

8th April 2014

LEGAL ANALYSIS OF THE ONE OF US INITIATIVE

The “One of Us” initiative demands a stop to “research activities that destroy human embryos, including those aimed at obtaining stem cells, and research involving the use of human embryonic stem cells in subsequent steps to obtain them”.

Consideration on norms and premises – Oliver Brustle vs Greenpeace

It should firstly be taken into account that the question regards the definition of the human embryos within the framework of the Directive 98/44/CE art. 6n. 2 lett c stating: **On the basis of paragraph 1, the following, in particular, shall be considered unpatentable: (c) uses of human embryos for industrial or commercial purposes.**

The referring court (Bundesgerichtshof) wanted to ascertain whether human embryonic stem cells which serve as base material for the patented processes constitute ‘embryos’ within the meaning of Article 6(2)(c) of the Directive. It also wanted clarification on whether the organisms from which those human embryonic stem cells can be obtained constitute ‘human embryos’ within the meaning of that article.

This case has no connection with the “One of Us” initiative. Indeed, **the Court of Justice of the EU’s decision does not prevent scientist from experimenting on human embryos, just that they will not be able to patent their work in the European Union.** The “One of Us” initiative aims to use the recognition of the legal status of the embryo as an individual as the first step towards justifying the banning of the right of abortion and, as a consequence, putting women’s health at risk.

The lack of a connection between the “One of Us” initiative and this case is confirmed by the General Attorney in its Conclusion in which two points are particularly pertinent:

- *The provisions of Directive 98/44 provide an important indication. What should be defined? **The appearance of life?** The amazing moment when, in utero, what was perhaps only a group of cells changes in nature and becomes, whilst not yet a human being, an object, or even a subject of law? **Not at all.** This is not the question which follows from the wording and the approach taken by the directive which, through the wise wording it uses, leads us to define not life, but the human body. It is ‘the human body, at the various stages of its formation and development’ for which it demands protection when it declares it expressly unpatentable.*

From choice, a world of possibilities



- *I think that it also worth pointing out that the legal definition which I will propose falls within the framework of the technical directive under examination and that, in my view, **legal inferences cannot also be drawn for other areas which relate to human life**, but which are on an entirely different level and fall outside the scope of Union law. For that reason, I consider that the reference made at the hearing to judgments delivered by the European Court of Human Rights on the subject of **abortion is, by definition, outside the scope of our subject**. It is not possible to compare the question of the possible use of human embryos for industrial or commercial purposes with national laws which seek to provide solutions to individual difficult situations.*

The Court followed this approach as it stated in the sentence:

*As regards the meaning to be given to the concept of ‘human embryo’ set out in Article 6(2)(c) of the Directive, it should be pointed out that, although, the definition of human embryo is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems, **the Court is not called upon, by the present order for reference, to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of the Directive.***

[This approach has been adopted also in a similar case: Case C-506/06 Mayr in 2008 that involved artificial fertilisation and viable cells treatment (ECR I-1017, paragraph 38).]

The Rebuttal:

The rationale on not stopping funding of activities and research activities that destroy human embryos should concentrate on the **freedom of research activities**, specifically Article 15 of International Covenant on Economic, Social and Cultural Rights: *The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.*

The mentioned article comes directly from the article 27 of the **Universal Declaration of Human Rights:**

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

From choice, a world of possibilities



It should therefore be concluded that the **“One of Us” initiative’s first proposal goes against the two forementioned treaties.**

Furthermore, it should be taken into account that the One of Us Initiative suggested the amendment of the [Proposal](#) of the Regulation of the European Parliament and Council that establishes a framework program for research and innovation (2014-2020) - Horizon 2020 - COM (2011) 809 . Horizon 2020 is the new EU's programme for research and innovation. It will run from 2014 to 2020 and it was first proposed by the European Commission in November 2011.

The suggested amendment would be under the ethical principles and would state that 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, shall not be financed.

It is important to underline that the Horizon2020 Regulation **has been approved** on the 21st November 2013 by plenary vote in the European Parliament. The Proposal was approved without major changes/additions, meaning that the One of Us suggestion has definitely not been taken into account.

The “One of Us” initiative demands a stop to “abortion, directly or indirectly, through the funding of organisations that encourage or promote abortion”.

The Rebuttal:

SRH & EU Development Cooperation policy

The “One of Us” initiative wants to add an Amendment to Regulation (EC) N. 1905/2006 of the European Parliament stating 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 Programme of Action, the Cairo Agenda and the Millennium Development Goals, in particular MDG 5 on health and maternal mortality, can be interpreted as providing a legal basis for using EU funds to finance directly or indirectly abortion.*

Art. 168 TFUE is considered pertinent by the “One of Us” organizers to support the petition. However, the article is clear, stating that *“the EU’s action, which shall complement national policies, shall be directed towards **improving public health** [...] Union action shall respect the responsibilities of the Member States for the definition of*



their health policy and for the organisation and delivery of health services and medical care”.

The definition when life begins is not part of the European Commission’s competence. The competence in matters related to definition of life and abortion laws are within the EU member states and, in the context of EU development aid, in the beneficiary countries.

Working on social development in developing countries, the EU’s external action in the field of Sexual Reproductive Health (SRH) falls under the umbrella of EU Development Cooperation policy (Part Five, Title III, Chapter 1 of the TFEU). Within this policy field the EU exercises its own complementary competence acting in accordance with the ordinary legislative procedure (Article 209 TFEU).

Regulation 1905/2006 provides a Framework for financing international program support actions in various areas including:

“addressing the essential needs of the population with prime attention to primary education and health, in particular by: Health:

(i) increasing access to and provision of health services for lower income population groups and marginalised groups, including women and children, persons belonging to groups subject to ethnic, religious or any other discrimination and persons with disabilities, with a central focus on the related MDGs, namely reducing child mortality, improving maternal and child health and sexual and reproductive health and rights as set out in the Cairo Agenda of the International Conference on Population and Development (ICPD), addressing poverty diseases, in particular HIV/AIDS, tuberculosis and malaria;”

The EU has a duty to comply with its commitments in relation to the United Nations in accordance with Article 208 TFEU. This means that through its shared competence in the external policy area “development cooperation and humanitarian aid”, the EU must, **in accordance with its international commitments under the ICPD**, support actions in developing countries to protect women’s health including actions for safe and accessible abortion. The amendment proposed by the Initiative, goes against EU the international commitments in the context of the United Nations.

Andrea Rotondo
IPPF EN Advisor

From choice, a world of possibilities

