APPLICATION TO THE GENERAL COURT OF THE EUROPEAN UNION

IN THE CASE OF

European Citizen's Initiative ONE OF US and others

versus

the **European Commission**,

the **Council of the EU**, and

the **European Parliament**

Strasbourg, on the 25th of July 2014

European Citizen's Initiative ONE OF US, registered before the Commission on the 11th of May 2012 under the number ECI(2012)000005, represented in accordance with Art. 3 (2) of Regulation (EU) No 211/2011) by

- Dr. Patrick Grégor PUPPINCK, xxxxxxxxxxxxxxxx, President of the European Citizen Initiative *One of Us*;
- Prof. Filippo VARI, Vice-President of the European Citizen Initiative *One of Us*, xxxxxxxxxxxxxxxx, Italy;
- Mme Josephine QUINTAVALLE, xxxxxxxxxxxxxxxx, United Kingdom;
- Mme Edith FRIVALDSZKY, xxxxxxxxxxxxxxxx, Hungary;
- M. Jakub BALTROSZEWICZ, xxxxxxxxxxxxxxxx, Poland;
- Mme Alicia LATORRE CANIZARES, xxxxxxxxxxxxxxxx, Spain;
- M. Manfred LIEBNER, xxxxxxxxxxxxxxxx, Germany;

Members of the Committee of the Citizen Initiative One Of Us,

represented by Mrs **Claire de LA HOUGUE**, PhD, lawyer at the French bar, residing 7 rue Brûlée, 67000 Strasbourg, France. Consenting to service being effected on her by telefax or other technical means of communication **xxxxxxxxxxxxxxxx**

versus

(1) the **European Commission**,

(2) the **Council of the EU**, and

(3) the **European Parliament**

Served on 25 July 2014 by Fax (+ 352 43.03.21.00), and by mail.

Application

under Articles 263 and 265 of the Treaty on the Functioning of the EU, in view of:

(1) the **annulment of Commission Communication COM (2014) 355 final**,

(2) in the alternative: **the annulment of Article 10 (1) (c) of Regulation (EU) No 211/2011**

1. STATEMENT OF FACTS

1. ONE OF US is one of the first European Citizens' Initiatives (ECIs) that have been registered and carried out under the regime set out in Article 11(4) of the Treaty on the EU (TEU) and Regulation (EU) No 211/2011 on the citizens' initiative.

2. Among the more than 30 applications for registration under Regulation 211/2011 received so far, 15 have been declared admissible by the European Commission on the basis of a formal examination.

3. ONE OF US has been officially registered by the Commission on 11 May 2012 under registration no. ECI(2012)000005.

4. Together with its application for registration, the organisers' committee submitted to the Commission a ready-to-use legislative draft. The Commission had the occasion of examining this draft, which formed an integral part of the application. Neither the legislative draft nor the application itself appear to have raised any objection on the Commission's side.

5. ONE OF US' goal is to "*advance the protection of human life from conception in Europe – within the possibilities of the competency of the EU.*" To this purpose, ONE OF US includes a legislative proposal which asks the EU to end the financing of activities which "*destroy or presuppose the destruction of human embryos*," in particular in the areas of research, development aid and public health.

6. This proposal involves three legislative modifications:

   - The introduction in the Financial Regulation applicable to the general budget of the European Communities (Regulation (EC, Euratom) N. 1605/2002 of the Council of 25 June 2002 that decides the Financial Regulation applicable to the general budget of the European Communities) of an article stating that: "***No budget allocation will be made for the funding of activities that destroys human embryos, or that presumes their destruction.***"
   - The introduction in the Proposal of a Regulation of the European Parliament and Council that establishes a framework program for research and innovation (2014-2020) - Horizon 2020 - COM (2011) 809 final edition, in article 16(3), of a **(d)** excluding "***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" from European financing***.
   - The addition in article 2 of Regulation (EC) N. 1905/2006 of the European Parliament and the Council of 18 December 2006 establishing a financing instrument for development cooperation, of a paragraph **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."

7. The Initiative therefore neither relates to legislation concerning research nor to legislation concerning abortion, but solely to the issue of public financing by the funds of the European Union of activities implying the destruction of human embryos because each individual human life deserves respect and protection from the moment of its conception.

8. The collection of signatures for ONE OF US was closed on 31 October 2013. Subsequently, 1.721.626 signatures have officially been validated by the competent authorities of Member States. ONE OF US is only the second ECI to meet the threshold of 1 million signatures that is required under Art 11(4) of the TEU, and it is so far the most successful (in terms of signatures) of all ECIs that have been carried out under this procedure. This places the material content of this petition on the very top of the issues that citizens expect the EU to deal with. It is absolutely unprecedented in the EU's history that citizens, upon their own initiative (i.e. not called to express themselves in a legally binding referendum) have given such direct and explicit endorsement to a specific proposal.

9. Following the validation of the signatures, the ECI was formally submitted to the Commission on 28 February 2014. A meeting between the organisers of the ECI and representatives of the Commission took place on 9 April 2014 and a public hearing at the premises of the European Parliament on 10 April 2014.

10. As provided for under Article 10(1)(c) of Regulation 211/2011, the Commission published its conclusions on the ECI on 28 May 2014.

11. The applicants consider these conclusions unsatisfactory both regarding their form and their content.

2. LEGAL ANALYSIS

2.1. The European Commission's obligations under Article 10(1)(c) of Regulation (EU) No 211/2011

12. Article 10(1)(c) of Regulation (EU) No 211/2011 on the citizens' initiative provides as follows:

"Where the Commission receives a citizens' initiative in accordance with Article 9 it shall:

(…)

(c) within three months, set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action."

13. At first glance, this provision seems to leave an extremely wide margin of appreciation to the Commission letting it free to decide whether or not it wants to take any action, and which action it wants to take, in response to a successful ECI. The only obligation for the Commission seems to be to set out its conclusions in writing, and to provide some reasons for them.

14. Upon a more careful reading, however, it quickly becomes clear that that margin of appreciation cannot be limitless. The legal obligation to provide reasons for a decision logically implies three things:

15. First, **the reasons that are provided must be of a certain quality**. It would obviously not be sufficient for the Commission to announce that it will (not) take action because *"we read the proposal and (dis)liked it"*. Instead, the reasoning must be logical, conclusive, and coherent within itself. It must engage with the concerns expressed by the ECI and provide a real answer to them.

16. Second, if the reasons must be of a certain quality, **they must also be susceptible to legal review.** It would make no sense to subject the Commission to an obligation to provide reasons, if afterwards those reasons (in particular if they could be shown to fall short of the required quality) can not be challenged.

17. Third, the obligation to provide reasons for a decision means that **the decision itself is subject to scrutiny,** given that such obligation only makes sense in view of a possibility to challenge that decision. It was certainly not the intention of the Lisbon Treaty to create a mechanism under which a petition that has been signed by more than 1 million citizens can be rejected by the Commission with an arbitrary statement.

18. It follows therefrom that a successful ECI cannot be rejected by the Commission in the absence of any reason, or on the basis of reasons that upon closer scrutiny turn out to be ill founded, but only for **compelling reasons that stand scrutiny**.

19. Even before a ECI is registered, it undergoes a preliminary scrutiny by the European Commission in order to ensure that it corresponds to the criteria set out in Article 4(2) of Regulation 211/2011. As it appears, this is a hurdle that many proposed ECIs do not pass: information on the European Commission's website indicates that so far 18 requests for registration have been refused, and only 15 accepted.

20. It certainly makes sense to carry out such a preliminary examination in order to make sure that citizens do not waste time and financial resources on initiatives that from the outset cannot lead to the desired outcome. One may ask whether, in a truly democratic society, citizens should not be allowed to petition for whatever they want, including a modification of the EU Treaties – but if one does not share that view, then the criteria in Article 4(2) of Regulation 211/2011 are self-evident and reasonable.

21. However, there is also a converse conclusion that must be drawn from the existence of the preliminary scrutiny foreseen under Article 4(2) of Regulation 211/2011. That conclusion is that the Commission cannot reject an ECI simply on the grounds that it finds it politically undesirable. If that were the intention of the EU legislator, it would at least have made sense to include "political desirability" among the criteria in Article 4(2), so as to make sure that the organisers of an ECI be informed of the Commission's unwillingness to provide a positive follow-up on their petition *before* they set out spending considerable amounts of time and money to collect more than 1

million signatures. It would then at least be clear that the purpose of this newly created instrument of "participative democracy" is to gather support only for policies that the European Commission sympathises with, or might even have promoted of its own initiative. But the question would then be: what are the 1 million signatures needed for?

22. It follows that the Commission's right under Article 10(1)(c) of Regulation 211/2011 to take no action as a follow-up to a successful ECI must be interpreted restrictively. The reasons not to take action cannot be the same as those listed under Article 4 (2), but there also cannot be an unlimited margin of appreciation.

23. Instead, it appears that a decision to take no action must be duly motivated and can only be taken in specific situations such as the following:

24. **the measures requested by the ECI are no longer necessary**, because the EU has adopted them while the ECI was still ongoing, or because the problem to be addressed has disappeared, or been satisfactorily solved in a different way;

25. **the measures requested by the ECI have become impossible** subsequent to the initiative's registration (n.b., if the Commission considers that the request brought forward by a proposed ECI is impossible from the outset, it should inform the organisers already on the occasion of the preliminary examination under Article 4(2) of Regulation 211/2011);

26. **the ECI does not contain any specific proposal for action but only raises awareness of a problem that should be resolved, and thus leaves it to the Commission to determine what action, if any, may be taken.** This appears to have been the case with many ECIs registered so far.[1] However, it is not the case with ONE OF US, which has submitted, already at the time of its registration, a clearly worded and unambiguous legislative draft, which the Commission had the occasion to examine, and which was found to meet the requirements set out in Article 4(2) of Regulation 211/2011.

27. It therefore does make sense that Article 10(1)(c) of Regulation 211/2011 provides for a possibility for the Commission to take no action in response to a successful ECI that is submitted to it. However, Article 10(1)(c) must not be misinterpreted as meaning that the Commission enjoys complete freedom to use that possibility as it pleases. The general rule must be that if an ECI has received the support of more than 1 million citizens, the Commission must take steps to follow up on it, except in situations such as those set out above. Any other interpretation would fundamentally undermine the usefulness of the ECI as an instrument of participative democracy, and destroy the credibility of the professed intention of Europe's political leadership to overcome the EU's often deplored "democratic deficit".

[1] For example, the other two successful ECIs, “Right2Water” and “Stop Vivisection” did not include elaborate legislative proposals, but set rather general policy targets. It was left to the Commission to define what action, if any, was needed to attain these targets.

2.2. The Commission's Communication COM (2014) 355 final is an "act" that can be challenged under Article 263 TFEU

28. The European Commission's reply to ONE OF US is in the form of a communication, COM (2014) 355 final. This is in conformity with Article 10(1)(c) of Regulation 211/2011, which requires the Commission to *"set out in a communication its legal and political conclusions"*. However, it raises the question whether such a communication is an *"act of the Commission"* that *"is intended to produce legal effects vis-à-vis third parties"*, and thus subject to judicial review under Article 263 of the TFEU.

29. In this regard, the following should be noted:

30. First, this communication is **an act that the Commission was legally required to set**. Failure to issue such a communication would have been a failure to act, for which the Commission could be held liable under Article 265 TFEU. The act therefore produces a legal effect for the Commission itself, protecting it against legal action under Article 265 TFEU.

31. Second, the communication, despite its name, is not merely a communication. It is **of a decisional nature**, as it gives expression to the Commission's decision not to take any action on the issues put forward by ONE OF US.

32. Third, this communication is clearly **intended to produce a legal effect vis-à-vis third parties**. According to the Commission, it is assumed that with this communication the citizens' committee and the signatories of ONE OF US have received all they are legally entitled to under Regulation 211/2011, and the procedure is thus considered closed. (Consequently, it deprives them of the possibility to bring an action against the Commission under Article 265 TFEU.)

33. It should also be noted that the Commission's power is not discretionary and is therefore subject to judicial review:

- according to article 4(3) of Regulation 211/2011, the refusal to register an ICE is subject to legal review;
- according to article 10(1) c of the Regulation, the Commission is compelled to give motives for its decision. It follows that the quality of these motives must be subject to legal review or it would be absurd to demand from the Commission that it provide motives for its decision if they cannot be contested. There thus have to be serious or compelling reasons that pass the legal test, to justify the Commission's refusal to act following an ICE.
- Finally, the fact that the Commission's communication is notified to the organisers, to the European Parliament and Council, and is made public (article 10(2) of the Regulation 211/2011), shows that this act is meant to produce legal effect.

34. The availability of a judicial control over the Commission's decision guarantees the efficacy and the credibility of the mechanism of ECI.

35. The situation is therefore not comparable to a situation where someone has reported a case of incorrect application of EU law to the Commission, but where the Commission is completely free to decide whether or not it will open, on the basis of that information, a formal infringement procedure against the Member State concerned.

Instead, **Regulation 211/2011 gives citizens who have submitted to the Commission a successful ECI a legal entitlement to an appropriate follow-up.**

36. It follows that COM (2014) 355 final is subject to legal review under Article 263 TFEU, and that the Court has authority to hear this case.

2.3. COM (2014) 355 final – the Commission's reply to ONE OF US is unsatisfactory

37. It must therefore be examined whether COM (2014) 355 final is an appropriate response to ONE OF US.

38. This examination must consider the following two aspects:

    First, the *quality* of the communication; i.e., whether it seriously engages with the concerns brought forward by the ECI and gives an answer to them, and whether the reasoning is logical, coherent, conclusive, and in line with the EU's values;

    Second, whether the proposed follow-up of the ECI remains within the scope of a *legitimate political appreciation*.

39. With regard to the first point, it is submitted that the Commission's answer to ONE OF US lacks the quality that would have been required. With regard to thesecond point, it is submitted that if an ECI has received the support of more than 1 million citizens, the Commission must take steps to follow up on it, except in situations such as those identified in section 2.1.

2.3.1. <u>The Commission's failure to provide an adequate response to ONE OF US</u>

40. One can conclude from the Commission's communication that the Commission intends not to take any action in response to the successful ECI. However, that position does not appear to be the result of a logical, principled, and conclusive reasoning. On the contrary, it appears that the Commission went the opposite way: it *first* adopted that position, and *then* went in search for arguments that might support it. As a consequence, the communication completely fails to intellectually engage with the concerns brought forward by the citizens' initiative, and to provide an adequate answer to them.

41. It is clear from the General Court's case-law that the Commission is submitted to a duty to state reasons (joint cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfal v Commission,* decision of March 6th 2003) and that this duty is demanding[2]. In the case in point, the Commission had to

[2] For example, it was not sufficient to refer to negative effects on competition in the AirTours case (T-342/99, *AirTours v Commission* (decision of June 6th 2002). The Commission had to prove the existence of such effects.

demonstrate that the existence of sufficient ethical and legal safeguards made the ONE OF US Initiative useless. It failed to do so. In the absence of any decisive argument, the Commission should have submitted the Initiative's proposal to the European Parliament.

2.3.1.1. The fundamental assertion of the ECI: the human embryo is "one of us" is not answered

42. The fundamental concern of the ECI is visibly expressed in its name and logo: the human embryo is a human being. As such, it is a bearer of human dignity, and must be treated accordingly. It must not be exploited for purposes other than its own, nor should it be destroyed solely because the interests of other persons so require.

43. This position is by no means arbitrary and subjective, but it is grounded on scientific facts:

    First, **the human embryo** clearly **belongs to the human species**: it is not an animal, a plant, or a bacterium, but it is human. We develop as human beings, not into human beings.

    Second, **each human embryo has from the moment of conception a unique and individual genetic identity**, which is distinct from its mother's. It cannot therefore be regarded as a part of its mother, but must be regarded as a separate human being.

44. This position is also legally recognized, including by the law of the EU and its Member States:

45. All EU Member States are bound by the European convention on human rights and by the jurisprudence of the ECtHR. The **ECtHR has explicitly recognized that the human embryo pertains to the human race**.[3]

46. Although there are differences between the laws of EU Member States with regard to the protection accorded to the human embryo, there is no EU Member State in which the human embryo enjoys no protection at all.

47. The EU Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of biotechnological inventions provides protection to the human embryo by excluding *"uses of human embryos for industrial or commercial purposes"* from patentability because, as it explicitly recognizes, such uses *"would be contrary to ordre public or morality"*. The only possible reason for such an exclusion from patentability is the EU legislator's awareness that the embryo is a bearer of human dignity.

48. The CJEU, in its Decision C-34/10 ***Oliver Brüstle v Greenpeace e.V*** of 18 October 2011, has explained that **this protection applies as from the moment of conception**.

49. In order to provide an adequate response to ONE OF US, the Commission should have engaged with this fundamental assumption. It should have clarified, either by

[3] ECtHR, Vo v. France, § 84

accepting or (on the basis of compelling arguments) by rejecting that core statement, its own position in this regard. On this basis, the Commission could then have developed a logical and consistent line of argumentation.

50. Unfortunately, the Commission's Communication does neither the one, nor the other.

51. There is no clear statement, be it in the positive or negative sense, with regard to the legal status that the human embryo enjoys, or should enjoy, under EU law; nor is there any argument that would support or rebut any such position. Instead, the Commission's position remains vague and undetermined. Some lip-service is paid to the signatories' position that the embryo should enjoy legal protection[4], but at the same time the Commission carefully avoids drawing the logical consequences arising therefrom.

52. As a result, the Communication remains a confuse compound of words, with no conclusive argumentation.

2.3.1.2. The CJEU's Brüstle judgment is highly relevant especially in relation to Article 7 TFEU

53. With regard to the CJEU's important judgment in the case of *Brüstle v. Greenpeace*, the Commission Communication makes the following statement:

"It should be noted that the so-called Brüstle judgement of the European Court of Justice (Case C-34/10, Brüstle v Greenpeace), which was referred to by the organisers in their objectives, stated that 'the purpose of the [Biotech] Directive is not to regulate the use of human embryos in the context of scientific research. It is limited to the patentability of biotechnological inventions'. It did not deal with the question of whether such research can be carried out and whether it can be funded."

54. The apparent purpose of this statement is to downplay the CJEU's decision, and to negate its implications.

55. It is of course undisputed that the purpose of the Biotech Directive is limited to regulating the patentability of biotechnological inventions. Nevertheless, the following observations must be made:

56. First and foremost, the fundamental assumption that the human embryo is a bearer of human dignity and deserves legal protection was not made by the CJEU, but is already clearly spelt out in the text of the Biopatent Directive. This is thus an

[4] For example, the Communication emphasises the fact that Horizon 2020 has a "triple lock" system in place to avoid the funding of ethically dubious research projects with hESCs. Such a "triple lock" system would hardly be necessary if those research activities raised no ethical concern. In the same vein, the Commission stresses that among its ethical commitments there is one according to which no research project shall be funded that directly involves the destruction of embryos. Regarding the EU's development aid policy, the Commission vaguely asserts that "*abortion should never be accepted as a means of family planning*", and that one of its aims is to reduce the number of abortions. All those commitments would make no sense without an underlying assumption that the human embryo is part of the human race, and thus a bearer of human dignity.

assumption made by the EU legislator, not by the Court. In this regard, the *Brüstle* judgment was not required to adduce any clarifications.

57. By contrast, the important clarification adduced by the *Brüstle* Decision concerned the meaning of the term "human embryo" in Article 6 of the Directive. The Court found that that term applied as from the moment of conception, thereby excluding any interpretation according to which there was an early stage in the development of a human being in which it was "not yet" an embryo, and thus "not yet" worthy of legal protection.

58. It is important to note that the Court did not base this decision on a specific legal definition of "human embryo" in the Biopatent Directive (which does not contain such a definition), but on the meaning of that term in everyday language.

59. It follows therefrom that the Court's clarification is of **universal validity**. Wherever the term "embryo" is used in EU law, it must be understood to apply as from the moment of conception. And even if, subsequent to the judgment, an arbitrary definition were to be introduced into the Biopatent directive in order to "correct" the (by some unwelcome?) *Brüstle* judgment, it would nevertheless remain that outside the scope of application of that new legal definition the meaning of "human embryo" would remain that which the Court has indicated.

60. **It is thus simply and plainly wrong to suggest that the Brüstle judgment is of no relevance for the subject matter of the ONE OF US initiative.** Patents are granted in order to make research possible, and to provide a financial incentive for it. If a given type of research, because it *"would be contrary to ordre public or morality"* (cf. Art. 6 (1) of Directive 98/44), is explicitly excluded from patentability under an EU Directive, it only seems logical that that same research projects should not receive public funding from the EU's research budget.

61. It is hardly believable that the European Commission (and in particular its Directorate General for Research) should not understand this self-evidence. The apparent naivety that the Commission puts on display thus looks rather disingenuous. Moreover, it is wrong to suggest, as the Commission does, that the ONE OF US initiative concerns *"the question of whether such research can be carried out"*. In actual fact, the petition only regards the issue of whether such activities (or any other activity involving or pre-supposing the destruction of human embryos) **should be funded with EU money**, as anyone reading the petition and the legislative draft attached to it can verify.

62. By suggesting that the EU should fund research projects that, being considered *"contrary to ordre public or morality",* are precluded from patentability under the EU's (and all its Member States') own legislation, the Commission grossly disrespects one of the fundamental principles of EU law, which is enshrined in Article 7 of the TFEU:

"The Union shall ensure ***consistency between its policies and activities,*** *taking all of its objectives into account and in accordance with the principle of conferral of powers. The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."*

63. The Commission's policy of funding activities involving or pre-supposing the destruction of human embryos thus **stands in manifest contradiction with the duty consistency under Article 7 TFEU**. By pursuing such policies, the Commission in fact fails to give full effect to the CJEU's Brüstle decision. Indeed, one may read the Commission's response to ONE OF US as an expression of brazen contempt and disrespect for the Court's jurisprudence.

2.3.1.3. "Horizon 2020" allows for the funding of research on human embryonic stem cells (hESCs)

64. Turning now to the specific subject of research funding, it must be examined what the Commission's reasoning should have looked like in order to be considered an adequate answer to the ONE OF US initiative:

    In the very first place, the Commission should have acknowledged the petition's position concerning the legal status of the human embryo, and clarified its own position in this regard. As we have already seen, the Commission failed to do so.

    Secondly, it should have, on the basis of this fundamental determination, explained and clarified precisely under which circumstances, if at all, it considers research involving hESCs to be morally acceptable.

    As a third step, the Commission should have demonstrated how the research projects it has funded so far, or intends to fund in the future, comply with those criteria of acceptability.

    Only as a fourth and last step could the Commission have explained how the administrative mechanisms it has put in place for "Horizon 2020" ensure that relevant ethical standards are complied with.

65. The ethical concern expressed by the ONE OF US initiative could thus be considered to have been adequately dealt with only where (1) EU-funded research on hESCs were shown to be governed by reasonable ethical standards, **and** (2) efficient mechanisms to implement those standards were shown to have been put in place.

66. The Commission's reply to ONE OF US focuses solely on point (2), but completely fails to deal with point (1). In this submission, we deal with both points separately.

2.3.1.4. The European Commission's ethical reasoning concerning hESC research is flawed

67. The Commission's "ethical reasoning" (if it really can be called by that name), can be summarized through the following points:

68. The Commission considers research on hESCs to be morally acceptable, because it *"holds much promise"* in term of new therapies *"for many diseases"*. (This indication is rather imprecise. *Which* promise? *Which* diseases? At some point, *"diseases such as spinal cord injury, heart failure and various forms of blindness*," are mentioned

but no precise information is provided. Conversely evidence shows that research on hESCs is unnecessary and that there are much more promising alternatives[5]).

69. The Communication also explains that *"researchers almost always use cell lines that already exist rather than creating new ones using spare blastocysts left over from fertility treatment which are donated for research following explicit, written, informed consent"*

70. These two points can hardly be said to form a conclusive ethical argument, but what is subjacent to them is clearly a utilitarian approach according to which, it is implied, scientific progress justifies the destruction of human embryos. But this leads to further questions, to which the Commission gives no answer: Does *every* "scientific purpose" justify the destruction of human embryos? Or are there only *some* new scientific insights that would justify the destruction of embryos, whereas other potential gains in insight would not provide sufficient justification? If so, what are the criteria for this distinction? The Commission's communication remains silent on this point.

71. The second point appears to adduce some kind of subsidiary argument, according to which it is rare that embryos must actually be destroyed for research purposes – and if it is necessary to destroy embryos, then one usually uses *blastocysts left over from fertility treatment.*

72. This can hardly be described as sound moral reasoning.

    With regard to the first point, it must be observed that a sound argument would take as starting point the nature of the human embryo. If the Commission accepts that the embryo pertains to the human race, then it must also accept that it is a bearer of human dignity. But that dignity means that it must be treated as an end, not as a means. Consequently, it can under no circumstances be made subject to "pragmatic" considerations of the kind one finds in the Commission's reply to ONE OF US. **Respect for human dignity means that no promise of scientific progress can ever be great enough to justify the deliberate destruction of a human being.**

    With regard to the second point, one cannot avoid noticing that the Commission uses a terminology (*"spare blastocysts", "leftovers"*) that has the purpose of de-humanizing the embryo, i.e. of concealing that in actual fact it is human beings that are being destroyed and used for research purposes. One might also ask, in this context, whether it is appropriate to speak of *"donation"* (which would imply that one human being can "own" and "donate" another human being), or of *"explicit, written, informed consent"* (as if it were the embryo who had given explicit consent to its own destruction).

73. In short, the Commission's reasoning has very serious ethical implications, - but the Commission does not seem to be aware of it. These implications not only include the possibility that human beings can be destroyed if it is in the interest of science and progress, but also the notion that one human being can own, or donate, another human being. This implies nothing else than the return to slave trade.

[5] Un de nous et Fondation Lejeune, Bilan recherche sur l'embryon et alternatives dans le monde. **Annex 3**.

74. It is likely (and we sincerely believe) that these implications were not intended by the Commission. Rather than being derived from a reflected and principled reasoning, they appear to result from the regrettable *absence* of such reasoning. In any case, however, it is self-evident that a text with such worrying implications cannot be considered an adequate reply to a petition through which more than 1.7 million citizens have expressed their concern with regard to adequate ethical standards in the EU's research policy.

2.3.1.5. The "triple lock" system is unsound

75. Rather than providing a reasoning that would justify its (subjacent) ethical approach, the Commission limits itself to presenting what is in fact merely an administrative mechanism to implement that approach.

76. As has already been pointed out, this could be dismissed without further comment. If the ethical approach is in itself ill-founded and inadequate, then there is not much interest in discussing the legal framework through which it is implemented. Nevertheless we will, for the sake of completeness, also deal with this aspect of the Commission's Communication.

77. In this regard, we must take a closer look at what the Commission describes as a *"strict ethical framework"*, i.e. the so-called *"triple lock"* system. This framework consists of the following components:

    Projects receiving EU funding *"must follow the laws of the country in which research is carried out"*, and *"no funding shall be granted for research activities that are prohibited in all the Member States";*

    they *"must be scientifically validated by peer review and must undergo rigorous ethical review";*

    EU funds may not be used for derivation of new stem cell lines, or for research that destroys embryos - including for the procurement of stem cells.

78. With regard to this framework, the following observations must be made:

79. *The first of the "three locks"* is a patent absurdity. Indeed, one wonders whether, in the absence of this important ethical principle, the Commission would feel entitled to fund activities that violate the laws of Member States where they are carried out. If that is not the implication, why does the Commission even find it necessary to make such "commitments?

80. In addition, the commitment that *"no funding shall be granted for research activities that are prohibited in all the Member States"* means by implication that **activities may qualify for EU funding if they are legal in only one out of 28 Member States**. It is difficult to understand how this can be described as part of a "strict ethical framework", as it opens the way for a race to the bottom: the Member State with the most liberal framework will attract research activities that would not be permitted elsewhere, and thus is likely to draw the greatest benefit from EU funding. In this

way, low ethical standards are turned into a competitive advantage – and the Commission's "strict framework" rewards and incentivizes this!

81. In any case, none of the two rules does actually set an ethical standard, but they simply make sure that the laws, whatever they provide for, are respected. By contrast, they do not determine the content of those laws.

82. *With regard to the second "lock",* it should be noted that *"peer review"* does not serve the purpose of enforcing ethical standards. It only serves to demonstrate that an experiment is conducted in accordance with recognised scientific principles.[6] This argument is therefore largely beside the point.

83. As concerns the so-called *"rigorous ethical review",* the Commission fails to explain on which criteria it is based. We are simply told that it is *"rigorous",* nothing more. (It may thus be that the Commission is rigorously enforcing ethical standards that are ill-founded, or have no reasonable foundation at all…)

84. *Concerning the third "lock"*, it does at first glance seem to include something resembling an ethical commitment, blocking the use of EU funds for the derivation of new stem cell lines, or for research that destroys embryos. In actual fact, however, this commitment is not a real one. The derivation of new stem cell lines does not require any new research activity, as the technology is already known: it simply requires a living human embryo from which the new stem-cell lines can be taken. In the same vein, hESC research is not carried out on living embryos that are destroyed in the process, but on hESCs that have been taken from embryos that have already been destroyed. The problem is thus not that those research projects destroy human embryos, but that they pre-suppose their destruction.

85. The Commission describes its "triple lock" system at least four times in different places[7] of its 30 page document. These repetitions fill many pages, but they do not add substance to the Commission's reply. In particular, there is no argument exposing why this system represents an appropriate solution to the concerns raised by ONE OF US. Nor is there any argument to explain why this should be regarded as the best of all available solutions.

86. Instead of offering conclusive arguments, the Commission embellishes its "triple lock" system with empty self-praise: it is "carefully calibrated", "stringent", "rigorous", "appropriate", etc. etc.

87. These, however, are judgments that readers might have preferred to make for themselves, on the basis of a solidly reasoned analysis of the ethical issue at hand, which, alas, they do not find in this communication. The pervasive use of self-congratulatory language is one of the most remarkable features of this poorly drafted document.

88. A more sober look at the "triple lock" system reveals its total ineptitude with regard to its stated purpose. The commitment to respect the law of (only) one Member State

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6 At best it could be said that such "peer review" can help to prevent cases of scientific fraud, which, regrettably, have been all too frequent in the history of hESC research.

7 on pages 6-9 and 15-16 of the main document, as well as in Annexes II, III, IV, and V.

(out of 28) is not an ethical standard, but the absolute minimal legal requirement that would have to be met even in the absence of any "triple lock system" – passing this off as a "strict ethical framework" is ludicrous. "Peer reviews" do not have the purpose of enforcing ethical standards. As for the *"rigorous ethical review",* the Commission simply fails to explain in what it consists.

89. The sole element in the "triple lock" that has remotely to do with an ethical commitment is the statement that EU funds will never be used for the derivation of new stem cell lines, or for research that directly destroys embryos. However, this appears to be an empty shell. The request of ONE OF US is to exclude from funding all activities that involve or pre-suppose the destruction of embryos.

90. In light of what has been set out above, the Commission's description of the so-called "triple lock" system is, in both form and substance, an inadequate reply to the ONE OF US initiative.

2.3.1.6. The financing of abortions in developing countries through the EU's development aid funds

91. With regard to the issues linked to the EU's development aid policy, the Commission's reply is equally unsound.

92. Similarly to what has been explained above with regard to research funding, an appropriate response to the concerns voiced by the ECI would have consisted of the following elements:

- In the very first place, the Commission should have acknowledged the petition's position concerning the legal status of the human embryo, and clarified its own position in this regard. As we have already seen, the Commission failed to do so.

- Secondly, it should have, on the basis of this fundamental determination, explained and clarified precisely under which circumstances, if at all, it considers abortion to be morally acceptable.

- As a third step, the Commission should have demonstrated how the measures it has funded so far or intends to fund in the future to improve maternal health in developing countries, include those criteria of acceptability.

- Finally, it would have demonstrated how it ensures that governments and NGOs that receive EU funding comply with those criteria.

93. The Commission's reply to ONE OF US falls short of these expectations. It fails to offer a principled and conclusive justification for the Commission's action in this policy field. It evades the questions to which 1.7 million citizens expect an answer.

94. The Commission's position, as it must be understood from the Communication, can be summarized as follows:

95. First, the Commission agrees that it would be desirable to reduce the number of abortions in developing countries. (This is perhaps the point at which the Commission's position converges with that of the ONE OF US initiative.)

96. Then, however, the Commission claims to achieve the goal of reducing abortions by "*contributing directly or indirectly to the entire spectrum of health services offered by partner countries, which may or may not include abortion-related services to save the mother's life*". This could either mean that providing abortion-related services is necessary to reduce abortions, which would be paradoxical – or it could mean that the Commission's line is to make sure that such services are offered only where they are needed to save the mother's life, which does not seem to correspond to the institutions actual policy.

97. In any case, no evidence is provided for either of these two possible interpretations.

98. The Commission then indicates that it has no responsibility for the use of EU funds to perform abortions: "*The EU fully respects the sovereign decisions of partner countries as to which health services will be provided and how they are packaged as long as they are in line with agreed human rights principles. Therefore the Commission does not favour earmarking aid for certain services only, because it would make the comprehensive and effective support of a country's health strategy more difficult*."

99. Finally, the Commission indicates that its over-arching policy objective is not the reduction of abortion, but the achievement of the UN Millennium Development Goals (MDGs) – in particular MDG 5, the reduction of maternal mortality. In this context, the Commission claims that "maternal deaths and illness can be dramatically reduced by improving the safety of such health services" (viz. abortions). In other words, providing abortion helps reducing maternal mortality.

100. In conclusion, the Commission finds that *"a funding ban would constrain the Union's ability to deliver on the objectives set out in the MDGs, particularly on maternal health, and the ICPD, which were recently reconfirmed at both international and EU levels"*.

101. In response to this confuse and somewhat paradoxical reasoning, the following observations must be made:

102. In the first place, it must (again) be noted that a sound argument would have, as point of departure, the nature of the human embryo. If the Commission accepts that the embryo pertains to the human race, then it must also accept that it is a bearer of human dignity. But that dignity means that it must be treated as an end, not as a means. This must have practical consequences for all policy decisions relating to abortion.

103. The Commission pretends to be almost constrained to finance abortion as part of "sexual and reproductive health and rights" services, because of a "*robust international consensus on the scope and definition of sexual and reproductive health and rights codified in the ICPD Programme of Action in 1994*." Yet, there was no such consensus, and no international treaty does define "sexual and reproductive health." At most the Program of Action of the Cairo Conference defines "reproductive health" as "the state of complete physical, mental and social well-being

(…) in all matters relating to the reproductive system and to its functions and processes." (§ 7.2)[8]. Abortion is not part of it. In the final document of the Confernce of Cairo + 5 (10th of June 2010), several states have issued reservations or interpretative declarations explicitly underlying the exclusion of abortion from the scope of sexual and reproductive health. Norway, for exemple in its Declaration, manifested its disapointment that "*the need for secure and safe abortion, inter alia, the decriminalization of abortion*" had not been accepted, while the delegation of Malta reaffirmed that the provisions on reproductive health and rights were consistent with its national legislation, which considers that termination of pregnancy through induced abortion is illegal. Moreover, the non-inclusion of abortion in "reproductive health" was explicitly confirmed by both the US administration[9] and the European Commission. Answering to the question of members of the European Parliament, both the Council and the European Commission said that "*reproductive health"* does not include abortion[10], within the meaning of the EU and of the Cairo conferences. Even more recently, on the 14th of October 2013, in New York, the representative of the Polish Government reaffirmed that there is "*no recognized or agreed definition of the parameters of sexual and reproductive rights (SRHR) or sexual and reproductive health services (SRHS)*" and that "*Poland (…) objects to any interpretation of references to SRHR/SRHS used in international documents as including abortion on demand*"[11].

104. There is not any duty on states to allow abortion in International law (nor is there in European law). In fact, the Cairo Conference repeatedly insists on the necessity to limit recourse to abortion and on the fact that it should never be considered as a way of regulating births (eg §7.10 and §8.25). Instead of "*help[ing] women avoid abortion*" (§7.24), the Commission finances -and therefore encourages- it directly or through organisations that promote it. **This is contrary to international commitments and diverts funds that should be used to improve the health of mothers and children,** before as well as after birth.

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[8] COM(2014) 355 final uses the expression " sexual and reproductive health" while the Program of Action of the Cairo Conference uses " reproductive health ."

[9] It suffices to quote the statements of then U.S. Vice President *Al Gore* a few days prior to the ICPD (quoted in: Jyoti Shankar Singh, Creating a New Consensus on Population (London: Earthscan, 1998), 60) that *"the US do not seek to establish a new international right to abortion, and we do not believe that abortion should be encouraged as a method of family planning"*, and of then US Ambassador to the UN, *Ellen Sauerbrey*, at the UN "Beijing plus Ten" Conference (2005) that *"there is no right to abortion"*.

[10] European Parliament, 4 December 2003: Oral Question (H-0794/03) for Question Time at the part-session in December 2003 pursuant to Rule 43 of the Rules of Procedure by *Dana Scallon* to the Council. In the written record of that session, one reads: *Posselt* (PPE-DE): *"Does the term 'reproductive health' include the promotion of abortion, yes or no?"*. The representative of the Council Presidency answered: "***No***". Likewise, the European Commission, in response to another question from a Member of the European Parliament, clarified: *"The term 'reproductive health' was defined by the United Nations (UN) in 1994 at the Cairo International Conference on Population and Development. All Member States of the Union endorsed the PoA adopted at Cairo. The Union has never adopted an alternative definition of 'reproductive health' to that given in the Programme of Action, which makes no reference to abortion"*. (European Parliament, 24 October 2002: Question no 86 by Dana Scallon (H-0670/02)).

[11] H.E. Agnieszka Kozlowska-Rajewicz, Polish Government Plenipotentiary for Equal Treatment, 68th Session of the General Assembly, Third Committee: Advancement of women, Agenda item 28.

105. Moreover, the Commission's argument seems to rest to a large extent upon the objectives of its development aid policy. The underlying suggestion appears to be that such objectives justify the use of whatever means are necessary to achieve them. In this regard, the Commission appears to be **unaware of a fundamental moral principle: good ends do not justify bad means.** In other words, even if it could be demonstrated that the funding of abortions could be helpful in reaching the Commission's noble policy objectives (which anyway the Commission fails to demonstrate), it would not follow therefrom that the EU should fund abortions.

106. There is a vague indication in the Commission's reply that the Commission intends to assist in providing abortions only if and where they are needed *"to save the mother's life"*. However it remains totally unclear whether these words refer to a concrete, direct, and imminent threat to the pregnant woman's life, or to the more remote and abstract health risks that are associated with *every* pregnancy. There is an important need for clarification here, given that the first position would (at least) be close to that underpinning the ONE OF US initiative, whereas the latter would mean that the Commission in fact supports abortion on demand. Unfortunately, the Communication fails to provide this crucial clarification, thus leaving room for the largest possible interpretation.

107. The suggestion that providing abortion-related services is necessary to reduce abortions is paradoxical and counter-intuitive. To acquire credibility, it would need supporting evidence, which the Communication does not contain.

108. If, by contrast, the Commission's policy is to make sure that EU-funded projects include abortion-related services *only* where they are needed to save the mother's life, the Communication fails to offer any evidence on how that policy is implemented in practice, or how it is enforced.

109. Regarding the Commission's statement that *"the EU fully respects the sovereign decisions of partner countries as to which health services will be provided",* it must be noted that this respect is not without reservation. Even in countries where abortion is illegal except to save the life of the mother, like Bangladesh or Papua, organisations benefitting from EU funds carry out abortions, train doctors or give out "emergency contraception" including abortifacient pills. These organisations state it in their reports and the Commission thus knows about their actions. It cannot therefore pretend that "*EU action is based on national healthcare plans defined by public authorities of recipient countries*" and that it respects their "*sovereign right (…) to decide on the range of services and how they are offered to their citizens*." The EU finances abortions in countries where it is illegal.[12]

110. In addition, the EU requires that those "services" must be *"in line with agreed human rights principles"*. This means, however, that the EU is able to link its development aid to certain ethical commitments, if it wants to do so. It would therefore be perfectly possible to provide for a conditionality according to which EU funds would not be used for abortions. Given this possibility, the Commission cannot pretend to have no responsibility for the use that is made of the funds it administers.

[12] European Dignity Watch, *The Funding of Abortion through EU Development Aid*, March 2012: http://www.europeandignitywatch.org/fileadmin/user_upload/PDF/Day_to_Day_diverse/Funding_of_Abortion_Through_EU_Development_Aid_full_version.pdf . **Annex 4**.

111. Much in the same vein, the statement that "*the Commission does not favour earmarking aid for certain services only"* expresses not more than the Commission's own preference, without providing a compelling argument for it. In any case, it is hard to see how this relates to the ONE OF US initiative, given that the petition's proposal is not to *"earmark aid for certain services only",* but to prohibit the funding of one specific service. The Commission fails to adduce any concrete evidence on how that *"would make the comprehensive and effective support of a country's health strategy more difficult"*. Once again, a strong affirmation is made, but no argument is provided. One only learns that *"the Commission does not favour"* the policy that (it believes) is proposed.

112. With regard to MDG 5 and the ICPD Programme of Action, it should be noted that both constitute policy objectives rather than binding legal commitments. As such, the objective of reducing maternal mortality is without doubt legitimate and indeed laudable – but it does not (as has already been pointed out) justify the use of means that are not themselves intrinsically good. Good objectives do not justify bad means.

113. Besides, the Commission's Communication does not provide any evidence on how the financing of abortions through EU funds contributes to reducing maternal mortality. Many other, certainly less controversial, actions could be undertaken to reduce maternal mortality, and would probably have a much greater impact. Experience shows that countries where abortion is restrictively regulated (and hence infrequent) have similarly low or even lower maternal mortality rates than countries with a high prevalence of abortion. Indeed maternal mortality is linked to maternal care, hygiene and feeding rather than to the availability of abortion in developing countries. Countries like the Maldives and Bhutan managed to decrease maternal mortality rates by 75% without legalizing abortion. What's more, maternal mortality rates are higher in cases of abortion than in cases of birth[13]. Abortion is a serious act that puts women's health at risk both in the short and in the long-run. On the short term doctors observe perforations, hemorrhages, infections, and incomplete evacuations while on the long-term they observe consequences on fertility (sterility, miscarriages, premature births, extra-uterine pregnancies)[14]. Since abortion also entails physical risks, the same pattern can be observed in developing countries with regard to the link between abortion and mortality rates. 1 in 10 women suffers from medical complications of which half involves a life threat[15]. Therefore, countries like Ireland and Poland have very low mortality rates[16]. There is not any positive correlation between the legalization of abortion and the decrease of maternal

[13] Gissler M et al. Pregnancy-associated mortality after birth, spontaneous abortion, or induced abortion in Finland, 1987-2000. *American Journal of Obstetrics and Gynecology*, 2004, 190:422-427; Gissler M et al. Pregnancy-associated deaths in Finland 1987-94—definition problems and benefits of record linkage. *Acta Obstetricia et Gynecologica Scandanavica*, 1997, 76:651-657.

[14] Shah PS and Zao J. *BJOG: An International Journal of Obstetrics and Gynaecology* (2009). See also Abortion Hurts Women. **Annex 5**.

[15] Frank, P. I. et al., (1985). "Induced abortion operations and their early sequelae." *Journal of the Royal College of General Practitioners*, 35(73), 175-180.– Grimes, D. A. & Cates, W. "Abortion: Methods and complications." In Hafez, E. S. E. (ed) *Human Reproduction, Conception and Contraception*. Hagerstown: Harper & Row.

[16] Trends in Maternal Mortality: 1990-2010. Estimates Developed by WHO, UNICEF, UNFPA and the World Bank, http://data.worldbank.org/indicator/SH.STA.MMRT (last visited 20th November 2012). - See more at: http://eclj.org/Releases/Read.aspx?GUID=82ef0f1d-4cf7-44d7-a9a7-fd50375fe3bd#sthash.4MN1CLF7.dpuf

mortality rates. However there is definitely a link between medical progress (better hygiene, access to medical education, medical infrastructures) and maternal health.

114. The Communication ignores this fact and appears to rely on a scaremongering strategy. It states that *"287,000 women were still dying from pregnancy or childbirth-related complications around the world in 2010",* and that *"unsafe abortions, accounting for about 13% of all maternal mortality, result in 47,000 deaths each year"*. Those numbers (the sources of which have not been provided) are certainly very regrettable – but they should be put in perspective with (1) the fact that – given a world population of 7 billion – it seems reasonable to expect that an estimated 60 million persons (half of them female) die every year, which means that apparently only one out of 120 women dies of causes linked to "maternal mortality", or (2) with the WHO's estimation according to which the number of abortions world-wide exceeds 40 million per annum (with far more than half of them affecting female foetuses[17]).

115. One might therefore ask whether "un-safe abortion" is really such a decisive factor in the under-development of certain countries, and, if it is, whether the Commission should not focus its attention on the 87% of maternal mortality that has **not** to do with abortion. These lives might be saved through relatively simple means, none of which would be controversial. With regard to the 47,000 deaths per annum related to so-called "un-safe abortions" (is not *every* abortion by definition un-safe?[18]), the question is whether the best contribution to reducing them would not consist in offering to the concerned women a better, and less controversial, solution than abortion, such as housing, employment or food.. It is more than unfortunate that the Commission's communication neither raises nor answers these questions.

116. In light of these considerations, the Commission's conclusion that *"a funding ban would constrain the Union's ability to deliver on the objectives set out in the MDGs"* appears ill-founded. In the first place, it fails to acknowledge that what ONE OF US is asking for is not at all *"a funding ban"*, but simply a commitment not to use EU funds for activities that involve or pre-suppose the destruction of human beings. This would not prevent the EU from maintaining or increasing development aid funding, including for projects related to the reduction of maternal mortality. Secondly, it is self-evident that such a commitment would to some extent limit the Commission's liberty to use those funds as it pleases. However, **the Commission has not even asserted, and certainly not produced any evidence, that such a limitation would make the policy goal of reducing maternal mortality unachievable, or more difficult to achieve. It only says that it would place the EU's activities under some constraints.**

117. The Commission's refusal to act on the successful ECI thus has little or nothing to do with any necessities implied in the noble and laudable objective of reducing maternal mortality. By contrast, it appears to have a lot to do with the Commissions

[17] Gendercide is one of the most common discriminations against women. Due to selective abortions, there is in some countries a gender imbalance of 125 newborn boys vs. 100 newborn girls.

[18] The Commission has failed to adduce any data according which maternal deaths caused by botched abortions are more frequent in countries where the practice is prohibited than in countries where it is legal. This precisely is the data that might lend some (limited) credibility to the Commission's stance. But unfortunately, there is no such data in the Commission's communication.

institutional self-interest. The proposals made by ONE OF US would create a "constraint" for the Commission, and the Commission is reluctant to such "constraints". It is all very understandable: like any other administrative body, the Commission prefers to manage its legislative proposals autonomously. But this is not a sufficient reason for rejecting an ECI.

2.3.1.7. The Commission's refusal to amend the Financial Regulation is not sufficiently motivated

118. Beside making specific proposals regarding the EU's research and development aid policies, ONE OF US also proposed a measure that would have a horizontal effect: the inclusion of a clause into the EU's Financial Regulation that would prevent EU funds from being used for any activities that destroy human embryos, or presume their destruction.

119. Given its horizontal effect, this proposal is certainly of greater importance than the segmented (?) issues that have been discussed above. Indeed, this is the core element of the legislative proposal that the 1,7 million supporters of ONE OF US have endorsed. But the European Commission's reply to it is not longer than this:

> *"EU primary legislation explicitly enshrines human dignity, the right to life, and the right to the integrity of the person. The EU Financial Regulation states that all EU expenditure should comply with EU primary legislation. Therefore the Commission does not see a need to propose changes to the Financial Regulation."*

120. This reply astonishes not only because of its brevity, but also because of its apparent lack of foundation. What it implies is that the mere existence of references to human dignity and human rights in the EU's primary legislation suffices to ensure respect for human dignity and human rights throughout the entire body of EU legislation, and that a specific provision to implement those principles is not necessary.

121. Is this an argument that the Commission has developed specifically for the purpose of rejecting the ONE OF US proposal, or does it consistently use the same argument also in other contexts? If so, why, for example, has it proposed directives to promote "equality", given that equality is explicitly enshrined in primary legislation? Why has it proposed several directives to protect consumer interests, if consumer protection is explicitly enshrined not only in the TFEU, but also in the Charter of Fundamental Rights? Why has the Commission adopted a code of good administrative behaviour, given that the Charter of Fundamental Rights already provides for a "right to good administration"? Many more of such questions come to mind.

122. If taken at face value, this argument means that the EU should *never* adopt any secondary legislation to protect human rights and human dignity. Can this really be the European Commission's position?

123. In addition, the following objections must be made:

124. The need for an explicit, concrete, and precise provision in the Financial Regulation is evidenced precisely by the fact that the abstract and general references to human

dignity and human rights in the EU primary law have in practice **not** prevented the Commission from granting funding to activities that appear contrary to those values.

125. It follows that, in order to set an end to such misuses, one might, as a loyal citizen, either hope for a court decision or for a legislative change. However, the signatories actually did not have the possibility to file a complaint to the CJEU, given that they had no *locus standi* that would have allowed them to do so. Their petition to insert a precise and concrete provision into the Financial Regulation thus appears to be perfectly reasonable and appropriate. Indeed, this is the only step they could take in order to ensure that human rights and human dignity become a reality.

126. In addition, such a request could be considered reasonable even under the assumption (for arguments sake, not because we believe it!) that the Commission's current practice were in conformity with the Charter of Fundamental Rights and the EU's foundational values. In that case, the proposed provision would simply add additional security, which in itself is not unreasonable.

127. The true meaning of what the Commission is saying appears to be that the Charter of Fundamental Rights and the foundational values in Article 2 TEU constitute not a minimal standard, but a maximal standard that no EU secondary law should surpass or materialize. Indeed, it seems that the Commission wants those rights and values to remain as far as possible from being enforced.

128. Finally, the Commission appears to believe that in order to reject a successful citizens' initiative it is sufficient to say that the legislative change requested by the signatories is "not necessary." But even if it were not strictly necessary, the question is whether "necessity" really is the decisive criterion. Could not additional legislation to safeguard human rights and dignity, even if it goes beyond the strict minimum of what the Commission deems "necessary," nevertheless be useful and desirable? The Commission (once again) offers no argument in this regard.

129. The Commission's reasoning once more turns out to be superficial, inconsistent, and erroneous. It cannot be considered as an adequate reply to a petition signed by 1.7 million citizens.

2.3.2. The Commission's refusal to provide any follow-up to ONE OF US lacks justification

130. The Commission's decision is not only inappropriately argued, but it also lacks justification.

131. As was already mentioned, it is hereby contended that, under a correct interpretation of Article 10(1)(c) of Regulation 211/2011, the Commission does not enjoy an unlimited margin of appreciation in dealing with a successful ECI. A decision not to take action must be duly justified by reasons such as those set out under point 2.1 above.

132. Therefore, and given that ONE OF US has submitted a concrete and precise legislative proposal (which the Commission itself, prior to the initiative's registration, found to be in full compliance with EU primary law), the Commission should have demonstrated that this proposal has in the meantime become either unnecessary or impossible.

2.3.2.1. The Commission's failure to demonstrate lack of necessity of the measures proposed by ONE OF US

133. Insofar as this falls within the remit of the EU's competences, the measures proposed by ONE OF US would constitute an efficient means to ensure better protection of the dignity and the rights of the individuals at the embryonic and foetal stage of their physical development.

134. The Commission has not demonstrated, and indeed not even attempted to demonstrate, that these objectives could be better reached by different means.

135. In particular, the Commission's argument that a vague and general reference in the Financial Regulation to EU primary law suffices to achieve the petition's objectives is not corroborated by any concrete experience.

136. The Commission has also not demonstrated, nor attempted to demonstrate, that the proposals made by ONE OF US have become redundant as a consequence of new measures that the EU adopted in the meantime (i.e. after the registration of the petition). Indeed, the relevant legislation is currently the same as it was at the time when the ECI was registered, and no substantial legislative change has taken place in the meantime. This means that the (perceived) necessity of the proposed measures is the same today as it was then. The Commission's reply thus reveals only the institution's contempt for the views held by 1.7 million citizens, but it does not explain the reasons upon which this position is founded.

2.3.2.2. The Commission's failure to demonstrate the impossibility of the measures proposed by ONE OF US

137. The Commission has also not demonstrated the impossibility of any of the measures proposed by the ONE OF US initiative.

138. Its rejection of the ECI's proposals with regard to development aid rests on the fact that those measures would create (politically unwelcome?) "constraints", i.e. limit the Commission's own margin of appreciation. This does not equate to impossibility.

139. With regard to the ECI's proposals on research funding, the Commission asserts that *"that the request that the EU does not fund research subsequent to the establishment of human embryonic stem cell lines cannot* (sic!) *be met. The reason is that the Commission formulated its proposal taking into account ethical considerations,*

potential health benefits, and the added value of support at EU level, for all types of stem cell research. This proposal was adopted by the co-legislator, i.e. the European Parliament and the Council, based on an agreement democratically reached during the inter-institutional negotiations."

140. The Commission does not want to re-open a political debate, despite the fact that 1.7 million citizens have expressed their dissatisfaction with its outcome. The use of the word *"cannot"* in this context does not indicate impossibility, but unwillingness.

2.3.3. The Commission's action undermines the democratic process

141. Very disturbingly, the Commission's reasoning appears to rest on a serious misinterpretation of the requirements of the democratic process. The Commission argues that because the legislation currently in place has been adopted by the competent EU legislator under democratic procedures, it must be neither challenged nor changed as a result of an ECI.

142. This argument calls for the following observations:

143. First, nobody has ever doubted that the provisions in questions have been adopted in line with the legislative procedures that the Treaties provide for. But it is one of the fundamental characteristics of democracy that a law that has been democratically adopted can at any time be replaced by another law that is equally adopted through democratic procedures. The ONE OF US initiative is asking for just such a democratic procedure.

144. Second, by referring to "democratically reached agreements" of the past **the Commission seeks to conceal the fact that, through its decision to reject the ONE OF US initiative, it is itself currently blocking a democratic procedure from taking place**.

145. Third, if the Commission were to apply this criterion consistently, then an ECI should *never* ask for any legislative changes, given that the legislation to be amended or abrogated would always be the result of "democratically reached agreements" of the past. That would leave almost no scope for future ECIs – except, of course, if the Commission planned to use this potent argument only in an occasional or inconsistent manner...

146. Fourth, the Commission also seems unaware that the EU's current procedures, which it describes as "democratic", are often criticised for their "democratic deficit," and that the Lisbon Treaty has introduced the new mechanism of the European Citizens' Initiative precisely to overcome that deficit.

2.3.4. The Commission fails to give out separate "legal" and "political" conclusions

147. Under a more formal perspective, it should be noted that Article 10(1)(c) of Regulation 211/2011 obliges the Commission to "*set out in a communication its legal and political conclusions on the citizens' initiative"*. This requirement is clarified in Recital No. 20 where the Commission is required to "*examine a citizens' initiative and set out its legal and political conclusions* ***separately****"* (emphasis added).

148. In COM (2014) 355 final, there is no distinction between "legal" and "political" conclusions. The fact that the Commission failed to establish this distinction reveals that it does not have a legal argumentation.

149. This distinction is very important. As an administrative body, the Commission would be in a good position to provide a legal analysis of the proposals made by an ECI. Such legal analysis should already be carried out before an ECI is registered in order to ascertain whether it complies with the requirements set out in Article 4(2) of Regulation 211/2011.

150. After the submission of a successful ECI, the scope for "legal" conclusions seems rather limited. Indeed, during the process of registration, the Commission already recognised that the ONE OF US Initiative belonged to its attributions and had been submitted in accordance with the treaties. There is thus no legal reason that would justify a refusal to transmit the legislative proposal to the European Parliament. In any case, those legal conclusions, if any, should have been drafted in a constructive style. Rather than inappropriately speaking of impossibility (see above) where in fact there is none, such conclusions should *constructively* indicate how the proposal submitted by an ECI could be adapted in order to avoid unnecessary conflicts with other laws that the ECI does not intend to challenge. These indications should, however, leave the substance of the proposal intact.

151. A "political" conclusion, by contrast, would indicate whether the Commission finds a proposal politically desirable or not. Of course, the Commission is always free to communicate its opinions – and with regard to citizens' initiatives it is explicitly invited to do so. Such a "political" conclusion cannot, however, justify the decision by the Commission not to take any further action on a successful ECI, if the credibility of the ECI as an instrument of participatory democracy is not to be rendered nugatory.

2.3.5. Conclusion on the plea demanding the annulment of the Commission's Communication

152. As we have seen, it clearly results from the Commission's communication that the decision not to take any further action on the citizens' initiative is entirely grounded in "political" reasons. It does no injustice to the Commission (since it is based on the Commission's own words) to say that essentially those "political" reasons consist in the following:

- the legislation proposed by the ONE OF US would *"constrain" the EU's (viz. the Commission's) freedom to act*;

- it would *replace existing legislation* that has been *"carefully calibrated"* by the Commission and adopted as a result of an *"agreement democratically reached"* by the Parliament and the Council;

- it is *not necessary* because, given that EU primary law already enshrines human dignity and human rights, any secondary legislation that would give concrete effect to those principles is (according to the European Commission) redundant.

153. These are indeed the three main reasons not to act, as they can be read from the conclusions in section 4 of the Commission's own document.

154. If the Commission is going to apply this reasoning consistently, then it follows that an ECI should *never* make any proposals that would (1) constrain the Commission's freedom to act, (2) replace or abrogate existing legislation, or (3) give a concrete and practical effect to EU primary law principles enshrining human dignity or human rights.

155. Instead, an ECI should only make proposals that (1) would not constrain, but *extend*, the EU's (or rather: the Commission's) powers, and/or (2) create *new* EU legislation where currently there is none, and/or (3) be "necessary" (except in the sense that it would give concrete and practical effect to EU primary law principles enshrining human rights and human dignity). This, and only this, would be the kind of initiative that would be welcomed by the Commission.

156. The crucial question that the applicants put to the Court is whether Article 10(1)(c) of Regulation 211/2011 allows the Commission to filter successful ECIs in this way, and to turn them down solely on the basis of these (or similarly misguided) arguments.

157. The conclusions that must be drawn from the considerations set forth above are the following:

- COM (2014) 355 final is subject to legal review under Art. 263 of the TFEU. The Court has authority to hear this case.

- The Communication fails to comply with the *formal* requirements set out in Article 10(1)(c) of Regulation 211/2011 because:

  - it does not separate between "legal" and "political" conclusions, and

  - its conclusions are not based on logical and conclusive arguments.

- The Communication fails to comply with the *substantial* requirements set out in Article 10(1)(c) of Regulation 211/2011 because the Regulation does not allow the Commission to reject a petition on the grounds of (merely) political considerations.

2.4. In the alternative: is Article 10(1)(c) of Regulation (EU) No 211/2011 compatible with the EU's primary legislation?

158. In case the Court should find, contrary to what has been exposed above under section 2.3, that the Commission has correctly applied, rather than violated, Article 10(1)(c) of Regulation 211/2011, the applicants consider that this provision – which would then fail to properly implement Article 11 (4) of the TEU - must itself be challenged. For this reason, they submit to the Court the **subsidiary request to annul Article 10(1)(c) of Regulation 211/2011**.

159. It is only with regard to this limb of the application that the Council of the EU and the European Parliament, having adopted a legal act that falls short of the requirements it had to satisfy, are to be considered as having passive legitimacy as defendant parties.

2.4.1. The requirements for legislation concerning the European Citizens' Initiative, as set forth in Article 11 (4) of the Treaty on the European Union

160. The European Citizens' Initiative is a new instrument of participative democracy that was introduced into the EU's legal system through the Treaty of Lisbon with the specific purpose of addressing the EU's often regretted "democratic deficit".

161. It can not be insinuated that Member States, when providing for this new instrument, had the intention to mislead citizens, e.g. by presenting as an important innovation something that already existed. Nor can it be suspected that the Member States intended to create something that, being of no practical value, would remain meaningless. In other words, the relevant provisions of the TEU must be interpreted in conformity with Member States' stated intentions, i.e. in a way that turns the ECI, as much as possible, into a meaningful and expedient element of participatory democracy.

162. Article 11(4) of the TEU provides as follows:

"Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting 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.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union."

163. The first paragraph of Article 24 of the TFEU provides that:

"The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come."

164. It is on this basis that Regulation (EU) No 211/2011 on the citizens' initiative has been adopted.

165. At first glance, Article 11(4) of the TEU seems to leave a wide margin of appreciation to the Community legislator. For example, the number of signatures required for a successful initiative must be *"not less than one million citizens who are nationals of a significant number of Member States"*, but the requirement could in principle be set *higher* than 1 million, or it could be that a certain quorum must be reached in *every* Member State. It is also noticeable that the provision speaks (rather vaguely) of an *"invitation to the European Commission"*, without at all specifying what kind of response should be reserved to such an invitation. The Commission, too, thus seems to enjoy an extremely wide margin of appreciation.

166. But would such a literal reading of Article 11(4) TEU be really compatible with the purpose of that provision? There are some fundamental questions that must be asked in this regard.

167. First and foremost: did European citizens not always, even prior to the Lisbon treaty, have the possibility to address letters to the Commission, including letters wherein they might have *invited* the Commission to *submit appropriate proposals* on matters where they considered *that a legal act of the Union was required*? Is the Commission not receiving thousands of such letters every day – from individuals, lobbyists, or various pressure groups? Doesn't the Commission respond to such letters? Isn't the Commission *obliged*, through its own code of good administrative conduct, as well as through Article 41 of the EU Charter of Fundamental Rights, to politely reply to such letters? If that is so, what then is the added value created by Article 11(4) of the TEU?

168. Surely Article 11(4) TEU was not adopted with the purpose of *restricting* the right of citizens to address letters to the Commission, in particular by stipulating that henceforth the Commission should consider, or reply to, letters *only when* they bear the signatures of at least one million citizens. But if that was not the purpose, then **the provision must be interpreted in a way that brings about some real added value with regard to the possibility for citizens to influence European politics.**

169. It is therefore clearly inadmissible to interpret Article 11(4) TEU in a restrictive manner that would allow the Commission to treat a successful ECI that is submitted to it in more or less the same way as it might treat any other letter it receives from individual citizens, or from a lobbyist, or a pressure group. Instead, **there must be a difference of treatment** - and that difference of treatment cannot consist in mere formalities, but must be **proportionate to the (huge) effort of collecting more than one million signatures**.

170. If such a difference of treatment is not provided, then the inevitable consequence will be that (after one or two frustrating experiences) citizens will stop using the ECI as an instrument for articulating their political priorities. Such abstention will then not be

imputable to citizens, but to the EU legislators and administrators who will have turned the ECI into a false promise.

171. It clearly follows that Article 11(4) of the TEU would make no sense at all if it were interpreted in a way that renders the ECI ineffective and meaningless, in particular by saying that it allows the Commission to turn down a successful ECI without giving any reasons, or on the basis of poorly argued reasons, or on the basis of purely "political reasons". And as a matter of consequence, an implementing legislation (such as Regulation 211/2011) would, if it were to allow or impose such interpretation, stand in contradiction to a correct and appropriate interpretation of Article 11(4) of the TEU.

2.4.2. The essential characteristics of a citizens' initiative: a democratic institution

172. According to the explanatory statement of the European Parliament's report on the proposal for a regulation on the citizens' initiative 2011/2302(REG) of May 22nd 2012, *"The citizens' initiative will be a powerful tool that European citizens can use to identify issues to place on the EU's agenda. It was first introduced in the Treaty establishing a Constitution for Europe and then taken over by the Lisbon Treaty, with the aim of giving citizens powers of political initiative on a par with those already enjoyed by the Council of Ministers and the European Parliament."* The Commission is not the only institution to hold the right of initiative. Though it retains a major role, it now shares this prerogative with the Council (art. 241 TFEU), the Parliament (art.225 TFEU) and eventually with at least a million European citizen. The democratic functioning of the European institutions should be given effect.

173. The legislator cannot regulate a "citizens' initiative" any way he likes, but he must adopt a law that respects the essential characteristics of such initiative. Otherwise what he creates will – notwithstanding the name - be something else than a citizens' initiative. And it will probably be useless.

174. It is therefore necessary to distinguish between a simple letter or petition that anyone can address to the Commission (or to other EU institutions), and the European Citizens' Initiative. An individual letter or petition is the expression of the particular interest or opinion of one individual person. An ECI, by contrast, is a legislative initiative that, since it is endorsed by more than one million citizens from a significant number of Member States, must be credited to be of considerable relevance. It must be treated accordingly.

175. Obviously, one million signatures do not create an entitlement for the organisers of a citizens' initiative to see their proposal being accepted as new law. This is not what this submission contends. **But given the representativeness of an ECI, the appropriate institutions to decide over its adoption or rejection must themselves be representative of the EU's population.** Within the European institutional framework, that would be the **European Parliament** (which is directly elected) and the **Council** (which consists of representatives of national governments that govern on the basis of parliamentary majorities within their respective countries).

176. With regard to the Commission, by contrast, it must be noted, that (despite any claims the Commission will make to be a "democratic institution") citizens have little or no influence on its composition and its actions. Commissioners are not directly elected, but they are selected by their national governments and then confirmed as a group by a parliamentary vote. At best, therefore, they can be said to have a rather remote and indirect democratic legitimation. This precisely is one part of EU's disapproved "democratic deficit", to which the ECI was supposed to provide a partial solution.

177. From the point of view of democratic governance, it is unthinkable that an administrative body like the Commission should have the right to adopt a decision that, based on that body's institutional self-interest rather than on sound legal reasons, supersedes a legislative proposal directly and explicitly endorsed by more than 1 million citizens. Such a structure would simply mean that the executive branch of government prevails over the will of the people, and would belie all of EU's ambitions to become a more democratic structure. This would be contrary to the democratic principles that constitute a core value of the European Union.

178. Moreover, such a structure would also stand in contradiction with the constitutional traditions of Member States. Not all Member States have constitutional set-ups that provide for citizens' initiatives similar to the ECI. However, where such citizens' initiatives are provided for, they are addressed to the legislative (rather than the executive) bodies of the Member State concerned, triggering a full-fledged legislative procedure in the course of which the proposed measure can be adopted or rejected. It is also in the course of those legislative procedures that potential opponents to the measures in question can legitimately express their opinions and interests.

179. This is corroborated by the following examples:

- Austria: Volksbegehren
- Croatia: Art. 87 of the Constitution (but limited to changes to the Constitution)
- Finland: Kansalaisaloite / Medborgarinitiativ
- Germany (at the regional level): Volksbegehren, Volksinitiative
- Italy: Legge di iniziativa popolare (Art. 71 of the Constitution)
- Spain: Petición Colectiva Legislativa (Art. 87 of the Constitution)

180. It thus appears to be an essential characteristic of a "citizens' initiative" that it confers a right of legislative initiative to the people – provided, of course, that a sufficiently great number of signatures is gathered. This, and this alone, justifies the cost and effort of collecting an amount of signatures which, for the purposes of an ECI, exceeds 1 million. By contrast, the perspective of being received by representatives of the Commission of "appropriate level," (cf. Art. 10(1)(b) of Regulation 211/2001) for a two-hour meeting, or a parliamentary hearing of similar duration (Art 11 of Regulation 211/2011), can hardly be considered as a sufficient reason for making this effort.

181. Last but not least, it should also be noted that other EU institutions than the Commission have, at the time when the draft of what became Regulation 211/2011 was discussed, expressed their concern over a mechanism that would allow the Commission to block a successful ECI. The European Ombudsman, in his contribution to the public consultation that took place on that occasion, stressed that

"effective supervision of the Commission" was required, and that, with regard to the Commission's political conclusions, the European Parliament should ultimately have the competence to decide. In June 2014, shortly after the decision of the Commission on ONE OF US, the Conference of Parliamentary Committees for Union Affairs (COSAC), "*taking into account the widespread mistrust of citizens towards the European institutions"* reaffirmed the importance of "*the democratic participation of EU citizens in the legislative procedure, under the European Citizens' Initiative"*[19] Likewise, the European Parliament itself, in its Resolution of 7 May 2009, affirmed that *"the Commission is not free to decide, on the basis of political considerations of its own, whether a citizens' initiative is or is not to be declared admissible",* and that *"if the Commission fails to take any decision on the request submitted by the citizens' initiative, this is subject to the scrutiny of the Court of Justice of the European Union and of the European Ombudsman in accordance with the relevant provisions of EU law".*

2.4.3. Conclusion on the plea demanding the annulment of Regulation 211/2011

182. Based on its mere wording, it is certainly *imaginable* to interpret Regulation 211/2011 in the way in which the European Commission has interpreted it. It is certainly *possible* to say that the Regulation, so interpreted, is compatible with the wording of Art 11(4) of the TEU. However, such an interpretation would be contrary to the very concept of the citizens' initiative. Only two years after its introduction, citizens would simply stop using this new instrument.

183. By contrast, it seems far more consistent to interpret both Article 11(4) of the TEU and Regulation 211/2011 in a way that is more in line with the essential purpose of a citizens' initiative.

184. In that interpretation, the ECI is formally addressed to the Commission only because the Commission has the technical ability to appropriately cast the content of an ECI into the form of a legislative proposal. However, the Commission is not free to decide whether or not it will take an action as a result of a successful ECI.

185. The Commission must examine the admissibility of an ECI prior to the collection of signatures on purely legal grounds. After the submission of a successful ECI, the Commission must set out in a communication its political and, where appropriate, its legal conclusions on the citizens' initiative. Political and legal conclusions must be separated. Political conclusions alone cannot justify a decision not to take any action. Instead, the decision to take no further action can only be taken in closely circumscribed situations, such as those described under section 2.1 of this submission.

[19] Contribution of the Li-COSAC, Athens, June 2014. Available at : http://www.cosac.eu/51-greece-2014/plenary-meeting-of-the-li-cosac-15-17-june-2014/

3. CONCLUSIVE REMARKS

186. The purpose of this application is not vindication, but clarification.

187. This application does not concern the substance of the ONE OF US initiative, but the way in which it has been handled. It is not only about the right to life, but firstly about democracy. It is not an angry reaction of "sore losers", but it meritoriously provides the core institutions of the EU with the opportunity to clarify what an ECI is supposed to be, and how they believe it should be treated. All EU citizens, supporters and opponents of the ONE OF US initiative alike, will appreciate this clarification.

188. There is a clear alternative. Either this application will be successful, in which case the ECI will become what it was intended to be: a meaningful and practicable instrument of participatory democracy. Or, it will be rejected, which would mean that citizens will in all probability stop using the ECI, except if they act in accordance with the political or ideological agenda of the Commission.

189. It is therefore in the name of democracy and the common good that the Court is requested:

(1) to annul Commission Communication COM (2014) 355 final,

(2) in the alternative: to annul of Article 10 (1) (c) of Regulation (EU) No 211/2011

(3) to order the defendants to pay the applicant's costs of this procedure.

Claire de LA HOUGUE, avocat

SCHEDULE OF ANNEXES

Annex 1: One of Us' legislative proposal

Referred to throughout the whole document.

Annex 2: COM (2014) 355 final

Reply of the Commission to the European Citizen's Initiative One of Us. Document released on the 28th of May 2014, sent to M. Patrick Grégor PUPPINCK and notified to the European Parliament.

Referred to throughout the whole document.

Annex 3: Un de nous et Fondation Lejeune, *Bilan recherche sur l'embryon et alternatives dans le monde*

Published on April 2014. This document sums up scientific research on the embryo and explains the potential of existing alternatives to it.

Mentioned p.13 of this document.

Annex 4: *The Funding of Abortion through EU Development Aid*

Document published by European Dignity Watch in March 2012, Brussels. This report documents how two world's largest abortion providers - International Planned Parenthood Federation (IPPF) and Marie Stopes International (MSI) have been receiving, and continue to receive funding from the European Union's Development Aid and Public Health budgets for projects related to "sexual and reproductive health" (SRH).

Mentioned p.19 of this document.

Annex 5: *Abortion hurts women*

Document published by the "Minnesota Citizens Concerned for Life Global Outreach". This document, based on scientific evidence, shows how induced abortion causes both short- and long-term risks to the physical health of women. It can also seriously affect mental health. These risks are exacerbated when abortion is legalized or promoted in countries with poor maternal health care.

Mentioned p.20 of this document.