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EUROPEAN COMMISSION

Brussels, 29 January 2015
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TO THE PRESIDENT AND THE MEMBERS OF THE GENERAL COURT OF THE EUROPEAN UNION

DEFENCE

In Case **T-561/14**

1. **Patrick Gregor PUPPINCK**, residing in Strasbourg, France,
2. **Filippo VARI**, residing in Rome, Italy,
3. **Josephine QUINTAVALLE**, residing in London, United Kingdom,
4. **Edith FRIV ALDSZKY**, residing in Tata, Hungary,
5. **Jakub BALTROSZEWICZ**, residing in Krakow, Poland,
6. **Alicia LATORRE CANIZARES**, residing in Cuenca, Spain,
7. **Manfred LIEBNER**, residing in Zeitlofs, Germany,

in their capacity of organisers forming the citizens' committee of the citizens' initiative "One of Us", represented by Claire de la Hougue, avocat, member of the French Bar,

Applicants,

v.

European Commission,

represented by Johannes Laitenberger, Deputy Director General of its Legal Service, and Hannes Kraemer, Legal Adviser in its Legal Service, acting as Agents, with an address for service at the office of Merete Clausen, also a Member of its Legal Service, Bâtiment Bech, L-2721 Luxembourg, who consent to service by e-Curia,

European Parliament

and

Council

Defendants,

Application for annulment pursuant to Article 263 TFUE of the Communication (COM (2014) 355 final) from the European Commission (hereinafter “Commission”) of 28 May 2014 on the citizens' initiative named “One of Us” (hereinafter "contested Communication") as well as, in the alternative, of Article 10 (1) (c) of Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (OJ L 65, p. 1; hereinafter “Regulation 211/2011”).

Legal Framework

1. Article 11 of the Treaty on European Union (TEU) reads as follows:

“1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. 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.”

2. Article 17 TEU provides:

“1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. {...}

7. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority,

shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. {...}

The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

8. The Commission, as a body, shall be responsible to the European Parliament. {...}The European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission."

3. Article 24 of the Treaty on the functioning of the European Union (TFEU) provides:

"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 {TFEU}, including the minimum number of Member States from which such citizens must come.

Every citizen of the Union shall have the right to petition the European Parliament {...}.

Every citizen of the Union may apply to the Ombudsman {...}.

Every citizen of the Union may write to any of the institutions or bodies {...} in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language."

4. Article 225 TFEU reads as follows:

"The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons."

5. Pursuant to Article 241 TFEU "the Council, acting by a simple majority, may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons."

6. Article 4 ("*Registration of a proposed citizens' initiative*") of Regulation 211/2011, which was adopted on the basis of the first paragraph of Article 24 TFEU, reads as follows:

"1. Prior to initiating the collection of statements of support from signatories for a proposed citizens' initiative, the organisers shall be required to register it with the Commission, providing the information set out in Annex II, in particular on the subject matter and objectives of the proposed citizens' initiative.

{...}

2. Within two months from the receipt of the information set out in Annex II, the Commission shall register a proposed citizens' initiative under a unique registration number and send a confirmation to the organisers, provided that the following conditions are fulfilled:

{...}

(b) the proposed citizens' initiative does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties;

(c) the proposed citizens' initiative is not manifestly abusive, frivolous or vexatious; and

(d) the proposed citizens' initiative is not manifestly contrary to the values of the Union as set out in Article 2 TEU.

3. The Commission shall refuse the registration if the conditions laid down in paragraph 2 are not met.

{...}"

7. Article 9 ("*Submission of a citizens' initiative to the Commission*") of Regulation 211/2011, provides:

"After obtaining the certificates provided for in Article 8(2), and provided that all relevant procedures and conditions set out in this Regulation have been complied with, the organisers may submit the citizens' initiative to the Commission {...}.

{...}

8. Article 10 ("*Procedure for the examination of a citizens' initiative by the Commission*") of Regulation 211/2011 reads as follows:

"1. 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"

2. The communication referred to in paragraph 1(c) shall be notified to the organisers as well as to the European Parliament and the Council and shall be made public."

9. The recitals of Regulation 211/2011 are worded as follows:

"(1) The {TEU} reinforces citizenship of the Union and enhances further the democratic functioning of the Union by providing, inter alia, that every citizen is to have the right to participate in the democratic life of the Union by way of a European citizens' initiative. That procedure affords citizens the possibility of directly approaching the Commission

with a request inviting it to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties similar to the right conferred on the European Parliament under Article 225 {TFEU} and on the Council under Article 241 TFEU.

{...}

(20) The Commission should examine a citizens' initiative and set out its legal and political conclusions separately. It should also set out the action it intends to take in response to it, within a period of three months. In order to demonstrate that a citizens' initiative supported by at least one million Union citizens and its possible follow-up are carefully examined, the Commission should explain in a clear, comprehensible and detailed manner the reasons for its intended action, and should likewise give its reasons if it does not intend to take any action. {...}."

Background to the dispute

10. On 11 May 2012 the Commission registered the (then proposed) citizens' initiative named "One of Us" (hereinafter "citizens' initiative at issue"), as requested by the applicants.
11. The request for registration contained the following indications as to the subject matter of the citizens' initiative at issue: *"the juridical protection of the dignity, the right to life and of the integrity of every human being from conception in the areas of EU competence in which such protection is of particular importance"*. Regarding the initiative's main objectives the following was indicated in the request for registration: *"The human embryo deserves respect to its dignity and integrity. This is enounced by the European Court of Justice in the Brüstle case, which defines the human embryo as the beginning of the development of the human being. To ensure consistency in areas of its competence where the life of the human embryo is at stake, the EU should establish a ban and end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid and public health"*.
12. In the annex to the request for registration three legislative amendments were mentioned. The first consists in the insertion into Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the

European Communities¹ of an article providing that: "*No budget allocation will be made for the funding of activities that destroys human embryos, or that presumes their destruction.*". The second legislative amendment concerns the insertion into article 16(3) of the Commission Proposal of a Regulation of the European Parliament and of the Council that establishes a framework program for research and innovation (2014-2020) - Horizon 2020 – (COM (2011) 809 final)² of a subparagraph (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 funding under that framework program. The third legislative amendment consists in the addition of a fifth paragraph to 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. This paragraph should provide that "*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.*"

13. On 28 February 2014, after having collected the necessary statements of support from signatories and obtained the certificates provided for in Article 8(2) of Regulation 211/2011 from the competent authorities of Member States regarding the number of valid statements of support for the Member State at issue, the applicants submitted the citizens' initiative at issue to the Commission.

¹ Subsequently to the registration of the citizens' initiative at issue that Regulation has been replaced by Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002.

² Subsequently to the registration of the citizens' initiative at issue Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) has been adopted on the basis of that Commission Proposal.

14. On 9 April 2014, representatives of the Commission received the applicants. On 10 April 2014, the applicants were given the opportunity to present the citizens' initiative at issue at a public hearing organised at the European Parliament.
15. On 28 May 2014, the Commission adopted the contested Communication (Annex 2 to the application).

Procedure and forms of order sought

16. By application lodged at the Registry of the Court in its initial version on 25 July 2014 and in a version in which defects have been cured on 21 August 2014, the applicants brought the present action. They claim that the Court should
 - annul the contested Communication,
 - in the alternative, annul Article 10 (1) (c) of Regulation 211/2011,
 - order the defendants to pay the costs.

Legal Assessment

Admissibility

First head of claim (relating to the annulment of the contested Communication)

17. As far as this head of claim is at issue, the Commission submits that the action is inadmissible. In the Commission's view, the contested Communication is not an act intended to produce legal effects vis-à-vis third parties, within the meaning of the fourth, read in conjunction with the first subparagraph of Article 263 TFEU. Therefore, it cannot be the subject matter of an action for annulment.
18. According to consistent case-law any measures adopted by the institutions, whatever their form, which are intended to produce binding legal effects are regarded as acts open to challenge, within the meaning of Article 263 TFEU (Case 22/70 Commission v Council ('ERTA') [1971] ECR 263, paragraph 42; Case C-316/91 Parliament v Council

[1994] ECR I-625, paragraph 8; and Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany v Commission* [2011] ECR I-9639, paragraph 36). Moreover, where an action for annulment of an act adopted by an institution is brought by a natural or legal person, the Court of Justice has repeatedly held that the action lies only if the binding legal effects of that act are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9, and *Deutsche Post and Germany v Commission*, paragraph 37).

19. In the present case, the contested Communication does not – by its very form and nature – purport to be an act intended to produce binding legal effects, let alone binding legal effects being capable of affecting the interests of the applicants by bringing about a distinct change in their legal position. The same hold true with regard to the content of the contested Communication (see to that effect Case T-258/06, *Germany v Commission* [2010] ECR II-2027, paragraph 27). In fact, neither does the contested Communication lay down obligations, let alone obligations incumbent on the applicants, nor does it otherwise regulate their legal status or powers. Rather is the contested Communication an act of the Commission which reflects only the latter's intention to follow a particular line of conduct, such acts not having to be regarded as intended to produce legal effects (see by analogy Case C-443/97, *Spain v Commission* [2000] ECR I-2415, paragraph 34).
20. It is true that, as a matter of principle, the rejection of a request aiming at the adoption of a legal act is indeed act intended to produce legal effects vis-à-vis third parties, within the meaning of the fourth, read in conjunction with the first subparagraph of Article 263 TFEU. However, neither Article 11(4) TEU nor Regulation 211/2011 provide for a right of the organisers or the signatories of a citizens' initiative to request from the Commission the adoption of a legal act. Rather do these provisions merely confer a right to request the submission of a proposal for a legal act. Such a proposal being itself merely preliminary and preparatory in nature, the rejection of a request aiming at the submission thereof cannot be considered as an act intended to produce legal effects vis-à-vis third parties. In fact it follows from established case law that a contested act rejecting the applicants' request cannot be assessed independently of the act expressly referred to by that request and that accordingly, the contested act is only an act amenable to review

if the latter act were also capable of being the subject of an action for annulment brought by the applicants (cf. Case T-369/03, *Arizona Chemical BV a. o. v Commission*, ECR [2005] II-5839, paragraphs 64 - 66).

21. The conclusion that the contested Communication not being an act intended to produce legal effects vis-à-vis third parties, within the meaning of the fourth, read in conjunction with the first subparagraph of Article 263 TFEU is not altered by the arguments put forward by the applicants.
22. First, the fact that the Commission adopted the contested Communication in order to discharge a legal obligation (cf. paragraph 30 of the application) does not confer binding legal effects to that Communication. In that connection the Commission refers by analogy to Case T-193/04, *Tillack v Commission*, [2006] ECR II-3995, paragraphs 68 – 73. In that Case, the General Court held that the act by which OLAF forwarded the German and Belgium judicial authorities information concerning suspicions of breach of professional secrecy and bribery involving the applicant was not challengeable under Article 230 TEC (now Article 263 TFEU), despite the fact of Article 10 paragraph 2 of Regulation No 1073/1999 providing for a legal obligation of OLAF to forward to the judicial authorities of the Member State at issue the information obtained by OLAF during internal investigations into matters liable to result in criminal proceedings. The same conclusion was contained in the order of the President of the (then) Court of First Instance rejection of the related application for interim measures (Case T-193/04 R, *Tillack v Commission*, [2004] ECR I-3575, paragraphs 38 – 47) and confirmed by the order of the President of the Court of Justice rejecting the appeal against the former order (Case C-521/04 P (R), *Tillack v Commission*, [2005] ECR I-3103, paragraphs 24 – 34).
23. Secondly, contrary to what the applicants suggest (cf. paragraph 31 of the application), the mere fact that by adopting the contested Communication the Commission has taken the position not to submit a proposal for a legal act does not make that Communication an act intended to produce binding legal effects. It is indeed obvious that a position not to adopt an act does not necessarily share the legal characteristics attached to such act. Moreover, in the present case the Commission did not even decide not to adopt an act but rather not to submit a proposal for a legal act, such proposal being of merely preparatory nature and hence not challengeable under Article 263 TFEU. In any event, even if one were to assume that the position taken by the Commission not to submit a proposal for a

legal act is an act intended to produce binding legal effects, such legal effects would not be capable of affecting the interests of the applicants by bringing about a distinct change in their legal position.

24. Thirdly, the argument by which the applicants attempt to deduce a binding legal effect of the contested Communication from the latter's **alleged effects on their possibility to bring an action for failure to act** against the Commission under Article 265 TFEU (cf. paragraph 32 of the application) are equally unfounded. In this regard, it is not necessary to take a position on whether only the failure to address to a person an act intended to produce binding legal effects gives rise to an action for failure to act, although such an interpretation is supported by the **explicit exclusion of situation of a failure to address to a person a recommendation or an opinion** and is borne out by the case law of the Union judicature (Joined cases 83/84 and 84/84, *N. M. v Commission and Council*, [1984] ECR 3571, paragraph 10; Case C-257/90 *Italsolar v Commission* [1993] ECR I- 9, paragraph 30). If this is the state of law, the applicants' argument relating to the possibility to bring an action Article 265 TFEU is **a *petitio principii* in that it is precisely disputed whether the contested Communication is indeed an act intended to produce binding legal effects.** Conversely, if Article 265 TFEU were to be construed as allowing an action for failure to act also where an institution has failed to address to a person an act other than intended to produce binding legal effects, **the possibility for the applicants to bring such action, had the Commission failed to act instead of adopting the contested Communication, would be irrelevant for assessing whether or not that Communication intended or not to produce binding legal effects.** In fact, for the purpose of Article 263 TFEU, the issue of an act producing binding legal effects must be assessed with regard to the **intrinsic nature of that act.** Hence, **it must be assessed independently from the question whether the bringing of an action for failure to act under Article 265 TFEU against an institution would have been possible,** had the latter failed to act, instead of adopting the contested act.
25. Fourthly, the applicants' argument relating to the notification of the contested Communication (cf. paragraph 33, last indent of the application) must be rejected. The **fact that an act is notified is indeed irrelevant as regards the question of its producing binding legal effects** (see, by analogy, Case T-258/06, *Germany v Commission* [2010]

ECR II-2027, paragraph 31 on the parallel issue of the publication of an act in the Official Journal).

Second head of claim (relating to the annulment of Article 10 (1) (c) of Regulation 211/2011)

26. Regarding this head of claim, the action is inadmissible insofar as it is directed against the Commission, since not the latter but the European Parliament and the Council are the authors of that Regulation. Indeed, actions must be directed against the body which enacted the contested measure, in other words, the Union institution or body from which the decision emanated (judgement of the General Court in Case T-411/06, *Sogelma v European Agency for Reconstruction*, paragraph 49). Moreover, that head of claim is inadmissible also on two other grounds. Firstly, the application is manifestly time-barred under the sixth subparagraph of Article 263 TFEU, given that Regulation 211/2011 was published in the Official Journal on 11 March 2011. Secondly, the applicants lack standing under the fourth sub-paragraph of Article 263 TFEU since Regulation 211/2011 is neither addressed nor of direct and individual concern to the applicants. Therefore, the Commission will not deal with the substance of the second head of claim separately but rather re-qualify it as an exception of illegality with which it will deal, albeit only in the alternative, when addressing the substance of the first head of claim.

Substance

27. Since the Commission considers the first head of claim (relating to the annulment of the contested Communication) to be inadmissible, it is only in the alternative that it will address its substance. It would occur to the Commission that upon a proper construction of the action the applicants raise three pleas in law in support of that head of claim. Firstly and secondly, they allege that by omitting to submit a proposal for a legal act after receiving the citizens' initiative at issue the Commission infringed, respectively, Article 10 (1) (c) of Regulation 211/2011 and, in the alternative, Article 11 (4) TEU, read in the light of the right of citizens to participate in the democratic life of the Union. Thirdly, they allege that the Commission infringed Article 10 (1) (c) of Regulation 211/2011 by the manner in which set out the reasons for not submitting a proposal for a legal act.

First plea in law, alleging infringement of Article 10 (1) (c) of Regulation 211/2011 by omitting to submit a proposal for a legal act after receiving the citizens' initiative at issue

28. As a general proposition, the applicants suggest that the Commission can lawfully refrain from submitting a proposal for a legal act after receiving a citizens' initiative only where such legal act is no longer "*necessary*", where its adoption has become impossible subsequent to the registration of the citizens' initiative or where the latter does not refer to any specific legal act but only intends to raise awareness of a problem that should be solved (cf. paragraphs 21 – 27 of the application). As in the applicants' view (cf. paragraphs 130 – 140 of the application) in the present case none of these conditions is met, they contend that the Commission violated Article 10 (1) (c) of Regulation 211/2011 by omitting to submit a proposal for a legal act after receiving the citizens' initiative at issue.
29. The Commission would point out that nothing in text of Article 10 (1) (c) of Regulation 211/2011 supports the interpretation put forward by the applicants.
30. That provision clearly defines the obligation which is incumbent on the Commission following the reception of a citizens' initiative as consisting in setting out its legal and political conclusions on that citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action. In particular the use of the terms "*if any*" emphasises that taking an "*action*", i. e. submitting a proposal for a legal act is one of the options open to the Commission.
31. This reading is plainly borne out by recital 20 of Regulation 211/2011. Not only is the optional character of submitting a proposal for a legal act stressed in that recital, by the phrase "*the Commission {...} should likewise give its reasons if it does not intend to take any action*". Moreover, the obligations incumbent on the Commission following the reception of a citizens' initiative is defined as, firstly, carefully examining that citizens' initiative and its possible follow-up and, secondly, explaining in a clear, comprehensible and detailed manner the reasons for its choice.
32. The interpretation set out in paragraphs 29 – 31 above is supported by the legislative history of Regulation 211/2011. While the terms "*if any*" referred to in paragraph 29

above were already present in the Commission's proposal for a Regulation, recital 20 was completed by the European Parliament with the sentence quoted in paragraph 30, reinforcing the non-mandatory character of the follow-up by the Commission. Likewise, the European Parliament added the words "*or not taking [that action]*" in Article 10(1)(c) of the Regulation.

33. Finally, the conclusion that Commission is not obliged to submit a proposal even outside any of the situations referred to by the applicants (cf. paragraph 28 above) is not altered by the existence of a procedure of registering a proposed citizens' initiative pursuant to Article 4(2) of Regulation 211/2011. The registration is a mere prerequisite for the organisers to initiate collecting statements of support. As the applicants recognise at paragraph 20 of the application, the purpose of the registration procedure is to prevent organisers from wasting time and financial resources on a citizens' initiative that "*from the outset cannot lead to the desired outcome*". However, it is clear from the conditions for refusal of registration set out in Article 4(2) b) – d) of Regulation 211/2011 (the proposed citizens' initiative falling manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties or being manifestly abusive, frivolous or vexatious or manifestly contrary to the values of the Union as set out in Article 2 TEU) **do not imply a political but merely an initial legal assessment**. Hence, no conclusion can be drawn from these conditions as regards the extent of the political discretion enjoyed by the Commission's when receiving a citizens' initiative having reach the required number of statements of support.
34. In the Commission's view the first plea in law is thus unfounded.

Second plea in law, alleging infringement of Article 11 (4) TEU, read in the light of the right of citizens to participate in the democratic life of the Union, by omitting to submit a proposal for a legal act after receiving the citizens' initiative at issue

35. The applicants (at paragraphs 141 – 146 and 158 – 181 of the application) raise this plea in law in the alternative, in case Article 10 (1) (c) of Regulation 211/2011 were to be interpreted to the effect that it does not the oblige the Commission to submit a proposal for a legal act after receiving a citizens' initiative despite such legal act being still

"*necessary*", the adoption thereof not having become impossible subsequently to the registration of the citizens' initiative and the latter referring to a specific legal act. They contend in essence that by omitting to submit a proposal for a legal act after receiving the citizens' initiative at issue the Commission infringed Article 11 (4) TEU, read in the light of the right of citizens to participate in the democratic life of the Union and that hence, by implication, Article 10 (1) (c) of Regulation 211/2011 is itself incompatible with the Treaties.

36. The Commission is of the opinion, first, that **nothing in text of Article 11 (4) TEU supports an interpretation of that provision according to which the Commission is obliged to submit a proposal for a legal act after receiving a citizens' initiative** where such legal act is still "*necessary*", where the adoption thereof has not become impossible subsequently to the registration of the citizens' initiative and where the latter refers to a specific legal act. Indeed Article 11 (4) TEU merely refers to "*inviting the {...} Commission {...} to submit any appropriate proposal*". This wording cannot be read as implying a restriction of the right of initiative with which the Commission is vested by Article 17 (1) TEU for the purpose of promoting the general interest of the Union. The **wording of Article 11 (4) TEU is indeed in material part structurally identical to that of Articles 225 and 241 TFEU in regard of which it is undisputed that a request by the European Parliament or the Council, respectively, does not oblige the Commission to submit a proposal for a legal act.** This reading is borne out by the first recital of Regulation 211/2011 according to which the citizens' initiative provided for by the TEU "*affords citizens the possibility of directly approaching the Commission with a request inviting it to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties similar to the right conferred on the European Parliament under Article 225 {TFEU} and on the Council under Article 241 TFEU.*"
37. Secondly, **the right of citizens to participate in the democratic life of the Union (Article 10 (3) TEU) is to be seen not in isolation but rather together with the principle of representative democracy (Article 10 (1) TEU) in accordance with which citizens are directly represented at Union level in the European Parliament (Article 10 (2) TEU).** That right can therefore not be relied on in order to construe the scope of the citizens' initiative in an extensive manner and beyond the text of Article 11 (4) TEU.

38. Thirdly, contrary to what the applicants contend at paragraphs 175 – 177 of the application, the Commission is not an "administrative body" but an institution which by virtue of the procedure for its appointment set out in Article 17 (7) TEU enjoys an – albeit indirect – democratic legitimacy and which is politically responsible to the European Parliament, in accordance with Article 17 (8) TEU, and thereby, albeit indirectly, to the citizens of the Union. That political responsibility obviously also extends to the question whether and, as the case may be, in which manner, when receiving a citizens' initiative, it makes use of its right of initiative. Furthermore, if dissatisfied with the manner in which the Commission has reacted to a given citizens' initiative, the European Parliament may make use of the various instruments at its disposal for exercising political control (cf. Article 14 (1) TEU) over the Commission, including notably, requesting itself that the Commission submit an appropriate proposal, pursuant to Article 225 TFEU.
39. Fourthly, on the basis of the Commission's interpretation of Article 11 (4) TEU, read in the light of the right of citizens to participate in the democratic life of the Union, that provision would not be devoid of an "effet utile". Indeed, such "effet utile" resides in the obligation for Commission to examine the issue raised by the citizens' initiative and to address it publicly. The function of a communication presented by the Commission after receiving a citizens' initiative – including and notably where such a communication does not announce a proposal for a legal act – is to allow for a possible political debate both publicly, among citizens, and within the institutions including, notably, those entitled to request themselves that the Commission submit a proposal, i. e the European Parliament and the Council.
40. Fifthly, as regards the comparison drawn by the applicants (cf. paragraphs 178 – 180 of the application) with the rules governing citizens' initiatives in the constitutional systems of certain Member States, the Commission would make the following observations: Firstly, instead of analysing primary Union law and its underlying institutional balance the applicants attempt to deduce legal consequences from an imaginary "archetype" of citizens' initiatives. Such an "essentialist" line of reasoning cannot be accepted. Indeed, whilst general principles of substantive Union law and in particular fundamental rights may well be derived from the constitutional traditions common to the Member States (cf. Article 6(3) TEU) no such conclusions can be drawn as regards the interpretation of those provisions of the Treaties which set up a system for distributing powers among the

different Union institutions and assigning to each of them its own role in the institutional structure of the Union and the accomplishment of the tasks entrusted to the Union (as to these concepts cf. Case C-70/88, *European Parliament v Council* [1990] ECR 2041, paragraph 21 et s.). Secondly, it has been a deliberate choice by the "pouvoir constituant" of the Union that the relevant quorum of citizens may only invite the Commission to submit an appropriate proposal but may not, conversely, itself present proposals to the institution(s) competent for adopting the legal act at stake. This is patent from the structure of both Article 11 TEU and Article 24 TFEU which deal with the citizens' initiative in the context of other means by which citizens may bring certain issues to the attention of institutions of the Union (dialogue with representative associations and civil society, consultations with parties concerned, petitions, applications to the ombudsman).

41. Sixthly, the applicants' interpretation of Article 11 (4) TEU, read in the light of the right of citizens to participate in the democratic life of the Union would lead to an absurd consequence: In case two citizens' initiatives aiming at proposals for legal acts with conflicting objectives or effects are simultaneously received by the Commission the latter would be legally obliged either to submit two conflicting proposals or else not be in a position to fulfil its obligation as resulting from that interpretation with regard to any of these citizens' initiatives.
42. For the above mentioned reasons the Commission respectfully submits that the second plea in law is unfounded as well and that hence the applicant's allegation that Article 10 (1) (c) of Regulation 211/2011 is itself incompatible with the Treaties is equally unfounded.

Third plea in law, alleging infringement of Article 10 (1) (c) of Regulation 211/2011 by the manner in which the Commission set out the reasons for not submitting a proposal for a legal act

43. By the first limb of this plea (paragraphs 147 – 151 of the application) the applicants criticise that the Commission failed to set out its legal conclusions on the citizens' initiative at issue separately from its political conclusions, contrary to what is required by recital 20 of Regulation 211/2011.

44. The Commission recalls, firstly that in accordance with point 10 of the "Interinstitutional agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation" (OJ 1999 C 73, p. 1) recitals, serving the purpose of setting out concise reasons for the chief provisions of the enacting terms, "*shall not contain normative provisions*". Given that **the text of Article 10 (1) (c) of Regulation 211/2011 does not contain an obligation for the Commission to set out its legal conclusions on a citizens' initiative separately from its political conclusions such an obligation cannot be derived from recital 20 of that Regulation** (on the relevance of the said interinstitutional agreement for interpreting provisions of secondary Union law cf. Opinion of AG Geelhoed of 10 September 2002 in Case C-491/01, *The Queen v Secretary of State for Health ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, point 173, in conjunction with footnote 82).
45. Secondly, in the contested Communication **the Commission did indeed set out separately its legal and political conclusions on the citizens' initiative at issue.** Section 2 ("State of play") of that Communication contains mainly a detailed description of international, Union, and Member States' national law regarding respectively human embryonic stem cell research (section 2.2.) and development cooperation (section 2.3.). That section also contains an analysis of the factual situation in regard of human embryonic stem cell research and development cooperation. The subsequent section 3 ("Assessment of the European citizens' initiative requests") contains the genuinely political conclusions drawn by the Commission.
46. By the second limb of this plea (paragraphs 40 – 129 of the application) the applicants criticise the alleged insufficiency of the reasons for not submitting a proposal for a legal act set out in the contested Communication.
47. The Commission would recall that **the function of a communication presented by the Commission after receiving a citizens' initiative is to allow for a possible political debate.** It is against the background of that objective that the precise content and scope of the obligations for the Commission in setting out the reasons for not submitting a proposal for a legal act falls to be determined. In the Commission's view, the reasons it is obliged to set out after receiving a citizens' initiative must be of such nature as to allow for a political debate, thereby **enabling the European Parliament and, ultimately, the citizens to exercise their political control over the Commission.** Conversely, it is not required by

Article 10 (1) (c) of Regulation 211/2011 that the reasons to be set out in a Communication under that provision be academically exhaustive. Finally, the sufficiency of the reasons given must be assessed in relation to the subject matter of the citizens' initiative concerned, i.e. ultimately in relation to the subject matter of the legal act at which that citizens' initiative aims.

48. Conversely, the fact that another institution or indeed the organisers or signatories of the citizens' initiative concerned do not agree with factual assumptions or legal interpretations expressed in the reasons set out by the Commission for not submitting a proposal for a legal act is irrelevant for assessing whether the latter has discharged its obligation under Article 10 (1) (c) of Regulation 211/2011. Rather is the question whether such factual assumptions or legal interpretations are convincing one of the elements to be raised, as the case may be, throughout the political debate following a communication presented pursuant to that provision. Only in extreme cases of manifest incorrectness of such factual assumptions or legal interpretations the Commission could be said not to have discharged its obligation under Article 10 (1) (c) of Regulation 211/2011.
49. In the Commission's view, the fact that another institution or indeed the organisers or signatories of the citizens' initiative concerned do not share its political assessment – based on the reasons set out in its communication pursuant to Article 10 (1) (c) of Regulation 211/2011 – that it is not appropriate to submit a proposal for a legal act after receiving a citizens' initiative is equally irrelevant for assessing whether it has complied with its obligation under that provision. Likewise, it is irrelevant in that regard whether another institution or indeed the organisers or signatories of the citizens' initiative agree or not with the value judgments underlying such political assessment.
50. In respect of the developments at paragraphs 48 and 49 above a comparison by analogy can be drawn with the case-law of the Union judiciary on the obligation to state reasons according to which the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (Case C-367/95 Commission v Sytraval and Brink's France [1998] ECR I-1719, paragraphs 67 and 63). Again, in extreme cases of a manifest and severe inconsistency in those reasons, the Commission could be said not to have discharged its obligation under Article 10 (1) (c) of Regulation 211/2011.

51. In the present case, the Commission takes the view that the reasons set out in the contested Communication make possible a political debate, thereby enabling the European Parliament and, ultimately, the citizens to exercise their political control over the Commission. Hence, it does not deem necessary to discuss in detail the various inconsistencies and misrepresentations of the contested Communication.
52. At paragraphs 53 – 63 of the application the applicants criticise in essence that the Commission did not espouse their reading of the scope and legal implications of the judgment of the Court in case C-34/10, Brüstle [2011] ECR I-9821 for the issues covered by the subject matter of the citizens' initiative at issue. In doing so, they merely display their disagreement with the Commission's interpretation of that judgment (cf. section 2.1 *in fine* of the contested Communication) according to which the latter does not deal with the question of whether scientific research involving the use of human embryos can be carried out or funded. However, as pointed out at paragraph 48 above, the fact that the organisers of the citizens' initiative concerned do not agree with factual assumptions or legal interpretations expressed in the reasons set out by the Commission for not submitting a proposal for a legal act is irrelevant for assessing whether the latter has discharged its obligation under Article 10 (1) (c) of Regulation 211/2011.
53. At paragraphs 64 – 66 of the application the applicants criticise that the Commission, regarding the issue of research on human embryonic stem cells, failed to "clarify" its position in regard of the legal status of the human embryo. However, the subject matter of the legal act at which the citizens' initiative at issue aims is not clarifying that legal status. Rather does that subject matter consist in three clearly defined amendments to legislative acts (cf. paragraph 12 above). These amendments do not imply defining or clarifying the legal status of the human embryo. As pointed out at paragraph 47 *in fine* above, the sufficiency of the reasons given must be assessed in relation to the subject matter of the citizens' initiative concerned, i.e. ultimately in relation to the subject matter of the legal act at which that citizens' initiative aims. The Commission thus lived up to this standard by making its political assessment regarding the citizens' initiative at issue, without taking position, in the abstract, on the legal status of the human embryo.
54. At paragraphs 67 – 90 of the application the applicants in essence express their disagreement with the political assessment by Commission regarding the issue of research on human embryonic stem cells, as to the relevant ethical approach (cf. e. g. the

criticism at paragraph 70 of the application regarding an allegedly "utilitarian approach") and as to the sufficiency of certain safeguards ("triple lock") to which the Commission refers in the contested Communication (paragraphs 75 – 90 of the application). However, as pointed out at paragraph 48 above, **the fact that the organisers of the citizens' initiative concerned do not agree with factual assumptions in the reasons set out by the Commission for not submitting a proposal for a legal act is irrelevant for assessing whether the latter has discharged its obligation under Article 10 (1) (c) of Regulation 211/2011.**

55. At paragraphs 91 – 117 of the application, dealing with the issue of financing of abortions in developing countries through the financing instrument for development cooperation, the applicants criticise in essence, firstly, that the Commission failed to "clarify" its position in regard of the legal status of the human embryo and secondly express their disagreement with the Commission's political assessment and the underlying value judgments and factual assumptions.
56. This criticism regarding the first point is unfounded for the reasons explained at paragraph 530 above.
57. Regarding the second point, the Commission would recall its position that the fact that the organisers of a citizens' initiative do not agree with the Commission's political assessment and the underlying value judgments and factual assumptions set out in a Communication under Article 10 (1) (c) of Regulation 211/2011 is irrelevant for assessing whether the latter has discharged its obligation under that provision.
58. Finally, at paragraphs 118 – 129 of the application dealing with the issue of amending the Financial Regulation, the applicants, firstly, criticise the brevity of the reasons set out in the contested Communication and, secondly, in essence express their disagreement with the Commission's political assessment and the underlying value judgments and legal interpretations.
59. Regarding the first point, the reasons set out in the contested Communication, whilst being admittedly succinct, **make possible a political debate,** thereby enabling the European Parliament and, ultimately, the citizens to exercise their political control over the Commission. The Commission has indeed explained the contested Communication that the combined legal effect of the Financial Regulation and of primary law in its view

sufficiently addresses the concern raised by the citizens' initiative at issue. On the second point, the criticism advanced by the applicants is equally unfounded for the reasons explained at paragraphs 48 and 49 above.

60. In the light of the foregoing, the Commission respectfully submits that *in casu* the reasons for not submitting a proposal for a legal act set out in the contested Communication fully satisfy the requirements of Article 10 (1) (c) of Regulation 211/2011 and that, hence, also the third plea in law is unfounded.

Conclusion

61. All three pleas in law being unfounded, the action for annulment is so as well.

**IN THE LIGHT OF THE FOREGOING, THE COMMISSION RESPECTFULLY
SUBMITS THAT THE COURT SHOULD:**

- reject the action as inadmissible and, in any event, unfounded;
- order the applicants to pay the costs.


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