and to address it",* it should be recalled that what the Commission effectively is claiming in its submission is that it is not required to examine the issue and address it in a meaningful way; this part of the argument appears thus rather paradoxical. The Commission's *real* position is that ECI organizers have no right to legal defence if the reply given to them fails even the lowest standards of legal and factual reasoning, or perhaps even if no reply at all is given to them. How does that square with the assertion that there is an "*obligation for [the] Commission to examine the issue raised by the citizens' initiative and to address it"?*

32. Even more astonishing is what the Commission has to say with regard to *"the function of a communication presented by the Commission after receiving a citizens' initiative".* While up to this point the Commission has built its argument on an extremely narrow literal reading of the relevant provisions in Article 10(1)(c) of Regulation 211/2011 and Article 11(4) TEU (and argued that there was *"nothing in* [those provisions] *to support the interpretation brought forward by the applicants"*), it suddenly switches to a radically different interpretive approach, itself making assertions that appear to have no foundation at all in the provisions it is interpreting, be it in one of the substantive provisions or at least in a recital. Indeed, this claim regarding the function of the Communication provided for under Article 10(1)(c) appears to be a product of pure fantasy. Elsewhere (§ 44), the Commission is arguing that legal obligations can be derived only from the normative text of a legal act, not from a recital – but here (§ 39) it founds its central argument regarding the (limited) scope of its own obligations under Regulation 211/2011 on language that is found neither in normative text nor in a recital.

33. The argument can thus be turned against the Commission itself: there is nothing in the text of Regulation 211/2011 or in Article 11(4) TEU to support the suggestion that the function of a communication presented by the Commission after receiving a citizens' initiative is (solely) that of *"allowing for a possible political debate both publicly, among citizens' and within the institutions including, notably, those entitled to request themselves that the Commission submit a proposal, i.e. the European Parliament and the Council"* (§ 39). However original this interpretation (which is repeated not less than six times in the Commission's submission, §§ 39, 47 (2x), 48, 51, and 59) may be, one feels tempted to wonder how the Commission comes to make it.

34. Besides, it is quite unclear what quality a communication must have in order to *"allow for a possible political debate"*. Is "allow" to be understood in the sense of permission – in other words, does the Commission believe that political debates in the EU should be permitted *only* under the condition that citizens first collect 1 million signatures and then receive the Commission's kind permission to hold a debate? Or is "allow" to be understood in the sense of "facilitate"? But how does Communication COM (2014) 355 *facilitate* or *catalyze* any debate that might not equally well take place in the absence of that poorly drafted document? Is the intended effect of the document not, on the contrary, to cut short a debate that the Commission appears to find politically undesirable? By refusing to submit a proposal for a legal act, the Commission effectively prevents debate in the Parliament and Council.

35. Finally, inasmuch as the Commission in its § 39 refers to *"the institutions ... entitled to request themselves that the Commission submit a proposal, i.e. the European Parliament and the Council"*, it must again be recalled that a request made by either of those two institutions is no more binding on the Commission than the request already made by the more than one million signatories of the successful ECI, so that there is no value added. The reasoning seems thus circular – as if the Commission wanted to poke fun on citizens, sending them on useless errands.

36. In § 41 of its submission, the Commission argues that the applicants' interpretation of Article 11(4) TEU might lead to absurd consequences in case two ECIs carried out at the same time were aiming at proposals with conflicting objectives and effects, and both were successful: the Commission would then be obliged to submit two conflicting legislative proposals. But that seeming "absurdity" is easily resolved. In such a hypothetical case the Commission should indeed make two conflicting proposals - and it would be for the European Parliament and the Council, acting in their role as co-legislators, to decide which of the two proposals should be adopted.

37. Once again, the argument can be turned against the Commission. For what actually happened in the case of the citizens' initiative "ONE OF US" was that the Commission, at a time when it was already apparent that the ECI had obtained the support of far more than one million citizens eagerly pushed and pressed for the adoption of two legislative proposals that stood in direct and radical contradiction to the successful ECI's objectives – and *for which no competing ECI had collected any statement of support*. These two legislative acts, freshly adopted, where then quoted in Communication COM (2014) 355 final as argument that the subject matter of the ECI had already been decided upon, and that the political debate should not be reopened.[3] Is that what the Commission understands by "allowing a political debate" – or does it not rather provide evidence for an attitude that is genuinely hostile to citizens' participation in the political process?

38. It seems thus that the problem is not the *hypothetical* situation of two competing ECIs standing in contradiction to each other, but the very *real* situation of one successful ECI through which citizens dare contradicting the Commission's own political priorities.

[3] With regard to the stem-cell research issue, this new legislation is the framework programme Horizon 2020, adopted in December 2013, when the collection of signatures for ONE OF US had already been completed but the initiative had not yet been submitted. In the Commission's reply to the ECI one reads that *"legislation on the current EU research programme contains detailed provisions governing EU support for human embryonic stem cell research. These provisions were only recently (December 2013) agreed by the EU co-legislator, i.e. the European Parliament and the Council, through the ordinary legislative procedure, in full accordance with Article 182 TFEU. The provisions for funding under Horizon 2020 were agreed taking into account all aspects, including ethical considerations, EU added value and potential health benefits of all types of stem cell research"*.
Likewise, the issue of EU development aid funds being used to fund abortions in developing countries is relevant to 233/2014, which was adopted on 11 March 2014. In its reply to ONE OF US the Commission claimed that the European Parliament and the Council *"supported the policy priorities and objectives for development policy including cooperation on the priority themes as proposed by the Commission"*, implicitly saying that therefore there was no need to submit a new legislative proposal on the basis of the successful ECI.

39. Another reason why the Commission claims that it should be completely free to decide whether or not to take action in response to a successful ECI is that it believes that this is so required by the balance of power between the EU institutions. In § 36 of its submission, the Commission draws a parallel between, on the one hand, Article 11 (4) TEU and, on the other hand, Articles 225 and 241 TFEU, saying that if a request by the European Parliament or the Council does not oblige the Commission to submit a proposal for a legal act, the same must be true for a successful ECI. The Commission believes to find corroboration for this theory in the first recital of Regulation 211/2011, which says that the possibility the ECI confers to citizens is "similar" to the right conferred on the European Parliament and the Council under Articles 225 and 241 TFEU.

40. But "similar" is not "identical". There may have been good reasons for withholding the right to legislative initiative from the European Parliament and the Council, which do not apply in the same way to 1 million citizens. For example, conferring a right of initiative to the European Parliament and the Council might unsettle the EU's inter-institutional balance precisely because both the European Parliament and the Council are legislative bodies – which certainly cannot be said of the signatories of an ECI. There is a difference between the European Parliament and the Council, both of which wield considerable institutional power in the framework laid out in the EU Treaties, and a simple ECI that has no such power.

41. In other words, conferring a right of initiative to the European Parliament and the Council might make those two institutions too powerful (and undermine the Commission's position in this institutional triangle), while conferring this same right to one million citizens might, on the contrary, introduce some balance into a system from which citizens feel locked out.

42. It is moreover unclear how the applicants' interpretation would imply *"a restriction of the right to initiative with which the Commission is vested by Article 17 (1) TEU"*. What the applicants are saying is not that the Commission's right to initiative should be restricted. On the contrary, it is the Commission that wants to restrict, or indeed exclude, the right to initiative of citizens. But while Article 17 TEU says that the Commission shall take "appropriate initiatives", no mention is made there of a *monopoly* of initiative. And indeed Article 11 (4) in conjunction with Article 17 (1) TEU could be read as meaning that an initiative is by definition "appropriate" if it has been directly and explicitly endorsed by more than one million citizens (provided of course that it falls within the EU's competence). The word "shall" in Article 17 thus would carry a sense of obligation: the Commission shall take the initiatives that 1 million citizens have invited it to take.

43. It is only in this way that Regulation 211/2011 can have any added value for citizens. This is also the deeper sense of the applicants' argument relating to an "archetype" of citizens' initiatives, which according to the Commission's view "cannot be accepted". It is unsurprising that this argument is not very appealing to the Commission – but it nevertheless is clear that if the ECI does not have the effect of triggering a formal legislative procedure (the outcome of which will in any case depend on the vote in the European Parliament and the Council), there is simply no reason why citizens should take the pain of using it.

44. In conclusion, the European Commission fails to offer a convincing explanation of what the ECI is supposed to be. The interpretation of Regulation 211/2011 and of Article 11(4) TEU put

forward by the Commission is utterly unconvincing and would, if accepted, lead to the failure of the ECI as an instrument for participatory democracy. Is that what the Commission is seeking to achieve? In that case, it should say so openly. The Commission's patronizing suggestion that the true purpose of an ECI consists in "*allowing for a possible political debate both publicly, among citizens, and within the institutions"* would render the ECI absurd and meaningless, given that political debates among citizens and within the institutions can already take place without, as a pre-condition, one million signatures being collected and certified. On the contrary, the complicated and burdensome rules set forth in Regulation 211/2011 can make sense only if a successful ECI triggers a legal effect that is meaningful and goes far beyond what the Commission is suggesting.

Failure to separate legal from political conclusions

45. In reply to the applicants' allegation that in its reply to the ECI there is no appropriate separation between legal and political conclusions, the Commission bluntly states that in its view there is no obligation to separate legal from political conclusions. It bases this view on an "Interinstitutional agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation", in which it is said that recitals *"shall not contain normative provisions"*. As regards the question whether the said interinstitutional agreement is relevant for interpreting provisions of secondary Union law, it quotes the opinion of an Attorney General that, however, does not appear to have made it into the Court's decision in view of which it was submitted, and which, therefore, is not more than an opinion.

46. In that context, one might point out that an agreement that *"recitals shall not contain normative provisions"* does not necessarily mean that if a recital, contrary to that agreement, did contain normative language, it would have to be considered non-normative. In any case, this is not relevant here: Recital 20 of Regulation 211/2011 says that *"legal and political conclusions should* (not: shall) *be set out separately",* which clearly is not *stricto sensu* normative. However, that recital obviously is intended to give direction and indicate *how Article 10 (1)(c) should be interpreted.*

47. Be that as it may, the Commission claims that in its Communication COM (2014)355 final it has anyway set out its legal and political conclusions separately, with Section 2 of that Communication containing the "legal" and Section 3 the "political" conclusions.

48. In this regard, it would already suffice to point out that in order to properly separate legal from political conclusions, it would have been appropriate for the Communication to contain one Section entitled "Legal Conclusions" and another one entitled "Political Conclusions". A "state of play" is usually understood to be a description of a situation (factual, legal and political) – and whoever reads the Communication attentively will find that Section 2 indeed contains all of these elements. There is, in addition nothing "conclusive" or "analytical" in this section, which instead has a rather "descriptive" character – descriptive of the situation in general, but without any discussion of the specific proposals made by "ONE OF US".

49. Section 3, by contrast, is best described as a more general discussion of the requests brought forward by the ECI, but again it mixes factual, legal, and political elements. This section, too, is descriptive rather than conclusive.

50. Not mentioned in § 45 of the Commissions submission, the Communication also contains a Section 4 with the title "Conclusions". Readers from outside the Commission might expect that the Section entitled "Conclusions" must be the one where they find the conclusions, both "legal" and "political". Yet if one is to believe the Commission's observations § 45, the conclusions are in fact not to be looked for under the header "Conclusions", but under the headers "State of Play" and "Assessment of the ECI Requests".

51. If the conclusions are not under the header "Conclusions", then possibly what is found under Section 4 of the Communication are something else than conclusions – even though the title indicates so. In any case, in that section it is completely impossible for the reader to distinguish whether what is being said is deduced from legal or political reasons.

52. In conclusion, the Commission's assertion to have set out separately, as required by Regulation 211/2011, its legal and political conclusions is obviously and manifestly wrong.

Material insufficiency and inadequacy of the Commission's reply to the ECI

53. For the applicants, this lawsuit provides a welcome occasion to expose the material inadequacy and inappropriateness (on factual as well as on legal and moral grounds) of the reply that the Commission has given to their ECI. If the Commission wants to leave this criticism unchallenged and unanswered, that will be – irrespective of the final outcome of this case - to the Commission's own damage.

54. It appears that the Commission has no ambition to avoid such damage. Instead of rebutting the applicant's criticism, the Commission's strategy is to make an audacious claim that it has *the right* to give inadequate answers to successful ECIs: firstly, because legal actions directed against such inadequate answers are anyway inadmissible (see above), and secondly because, as one reads with astonishment, the legal and factual reasoning in the communication that the Commission is obliged to issue in response to a successful ECI does not need to meet any minimum standards of quality.

55. According to the Commission, Article 10(1)(c) of Regulation 211/2011 does not oblige it to provide coherently and factually correct reasons for its decision to take, or not to take, action in response to a successful ECI. Instead, it claims *"the function of a communication presented by the Commission after receiving a citizens' initiative is to allow for a possible political debate"*.

56. As we have explained above, this view certainly has no basis whatsoever in Regulation 211/2011, or in Article 11 (4) TEU.

57. Similarly pretentious is the Commission's assertion that the Communication is there to *"enable the European Parliament and, ultimately, the citizens to exercise their political control over the Commission"*. Although this claim is made three times, no explanation is offered on how this Communication "enables" its addressees to do something that they might not have been able to do without it.

58. But the cherry on the cake is what the Commission says in § 48 of its submission, which deserves to be cited in full:

> *"Conversely, the fact that another institution or indeed the organisers or the signatories of the citizens' initiative concerned do not agree with factual assumptions or legal interpretations expressed in the reasons set out by the Commission for not submitting a proposal for a legal act is irrelevant for assessing whether the latter has discharged its obligation under Article 10 (1)(c) of Regulation 211/2011."*

59. Thus, with one grand gesture, all possible objections against the Commission's factual assumptions and legal interpretations are brushed away. The problem, it appears, is not that any of those assumptions and interpretations might be *objectively wrong*, but that people "disagree" with them. In other words, all is reduced to the level of mere subjectivity, or to a divergence of opinions. This is how the Commission treats not only citizens, but also "other institutions" – and one is tempted to wonder which institution the Commission's agent might have had in mind when he wrote this: did he perhaps refer to the CJEU and its interpretation of the term "human embryo" in the *Brüstle vs. Greenpeace* judgment?

60. The end of Commission's § 48 reads:

> *"Only in extreme cases of manifest incorrectness of such factual assumptions or legal interpretations the Commission could be said not to have discharged its obligation under Article 10(1)(c) of Regulation 211/2011"*

61. The Commission therefore accepts that a communication that is released in response to a successful ECI must correspond to certain minimum quality standards. At the same time (and without finding a basis for this statement in any legal provision) it claims that manifest incorrectness of the factual assumptions or legal interpretations are not a problem as long as they are not "extreme".

62. But although the Commission may have chosen to ignore this aspect of the initial application, this is precisely what the applicants are alleging. Communication COM (2014) 355 final indeed represents such an extreme case of manifest incorrectness both with regard to its factual assumptions and its legal interpretations; the Commission therefore must indeed be deemed not to have discharged its obligation under Article 10(1)(c). Rather than having expressed a mere divergence of opinion, the applicants have indeed alleged (and demonstrated) the objective inadequacy of the Commission's reply to their ECI.

63. Of course, the Commission has a different opinion. In § 51 of the submission, one reads the following:

> *"In the present case, the Commission takes the view that the reasons set out in the contested Communication make possible a political debate, thereby enabling the European Parliament and, ultimately, the citizens to exercise their political control over the Commission. Hence, it does not deem necessary to discuss in detail the various inconsistencies and misrepresentations of the contested Communication."*

64. As it appears, the Commission sets a rather low threshold for itself: irrespective of inconsistencies and misrepresentations, even the most poorly drafted document will (according

to this theory) be acceptable, if only it *"makes possible a political debate"* that might take place – and indeed is taking place – also without the Commission's precious contribution.

65. With regard to *"making possible a political debate"* and *"enabling ... political control"*, it suffices to refer to what has already been said above. But what is interesting here is that this paragraph appears to openly avow that the Communication indeed contains *"various inconsistencies and misrepresentations"* which, however, it does not want to *"discuss in detail"*. This is very different from the pervasive use of self-congratulatory language that characterized the Communication (cf. §§ 86, 87 of the applicants' initial submission). Then, everything in the Commission's actions and omissions was "carefully calibrated", "stringent", "rigorous", "appropriate", etc. etc.; now, by contrast, the Commission admits that there are inconsistencies and misrepresentations.

66. Thus, the Commission's defence appears to be that although there are "various inconsistencies and misrepresentations" in the Communication, those "inconsistencies and misrepresentations" do not amount to such an "extreme case of manifest incorrectness (...)" as to allow the conclusion that *"the Commission could be said not to have discharged its obligation under Article 10(1)(c) of Regulation 211/2011"*.

67. However, in order to hold even this rather unambitious line of defence, the Commission would have had to address more carefully, one by one, the points of criticism raised in the applicants' initial submission, given that that submission clearly exposes deficiencies that cannot be described in any other way than as *"extreme case of manifest incorrectness"*. According to the Commission's own theory, the qualification of the (avowed) "inconsistencies and misrepresentations" as "extreme cases of incorrectness" would mean that the Commission has failed to discharge its obligations.

68. But instead of carefully examining the various points of criticism one by one, the Commission summarily dismisses them all as "irrelevant" (cf. §§ 48, 49, 52, 54, 57 of the Commission's submission). Quite obviously, this allegation of "irrelevancy" is made for purely tactical reasons: the Commission hopes that in this way it can avoid the need of justifying what cannot be justified, and of defending what indeed cannot be defended. The Commission's legal representatives seem to have understood that any attempt to rebut the applicant's substantive criticism of Communication COM (2014) 355 final would end in an irredeemable disaster for the Commission – so they hope that by calling this criticism "irrelevant" they can get away cheaply. In this way, they believe that they can dismiss the well-founded and convincingly argued criticism of the Commission's statements regarding the issue of stem cell research in §§ 67-90 of the initial application (*i.e.*, 24 paragraphs) in just one paragraph, or the discussion of the apparent shortcomings of the Commission's reply regarding the issue of the funding of abortions in developing countries in §§ 91-117 (*i.e.*, 27 paragraphs) in just five lines.

69. The Court should not allow the Commission to get away with this. The applicants' reasoned criticism of the Commission's Communication is certainly more than just an expression of disappointment, or of a diverging opinion. Instead, it is based on established facts and conclusively argued reasons. The Commission must be held to give an equally well-argued response to this criticism.

70. Of course, nobody can expect the Commission to offer arguments where no good arguments are available to it – but if no appropriate answer is given to the applicant's criticism of Communication COM (2014) 355 final, then that means that the applicants' criticism stands unchallenged. Whatever the final legal outcome of this procedure, this would amount to a severe moral defeat of the Commission.

71. Most likely, however, the defeat will not only be moral, but also legal: it appears undeniable that what the applicants have exposed are not only *"various inconsistencies and misrepresentations",* but indeed *"extreme cases of manifest incorrectness"* that would render the Commission's answer to their ECI unacceptable even by the Commission's own low standards. There is no need to repeat this criticism here (it suffices instead to summarily refer to §§ 40-129 of the initial application); nevertheless, the applicants would point, *à titre d'exemple* and without claim to completeness, to just a few points where those manifest deficiencies in Communication COM (2014) 355 final very obviously undercut that Communication's potential to contribute (let alone to "allow for") an informed political debate on the subject matter of the ECI:

72. The deficiency of the Commission's reaction to ONE OF US is most evident where the Commission asserts, in § 53 of its submission, that the draft legal act that the organizers of the ECI have submitted does *"not imply defining or clarifying the legal status of the human embryo"*, and that therefore, in answering to this ECI, the Commission also was not required to "*tak[e] position, in the abstract, on the legal status of the human embryo"*.

73. In response to this rather warped reasoning, the applicants would point out that, while indeed they have submitted a draft legal proposal to substantiate the content of their ECI, this proposal is not the only content of their ECI. The Commission should be aware that most of the ECIs submitted (and registered) so far did not come along with a legislative proposal, but only in the form of a more abstract definition of the objectives pursued. And indeed, such abstract definitions of the subject-matter (not more than 200 characters) and main objectives (not more than 500 characters) are compulsory parts of each ECI, whereas the submission of a draft legal act is optional. Logically, therefore, the Commission's reply must take into account not only an optional element of the ECI, but also the compulsory elements.

74. In the case of ONE OF US the subject matter was this:

> *"Juridical protection of the dignity, the right to life and of the integrity of every human being from conception in the areas of EU competence in which such protection is of particular importance".*

The main objectives pursued were set out as follows:

> *"The human embryo deserves respect to its dignity and integrity. This is enounced by the ECJ in the Brüstle case, which defines the human embryo as the beginning of the development of the human being. To ensure consistency in areas of its competence where the life of the human embryo is at stake, the EU should establish a ban and end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health."*

It appears self-evident that in order to meaningfully address this subject matter and these objectives, the Commission was required to clarify the legal status of the human embryo.

75. As regards the draft legal proposal itself, the Commission's view that it does *"not imply defining or clarifying the legal status of the human embryo"* appears to rest upon a rather peculiar understanding of the English verb "to imply". It is true that the draft legislative proposal did not itself *include* a definition of the legal status of the embryo – but this is precisely why it *implied* such a definition. Quite obviously, it is not possible to comment in a meaningful way on this ECI without taking a clear stance on the legal status of the embryo.

76. It would appear self-evident that in order to assess the sufficiency and appropriateness of measures that have been proposed or adopted to protect the dignity and rights of the human embryo, it is unavoidably necessary to define the status of the human embryo. With regard, for example, to the Commission's highly-praised "triple lock" system for the Horizon 2020 Research Framework Programme, this means that if the embryo is "one of us", *i.e.* a human being, there are no circumstances that could justify the destruction of embryos for research purposes, however "much promise" a given research project might hold. If, by contrast, the embryo is not a human being, then the "triple lock" would seem unnecessary. Either way, it is not possible to demonstrate the appropriateness of the "triple lock" system without answering the question what it is that this system should protect. Moreover, the applicants have already underlined the inconsistency of prohibiting the use of EU funds for derivation of new stem cell lines or for research that destroys embryos, while financing such destruction through funding abortion abroad. Without a clarification of the legal status of the embryo, the Commission's policy remains devoid of any factual and moral foundation. The Commission's reasoning thus appears to suffer not only from some inconsistencies or factual misrepresentations, but rather is based on no facts and no arguments at all.

77. This leads us back to the *Brüstle* judgment, which clarified that the term "human embryo" includes the fertilized human ovum as from the moment of conception. If the Commission disagrees with this finding, it disagrees not with ONE OF US, but with the European Court of Justice. Likewise Directive 98/44/EC stipulates that inventions involving uses of human embryos for industrial or commercial purposes cannot be patented – in providing so, it clearly *implies* that the human embryo is a bearer of human dignity and human rights. Again, if the Commission disagrees with this position, it disagrees not with ONE OF US, but with the European Parliament and the Council. However, these "disagreements" are not just divergences of opinion, but rather it appears that the Commission is unwilling to acknowledge objective scientific facts (*i.e.*, that the human embryo is a human being as from the moment of conception), and a well-established legal situation (*i.e.*, the *Brüstle* judgment and its wider implications).

78. Last but not least, one would be curious to understand what the European Commission has in mind when it says that it is not necessary to take position "in the abstract" on the legal status of the human embryo. Does that mean that in the Commission's opinion the legal status of the embryo should be assessed "concretely", *i.e.* on a case-by-case basis? Do some human embryos deserve a different legal status from others? If so, what would be the criteria for such case-by case assessment? And how would such an approach be compatible with the principle of human

dignity, *i.e.* with the understanding that each human being has inherent dignity irrespective of its specific condition and situation?

79. Even if it may be not more than just a *lapsus linguae*, the Commission's statement that it is not necessary "in the abstract" to take position on the legal status of the embryo is revealing. It shows this institution's lack of understanding not only of this specific moral issue, but of human dignity *in general*. *The legal status of a human embryo, or of human beings in general, cannot be determined in any other way than "in the abstract"*. If we were to make human rights and human dignity depend on the situation or condition of a concrete person, we would thereby in fact abolish both human rights and dignity as *universal* concepts.

80. By highlighting these few points, the applicants are not saying that they are more important than any other part of their criticism of Communication COM (2014) 355 final, or that it would be sufficient for the Commission to address just these points and not all the others. Instead they note that the Commission's submission does not even attempt to challenge and rebut their substantive criticism, which therefore stands uncontested. In addition, given the apparent gross inconsistencies and misrepresentations in Communication COM (2014) 355 final, which the applicants have exposed and which the Commission seems (at least implicitly) to avow, it appears inevitable to conclude that the Commission, even by its own standards, has failed to discharge its obligations under Article 10 (1)(c) of Regulation 211/2011.

II. The Submissions by the European Parliament and the Council

81. In what appear to be accorded submissions, both the Council have requested that the application be declared inadmissible insofar as it concerns the annulment of Article 10 (1)(c) of Regulation 211/2011, of which both institutions are co-legislators and, under this head, co-defendants.

82. Both institutions have also applied to be granted permission to intervene in this litigation in support of the Commission, in order to contribute in this way to the defence of Article 10(1)(c) of Regulation 211/2011, which apparently they consider to be in conformity with Article 11(4) TEU. The applicants have reacted to this request in observations dated 24th March 2015 in which they suggest that this permission be denied because the Commission's position would deprive both the European Parliament and the Council of their right, as co-legislators, to decide whether or not to adopt the legislation proposed by the ECI.

83. The applicants have taken note of the Commission's approach of dealing with the second head of their claim (cf. § 26 of the Commission's submission) by re-qualifying it as an exception of illegality. The applicants are satisfied that this is sufficient to ensure that the substantial questions they are raising, namely the conformity of Article 10(1)(c) of Regulation 211/2011 with what is set forth in Article 11(4) TEU, can be adequately addressed. They therefore see no need to maintain their formal application for the annulment of Article 10(1)(c) of Regulation 211/2011.

III. Conclusion:

84. For the above reasons, the applicants hereby:

- withdraw their request under Article 263 TFEU to annul Article 10(1)(c) of Regulation 211/2011 provided it is requalified in exception of illegality, and

- respectfully maintain their request to annul Communication COM (2014) 355 final and condemn the Commission to pay the costs.

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