


The European Citizens' Initiative "One of Us". A Gloss to the Judgment of the CJEU of 19 December 2019 in Case C-418/18 P. Puppinck and Others v. Commission

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Abstract: In December 2019, the Court of Justice issued a judgment in Case C-418/18 P. Puppinck and Others v. European Commission, ending a long-standing dispute between the organizers of the European Citizens' Initiative "One of Us" and the European Commission. Ruling in the appeal proceedings, the CJEU dismissed in its entirety the application to set aside the judgment of the General Court of the European Union of 23 April 2018 in case T 561/14 One of Us and Others v. Commission. The "One of Us" organizing committee requested the repeal of the European Commission's communication following the public initiative on the grounds that it lacked follow-up. The aim of the "One of Us" initiative was to strengthen the protection of dignity, the right to life and the integrity of every human being from conception in the EU's areas of competence. The initiative proposed amendments to three legislative acts on research, humanitarian cooperation and their funding. The judgment under discussion is important for the interpretation of EU law in two areas. First, this is the first judgment that interprets the systemic position of the European Citizens' Initiative in such a comprehensive manner. The case confirms that the ECI is an autonomous institution of EU law, whose systemic position is shaped by the principle of institutional balance and participatory democracy. The ECI is a form of emanation

of deliberative democracy. Second, the judgment may be considered as confirming the exclusive competence of the Member States in the area of protecting human life at the prenatal stage. On the one hand, this means that EU law cannot impose its own standards on the right to life on Member States. On the other hand, in the area of its competences, it seems that the EU can have its own ethical position, allowing, while respecting the triple lock system, research involving the use of human embryonic stem cells and financing abortions as part of the package of medical assistance offered to the developing countries.

1. Introduction

In December 2019, the Court of Justice of the EU (CJEU) issued a judgment in case C-418/18 P. Puppinck and others v. Commission (EC)¹ ending a long-term dispute between the organizers of the European Citizens' Initiative (ECI) "One of Us" and the European Commission, in which the organizers sought the annulment of a communication of the Commission.² Ruling in the appellate proceedings, the CJEU dismissed in its entirety the application to set aside the judgment of the General Court of the European Union of 23 April 2018 in case T 561/14 One of Us.³ It thus confirmed the compliance with EU law of the communication in which the EC had refused to take follow-up action. The ruling makes an important contribution to the interpretation of a relatively new instrument of deliberative democracy in the EU. It also indirectly consolidates the position of the CJEU in the area of protection of dignity and the right to life at the prenatal stage.

¹ CJEU Judgment of 19 December 2019, Puppinck and Others v. Commission, Case C-418/18 P, ECLI:EU:C:2019:1113, hereinafter referred to as the Puppinck judgment.

² Commission Communication of 28 May 2014 on the European Citizens' Initiative "One of Us", COM(2014) 355 final.

³ CJEU Judgment of 23 April 2018, One of Us and Others v. Commission, Case T-561/14, ECLI:EU:T:2018:210, hereinafter referred to as "One of Us" judgment.

2. Facts

The European Citizens' Initiative "One of Us"⁴ was one of the first initiatives⁵ submitted to the European Commission for registration and the second to exceed the threshold of one million statements of support. It still remains at the forefront of initiatives with the widest support.⁶ It received the highest number of declarations of support in Italy, Poland, Spain, Germany and Romania, collectively exceeding the minimum support threshold in 18 Member States.⁷ In Malta, the initiative was supported by 4.4% of the population (2,3017 declarations). "One of Us" is also the only initiative for which the European Commission, after hearing it, refused to take any follow-up measures.⁸

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- ⁴ The original language of the initiative was Italian, in which it was entitled "Uno di noi".
- ⁵ Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (O.J.E.C. L65, 11 March 2011), 1 (hereinafter the ECI Regulation) has been applicable since April 2012. In May 2012, the first initiatives were successfully submitted. In total, in May, the European Commission accepted 6 applications for registration. Two of these initiatives ("One of Us" and "Right to Water") exceeded the required threshold of 1 million signatures and were classified by the EC as "successful" ECIs. The data is based on information provided by the European Commission, accessed 19 November 2021, https://europa.eu/citizens-initiative/_en.
- ⁶ The initiative collected 1,721,626 signatures. Given the technical difficulties in the signature collection process and the late implementation of the electronic system, resulting from the pioneering nature of the "One of Us" ECI, the number of signatories could be much higher, as indicated by Patrick Grégor Puppinc, chairman of the Organising Committee of the Initiative, in a letter addressed to the European Ombudsman in 2014, accessed May 19, 2023, <https://www.ombudsman.europa.eu/pl/correspondence/en/56982>.
- ⁷ Calculated in accordance with the principle of degressive proportionality, the minimum threshold of support from a given country is the product of the number of Members of the European Parliament and the number of MEPs representing individual countries. For an initiative to be admissible, the minimum threshold of support must be exceeded in ¼ of the Member States.
- ⁸ Most of the initiatives meeting the requirement of one million signatures met with the legislative actions of the European Commission, which, although to a limited extent, referred to the postulates presented in the applications. In the case of another initiative, "Stop vivisection", which concerned the proposal to create a European legal framework to abolish animal experimentation, the Commission indicated a number of soft measures taken, but still the most visible was the organization of a scientific conference; accessed January 4, 2023, <https://ec.europa.eu/citizens-initiative/public/initiatives/successful/details/follow-up/2012/000007/pl?!g=pl>; accessed January 4, 2020, <https://op.europa.eu/en/publication-detail/-/publication/11f840dc-be3f-11e9-9d01-01aa75ed71a1/language-en>. Dissatisfied with the actions of

The citizens' committee of the "One of Us" initiative invited the European Commission to take legislative action to strengthen the protection of dignity, right to life and integrity of every human being from conception in the areas of EU competence. The organizers justified the initiative in particular with the then new *Brüstle* judgment,⁹ in which, in their interpretation, the CJEU confirmed the dignity and integrity of the human embryo and indicated that it constitutes the beginning of the development of the human being.

The Annex to the "One of Us" initiative proposed specific amendments to the three existing or proposed legislative acts. In the first of the regulations, concerning the financial rules applicable to the EU budget,¹⁰ it was proposed to introduce a new article stating that Union funds shall not be used for activities that result in or imply the destruction of human embryos. The planned regulation establishing the framework program for financing research and innovation, *Horizon 2020*, assumed the inclusion of provisions that would exclude the funding of research in which human embryos are destroyed, research aimed at obtaining stem cells and research using embryonic stem cells in subsequent stages after they are obtained.¹¹ The third regulation, concerning development cooperation,¹² proposed the inclusion of provisions according to which EU financial assistance could be used, directly or indirectly, to finance abortion.

The initiative was registered on May 11, 2012. After the collection period for statements of support, it was finally submitted to the European

the Commission, the organizing committee of the ECI submitted a complaint to the European Ombudsman (<https://www.ombudsman.europa.eu/en/decision/en/78182>), which was however rejected.

⁹ CJEU Judgment of 18 October 2011, *Oliver Brüstle v. Greenpeace eV*, Case C 34/10, EU:C:2011:669; referred to as the *Brüstle* case.

¹⁰ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (O.J.E.C. L248, 16 September 2002).

¹¹ Proposal for a regulation of the European Parliament and of the Council establishing *Horizon 2020 – The Framework Programme for Research and Innovation (2014–2020)*, COM(2011) 809.

¹² Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (O.J.E.C. L378, 27 December 2006).

Commission on February 28, 2014. After verifying the number of declarations, the organizing committee was heard by the European Commission on April 9, 2014, followed the next day by a public hearing in the European Parliament (EP).

In a communication adopted on May 28, 2014, the Commission stated that it would not take any follow-up action. The communication consisted of four parts (points). In the first one, the EC introduced the subject matter and purpose of the disputed initiative and the three proposed legal changes. In the second, most extensive part, it presented the legal framework for the protection of human dignity, the right to life and the integrity of the person in primary law (Articles 2 and 21 TEU, CFR) and the CJEU rulings in the Brüstle case. Referring to scientific research on human embryonic stem cells (hESC), the EC indicated their potential use in the treatment of diseases such as Parkinson's disease, diabetes, strokes, heart disease and blindness, emphasizing their value in the development of science and medicine. The EC pointed to the sufficiency of existing "triple lock" system.¹³ In the area of development cooperation, the EC indicated that the EU strategy is closely linked to the objectives and commitments of the International Conference on Population and Development and the subsequent agreements to which all Member States are party. Finally, it indicated that EU development assistance is not intended to promote abortion as a method of family planning, but remains available in a broader package of services aimed at addressing the needs of vulnerable and disadvantaged women, adolescent women, single women, displaced and refugee women, HIV-positive women and rape victims.

From the perspective of the division of competences between the Member States and the Union, it is also important that both research and development cooperation are the so-called parallel competences.¹⁴ This means that the actions of the Union do not constrain Member States from legislating in these areas. The principle of preemption or the occupied field theory,

¹³ It entails financial support for research projects that (1) comply with national laws and (2) are scientifically and ethically verified; (3) excluding from funding research projects that involve the creation of new stem cell lines or research in which embryos are destroyed to obtain stem cells.

¹⁴ Article 4(3–4) of the Treaty on the Functioning of the European Union (consolidated version 2016) (O.J.E.C. C202, 7 June 2016); hereinafter referred to as the TFEU.

typical for shared competences, does not apply here. In the communication, the EC drew attention to this fact and pointed out that the actions of the EU in the area of development cooperation are in line with those of all Member States, and correspond to the legislation of most of them in the field of research. The EC also indicated that it had conducted public opinion surveys in both areas of competence, which in both cases granted a public mandate to the EC's position.

In the third part, the European Commission set out its reasons why it did not intend to follow up. In the area of the Financial Regulation, the EC indicated that it was adopted with due regard for the provisions of primary law relating to human dignity, the right to life and the right to the integrity of the person. In the area of the then planned "Horizon" program, the EC pointed to the already conducted discussion concerning the admissibility of research on hESC, the inclusion of some issues in line with the ECI's demands (the third stage of the "triple lock") and the final acceptance by the EP and the Council of the compromise arrived at. In the area of development cooperation, on the one hand, it stressed that the scope of support provided is determined at the international level and that the Union acts in respect of the sovereign decisions of the Member States. On the other hand, the EC pointed out that access to abortion that meets minimum medical standards can dramatically reduce maternal deaths and illnesses. The fourth part of the Communication summarizes the position of the European Commission.

The Citizens' Committee of the ECI "One of Us" and its members, dissatisfied with the lack of follow up, brought an action before the General Court for the annulment of the Communication, which, following an examination of the case, was dismissed. Subsequently, the members of the Citizens' Committee filed an appeal with the CJEU.

3. Judgment of the General Court

The complaint, received by the office on July 25, 2014, was prepared by seven natural persons who formed the "One of Us" organizing committee. The action sought the annulment of the EC communication and, in the alternative, sought the annulment of the provisions of the ECI Regulation.¹⁵ However, in

¹⁵ Article 10(1)(c) of the ECI Regulation.

the course of the proceedings, the General Court found that the alternative claim was inadmissible and rejected this part of the complaint. As a consequence, neither the Council nor the Parliament were granted legal standing as parties to the proceedings. However, by the decision of the General Court, they were admitted as outside interveners supporting the position of the European Commission. Two NGOs (International Planned Parenthood Federation and Marie Stopes International), which lobby for the expansion of access to abortion, also applied for outsider-intervener status in support of the EC's position. However, the lobbyists' requests were rejected. The Republic of Poland, on the other hand, intervened on the side of the applicants. The General Court, respecting the special circumstances of the case and its importance, furthermore availed itself of the possibility of referring the case to an extended composition of the court.

Due to the precedent-setting nature, the decision on the merits of the case was preceded by findings regarding the *locus standi* of the complainant and the admissibility of the complaint itself. First, many entities contested the legitimacy of the organizing committee,¹⁶ which was established under the ECI Regulation¹⁷ and did not have a legal personality. In the end, the General Court also refused the "One of Us" committee's legal standing, indicating that judicial capacity belongs to committee members.¹⁸ Second, the European Commission put forward a plea of inadmissibility of the complaint, pointing out that its communication was not an act that could be challenged through an action for annulment pursuant to Article 263 TFEU. However, the position of the EC was not accepted by the Court, which found that the contested communication had binding effects that could influence the interests of the complainants by significantly changing their legal situation.¹⁹ Furthermore, due to the nature of the ECI, the Court granted it broader legal protection as in the case of petitions to the EP,²⁰ where the EP's position on petitions meeting the conditions of

¹⁶ The current solutions provide for the establishment of an organizational unit with legal personality, cf. Article 5 of the new ECI Regulation.

¹⁷ Article 3(2) of the ECI Regulation.

¹⁸ Pt. 65 of the One of Us judgment.

¹⁹ Pt. 77 of the One of Us judgment.

²⁰ Pt. 91 of the One of Us judgment.

Article 227 TFEU “escapes judicial scrutiny”.²¹ It is worth emphasizing here the position of the Court, which indicated that failure to subject the refusal decision of the European Commission to judicial review would undermine the implementation of the ECI’s objective, which is to strengthen EU citizenship and improve the democratic functioning of the Union.²² The risk of arbitrariness on the part of the Commission would discourage recourse to the ECI mechanism, not least because of the demanding procedures and conditions to which this mechanism is subject.

The complainants raised five pleas of invalidity of the EC Communication.²³ The first and the second one concerned infringement of the provisions of the ECI Regulation²⁴ and of primary law²⁵ due to the failure to take up a follow-up action in the form of the preparation and presentation of a draft of a legal act, respectively. The third plea concerned the failure to present separately the political and legal conclusions in the contested communication. The fourth allegation concerned infringement of the obligation to state reasons, and the fifth – errors of assessment committed by the EC.

In the area of the first and second plea, the complainants essentially held the position that the EC, having heard the ECI submitted to it, is under a legal obligation to respond by presenting a legislative proposal implementing the applicants’ postulates, and only exceptionally may this obligation be waived.²⁶ However, the General Court did not share the position of the parties, indicating that the legislative initiative lies within the discretionary power of the EC. The Court pointed to the quasi-monopoly of

²¹ Pt. 90 of the *One of Us* judgment.

²² Pt. 93 of the *One of Us* judgment.

²³ Pt. 102 of the *One of Us* judgment.

²⁴ Article 10(1)(a) c of the ECI Regulation.

²⁵ Article 11(4) TEU.

²⁶ According to the complainants, only one of the three conditions could exempt the EC from its obligation: first, if the provisions proposed by the ECI were no longer necessary because (1) they were adopted in the course of the ECI procedure, or (2) the problem has become obsolete, or (3) it has been satisfactorily resolved. Second, if the adoption of the provisions postulated by this initiative became impossible after its registration. Third, if a given citizens’ initiative did not contain a specific proposal for action, but merely communicated the existence of a problem to be resolved, leaving it to the Commission to determine, if necessary, the action that could be taken; see paragraph 103 of the *One of Us* judgment.

the legislative initiative granted to the EC by the Treaties, which results from the function of promoting the general interest of the Union conferred by primary law and also the total independence under primary law with regard to the tasks to be performed.²⁷ Another condition highlighted by the Court was the inclusion of an institutional ECI as a means of dialogue with civic associations and civil society (an instrument of participatory democracy).²⁸ The Court also confirmed the similarity of the ECI with the indirect legislative initiative of the EP and the Council of the European Union, which do not impose an obligation on the EC to submit a legislative proposal.²⁹

Finally, the allegation of non-separation of legal and political conclusions was also dismissed. In that regard, the General Court recalled that, although the preamble to the ECI Regulation provided that the Commission should set out its legal and political conclusions separately, that does not mean that the Commission has an obligation in that regard since the preamble to the EU act has no binding force. The operative part of the Regulation does not repeat the obligation to present proposals separately.³⁰ Furthermore, the Court pointed out that even if such an obligation were legitimate, the failure to comply with it was formal in nature and did not constitute grounds for annulling the Communication.³¹

In examining the fourth and fifth pleas, the General Court reviewed the obligation to state reasons as a procedural requirement and, with reference to the suggested errors of assessment, reviewed the adequacy of the statement of reasons.³² These pleas were also finally dismissed.

As regards the area of comments on the assessment, the General Court pointed out that the information contained in the contested communication was sufficient to enable the applicants to understand the reasons why the Commission had refused to follow up on the contested ECI. In addition, the Court held that the argument that the Commission had infringed the duty to state reasons by failing to define and explain the legal status

²⁷ Pt. 110–111 of the One of Us judgment.

²⁸ Pt. 112 of the One of Us judgment.

²⁹ Pt. 113 of the One of Us judgment.

³⁰ Recital 20 and Article 10(1)(c) of the ECI Regulation.

³¹ Pt. 131 of the One of Us judgment.

³² Pt. 146 of the One of Us judgment.

of the human embryo in the contested communication was irrelevant and should be rejected since the sufficiency of the statement of reasons had to be assessed only in relation to the objective pursued by the ECI at issue.

In analyzing the adequacy of the statement of reasons, the Court concluded that, in view of the wide discretion enjoyed by the Commission in the exercise of its powers of legislative initiative, its decision not to submit a proposal for a legislative act to the legislator should be subject to limited review.

First, the General Court held that the Commission had not committed a manifest error of assessment in finding that the *Brüstle* judgment was irrelevant to the assessment of the lawfulness of the communication at issue, since that judgment concerned only the question of the patentability of biotechnological inventions and did not address the question of the funding of research activities that involve or imply the destruction of human embryos. Second, the Court held that the applicants had failed to demonstrate the existence of a manifest error of assessment concerning the Commission's ethical approach to research on hESC. The Court also rejected the argument that such research was not necessary on the grounds of insufficient justification of the said argument. Third, the Court held that the Commission had not committed a manifest error of assessment when it referred to a publication by the World Health Organization according to which there was a link between unsafe abortions and maternal mortality in order to conclude from this that a ban on abortion financing would hinder the EU achieving the objective of reducing maternal mortality. Fourth, the Court held that the Commission had not committed any manifest error of assessment when it decided not to submit to the EU legislature a proposal to amend the Financial Regulation in order to prohibit the financing of activities which appear to be contrary to human dignity and human rights.

4. Judgment of the Court of Justice

Patrick Puppinck, together with the other six members of the organizing committee of the European Citizens' Initiative "One of Us", applied for annulment of the judgment of the General Court. The applicants put forward five pleas in law which, in their view, constituted grounds for setting aside the judgment.

In the first plea, the applicants alleged that the General Court erred in law by not recognizing the specific nature of the ECI, which manifests itself in the impact on the quasi-monopoly of the EC's legislative initiative. In their opinion, the Commission's discretionary powers in the field of legislative initiative must be limited, and the use of its discretion to block the objectives of the ECI should be considered unlawful.³³ In their view, given the characteristics of an ECI, the costs and the organizational difficulties associated with it, the initiative cannot be equated with a mere "request" to the Commission to take appropriate action, which can be submitted by anyone. However, after interpreting the ECI linguistically and systematically and after indicating the scope of the discretionary power and the principle of institutional balance, the Court of Justice upheld the General Court's position. Furthermore, the CJEU pointed out that the failure to submit a legislative proposal does not affect the effectiveness of the ECI, whose particular, added value lies not in the certainty of its outcome, but in the possibilities and opportunities it creates for Union citizens to launch a political debate within the EU institutions, without having to wait for the start of the legislative procedure.³⁴

The second complaint concerned the failure to take into account the obligation, as interpreted by the applicants, to submit legal and political conclusions separately. The CJEU upheld the Court's reasoning pointing to the well-established line of jurisprudence as to the lack of legal force of the preamble to the ECI Regulation, from the wording of which this obligation was interpreted. In addition, the Court interpreted the phrase "separately" used in the preamble, arguing that, as used in recital 20 of that regulation, it should be understood that both the legal and political conclusions of the Commission should be set out in the communication concerning the ECI in question in such a way that the legal and political nature of the reasons given in that communication could be understood. Nevertheless, that term cannot be understood as imposing an obligation to formally separate legal proposals, on the one hand, from policy proposals,

³³ Pt. 46 of the Puppincck judgment.

³⁴ Pt. 70 of the Puppincck judgment.

on the other, and that the sanction for breach of that obligation could be the annulment of the communication in question.³⁵

In their third plea, the appellants submitted a claim that the General Court erred in law when it held that the communication at issue should be subject to a limited review, only as regards the exclusion of manifest errors of assessment. They took the view, first, that the Court relied on case law not applicable to the ECI mechanism and, second, that it did not propose any criterion enabling it to distinguish between errors which are “manifest” and those which are not.³⁶

The Court of Justice upheld the interpretation according to which the wide discretion of the EC results in limited judicial review.³⁷ According to the CJEU, the purpose of judicial review is to verify, in particular, the sufficiency of the statement of reasons and the absence of manifest errors of assessment.³⁸ The CJEU further clarified the differences between the petition to the EP and the ECI.³⁹

The fourth plea concerned a limited review of the EC’s discretion and an incomplete review of the communication, which was limited to determining whether the errors were obvious in nature. First, the “One of Us” organizing committee complained that the Court should have assessed the proposed prohibition of research on hESC on the grounds of the interpretation of the *Brüstle* judgment, which was proposed by the appellants. In their opinion, this would result in the need to adjudicate inconsistencies between the current legal solutions in the field of hESC and this judgment. According to the applicants, it is possible to infer from that judgment the attribution of the characteristics of a human person to an embryo. Referring to the first of the arguments, the CJEU pointed to an erroneous interpretation of the *Brüstle* judgment and, consequently, did not find an infringement of the law by the General Court. Second, according to the complainants, the EC should define the legal status of the human embryo in the communication. The CJEU stated that this was an irrelevant issue and

³⁵ Pt. 80–81 of the *Puppinck* judgment.

³⁶ Pt. 84 of the *Puppinck* judgment.

³⁷ Pt. 89 of the *Puppinck* judgment.

³⁸ Pt. 96 of the *Puppinck* judgment.

³⁹ Points 90–92 of the *Puppinck* judgment.

could not usefully serve as a basis for annulment of the Communication.⁴⁰ Third, the applicants argued that the Court could not assess the triple lock system as adequate. However, the CJEU held that the Court does not assess the legitimacy of the adopted ethical position, but only examines the communication for obvious errors, which are not identified by either instance. Fourth, according to the complainants, the Court took the position that performing abortions financed from the EU budget reduces the number of such procedures, which they considered paradoxical. The CJEU found that the plea was based on a misinterpretation of the Court's judgment and rejected it as unfounded. Fifth, the applicants considered that the General Court had distorted their arguments concerning international commitments under the Millennium Development Goals and the program of action of the International Conference on Population and Development, which, in their view, the EC had wrongly regarded as binding legal obligations. Both the Advocate General⁴¹ and the CJEU found that the disputed communication did not contain such claims.

The fifth plea concerned the parties' claim that it was necessary to define the legal status of the human embryo in order to reject the three proposals contained in the ECI for the amendment of existing or draft EU legislation. As the organizers pointed out, the purpose of the disputed ECI was not only to adopt the three measures proposed to the Commission but mainly to strengthen the legal protection of the dignity, the right to life and the right to the integrity of every human being from the moment of conception.

The organizing committee of the "One of Us" initiative argued that the Commission was required to cooperate with the organizers of the contested ECI and to submit a follow-up legislative proposal. According to them, the General Court erred in law by failing to take into account the specific objective of this ECI when it ruled that the Commission was not

⁴⁰ Pt. 109 and 110 of the Puppinck judgment and pt. 136 of the opinion of the Advocate General.

⁴¹ Opinion of Advocate General M. Bobek delivered on 29 July 2019, Case C-418/18 P. Puppinck and Others v. European Commission, ECLI:EU:C:2019:640; hereinafter referred to as the opinion of the Advocate General.

obliged to take further action.⁴² The CJEU considered the General Court's position to be correct.

5. Commentary

The commented judgment is important for the interpretation of European Union law in two areas. First of all, this is the first judgment that interprets the systemic position of the European Citizens' Initiative in such a comprehensive manner. Second, it falls into the category of CJEU judgments confirming that the competence to protect human life at the prenatal stage remains the exclusive competence of the Member States. In the further part of the commentary, the above areas will be discussed separately.

5.1. The Constitutional Position of the European Citizens' Initiative

The CJEU's position in the area of institutional positioning of the ECI does not introduce a significant alternation, but constitutes, in principle, a confirmation of the current systematic interpretation of primary law. However, it stands in significant opposition to the position of the "One of Us" organizing committee, which overestimated the role and position of the ECI.

As intended by the creators of integration processes (Member States), the European Citizens' Initiative is fundamentally different from national initiatives. First of all, the difference lies in the fact that it is not addressed to the EU legislator, but to the European Commission. It is also not binding, but agenda-setting. Changing the addressee of the initiative from the European Parliament to the European Commission seemed to be a *sine qua non* condition for recognizing the new mechanism in primary law. The initiative is an autonomous institution of the European Union system and it is the EU law that sets its legal framework. At the same time, as the "One of Us" organizing committee rightly argued, an ECI signed by a million citizens under a cumbersome formal procedure and at significant costs should have a special status, different from, for example, requests from lobbyists or petitions to the EP.⁴³

The position of the Court of Justice, which differentiates between the legal position of the ECI and that of petitions to the European Parliament,

⁴² Pt. 120 of the Puppink judgment.

⁴³ Pt. 18 of the Opinion of the Advocate General.

should be assessed as a definitely positive development. In its judgment, the Court already pointed to the fundamental differences between the right of petition and the ECI. The fundamentally different institutional position of the ECI results from the additional conditions imposed on organizers and the procedural guarantees put in place for them.⁴⁴ As procedural guarantees, the Court recognized the right to be heard at the appropriate level, the obligation to thoroughly examine the initiative, including a simple, understandable and detailed way of demonstrating the reasons justifying the adopted position, and the obligation to publish the position and communicate it to the organizers. There are no such requirements for petitions to the EP. Due to the detailed nature of the procedure and its complexity, the ECI is also entitled to higher legal protection, which applies not only to the registration of the initiative but also to judicial review of the Commission's follow-up activities or lack thereof. Indeed, unlike a petition, which is subject to the discretionary power of a "political nature",⁴⁵ the Commission is required to set out, by means of a communication, its conclusions, both legal and political, concerning the ECI in question, any action it intends to take and the reasons for taking or not taking such action.⁴⁶ The CJEU rightly notes that such requirements are intended not only to inform the organizers of the ECI clearly, comprehensibly and in detail of the Commission's position on their initiative but also to enable the Union judiciary to review the Commission's communications.⁴⁷

The CJEU confirms the quasi-monopoly of the European Commission's legislative initiative.⁴⁸ It does so based on a linguistic and systemic interpretation of primary and secondary law. First, the CJEU points out that even one million citizens are not a representative group of citizens.⁴⁹ Second, the CJEU refers explicitly to the principle of institutional balance, indicating that the legislative initiative is an important manifestation of that principle. And the principle of institutional balance itself is specific to and

⁴⁴ Paragraph 98 of the One of Us judgment.

⁴⁵ Pt. 24 of the CJEU Judgment of 9 December 2014, *Peter Schönberger v. the European Parliament*, Case C 261/13 P, ECLI:EU:C:2014:2423.

⁴⁶ Pt. 91 of the Puppink judgment.

⁴⁷ Pt. 92 of the Puppink judgment.

⁴⁸ Pt. 31 of the Opinion of the Advocate General.

⁴⁹ Pt. 51 of the Opinion of the Advocate General.

characteristic of the European Union. The CJEU concludes that the Commission's "quasi-monopoly" on the legislative initiative, which constitutes an important difference between the legislative process in the European Union and in the nation states, is rooted in the specificity of the institutional architecture of the European Union as an association of states and peoples and is a key element of the "community method".⁵⁰ Advocate General M. Bobek justifies the EC's systemic position by: (1) the need to confer the right of legislative initiative on an independent body, able to define the European general interest and not subject to national agendas or divided political factions reminiscent of national political debates; (2) the unequal weight of individual Member States in the European Parliament; (3) the need to rely on the technical capacities of a specialized administration of a supranational (and multinational) nature, equipped with adequate means.⁵¹

What is important, the Court of Justice has also defined what the effectiveness of an ECI is (*effet utile*). The CJEU points out that the added value of an ECI does not lie in the certainty of its outcome, but in the possibilities and opportunities it offers citizens of the Union to engage in political debate within the institutions of the EU without having to wait for a legislative procedure to be launched.⁵² The Advocate General enumerates four levels of the added value of the ECI: (1) promotion of public debate; (2) increased visibility of specific topics or issues; (3) privileged access to the institutions of the European Union, allowing these issues to be effectively debated; and (4) the right to receive a reasoned institutional response facilitating public and political scrutiny.⁵³

In a broader systemic context, the CJEU ruling one more time clarifies the framework of the democratic legitimacy of the EU. In its ruling, the CJEU⁵⁴ confirms that the basis for the functioning of the European Union is the principle of representative democracy, under which citizens are directly represented at the level of the Union in the European Parliament.

⁵⁰ Pt. 46 of the Opinion of the Advocate General.

⁵¹ Pt. 46 of the Opinion of the Advocate General.

⁵² Pt. 70 of the Puppinc judgment.

⁵³ Pt. 73 of the Opinion of the Advocate General.

⁵⁴ Pt. 64 of the Puppinc judgment.

The CJEU further points out that "(...) system of representative democracy was complemented, with the Treaty of Lisbon, by instruments of participatory democracy, such as the ECI mechanism, the objective of which is to encourage the participation of citizens in the democratic process and to promote dialogue between citizens and the EU institutions."⁵⁵ In an earlier ruling, the CJEU has already confirmed that the European Citizens' Initiative is an instrument of participatory democracy related to the right to participate in the democratic life of the Union.⁵⁶

The purpose of the ECI is to give citizens of the Union a right of recourse to the Commission, comparable to the right that the European Parliament and the Council have under Article 225 TFEU and 241 TFEU, respectively, to submit any appropriate proposal for the application of the Treaties. However, it follows from both of those Articles that the right thus conferred on Parliament and the Council does not limit the Commission's power of legislative initiative. The Commission may not submit a proposal provided that it informs the institution concerned about the reasons. Therefore, an ECI submitted under Article 11(4) TEU and the ECI Regulation cannot, *a fortiori*, affect that power.⁵⁷

An interesting legal analysis was carried out by the European Commission, which denied the ECI the status of a fundamental right, arguing that the provisions on the ECI are not part of the Charter of Fundamental Rights of the European Union (CFR). On the same basis, the EC concluded that the ECI could not be entitled to legal protection of a "higher order" than the right of petition.⁵⁸ The Court pointed to the rather obvious fact that the ECI was established by a legal act that has the same legal force as the Charter of Fundamental Rights⁵⁹ and is, therefore, an EU citizen's right.

As an emanation of deliberative democracy, the EC communication should contain a statement of reasons. As the General Court points out,

⁵⁵ Pt. 65 of the Puppinck judgment.

⁵⁶ CJEU Judgment of 12 September 2017, *Anagnostakis v. Commission*, Case C-589/15 P, ECLI:EU:C:2017:663, para. 24. See: Alicja Sikora, "Zagadnienia demokratycznego charakteru Unii Europejskiej," in *Podstawy i źródła prawa Unii Europejskiej*, vol. 1, *System Prawa Unii Europejskiej*, ed. Stanisław Biernat (Warsaw: C.H. Beck, 2020), 502.

⁵⁷ Pt. 61 of the Puppinck judgment.

⁵⁸ Pt. 92 of the One of Us judgment.

⁵⁹ Pt. 99 of the One of Us judgment.

and the CJEU confirms, the EC's obligation to set out in a communication the reasons for taking or not taking action following an ECI is the concrete expression of the obligation to state reasons imposed under the ECI Regulation.⁶⁰ The obligation to state reasons becomes even more important where institutions have wide discretionary powers.⁶¹ The communication should be examined from the point of view of justification as an essential procedural requirement, but also from the point of view of its legitimacy.⁶²

If the ECI is already recognized as an instrument of deliberative democracy, it should meet the conditions that are imposed on such instruments. The literature on the subject⁶³ enumerates the following criteria for deliberative-democratic decision-making: (1) provide space for deliberation; (2) take into account the point of view of the interested and competent parties; (3) adopt decisions in accordance with the principle of openness and transparency while preserving the possibility of social control of the process; (4) introduce mechanisms to balance asymmetric relations between deliberative participants (striving for equality of parties); (5) take into account the capacity to adopt binding decisions. It seems that the conditions indicated at the outset should be fulfilled in the perception of the participants in the deliberation, and from this perspective, the ECI is not fulfilling its purpose. Referring to space for deliberation, the organizing committee pointed out that the ECI procedure is highly formalized, cumbersome and costly and, above all, the cost of the initiative is inadequate to its impact on the EU legislative process. In the area of taking into account the point of view of the interested parties, the organizing committee of "One of Us" indicated their dissatisfaction with the manner in which the public hearing had been conducted. As the committee emphasized, the EC received them coldly, and in the EP most of the time allotted for speeches was used by intervening MPs, lecturing rather than listening.⁶⁴ This also contributed to the sense of asymmetry of the position of the participants

⁶⁰ Pt. 143 of the One of Us judgment.

⁶¹ Pt. 144 of the One of Us judgment.

⁶² Pt. 146 of the One of Us judgment.

⁶³ Anne Elizabeth Stie, "Decision-making Void of Democratic Qualities? An Evaluation of the EU's Foreign and Security Policy," *RECON Online Working Paper*, no. 20 (2008): 5–6.

⁶⁴ Pt. 31 of the Opinion of the Advocate General.

in the deliberation. As the organizers pointed out, the ECI, as interpreted by the General Court, constitutes a "false promise" to the organizing committee.⁶⁵

From the perspective of deliberative democracy, the mere possibility of bringing an action for invalidity to the General Court and appeal against the decision of the Court to the CJEU should be assessed positively. It creates another forum in which the voice of the participants of the deliberations is heard. However, this is not a deliberation *per se*, because what is involved here is a court deciding the case. However, the Advocate General plays a particularly important role from the perspective of a deliberative democracy. Acting as an advocate of the public interest, their task is to present expert opinions to the public, while maintaining complete impartiality and independence.⁶⁶

In this particular case, Advocate General Bobek, referring to the non-binding nature of the ECI, uses metaphors that are rather unusual for legal documents. He states:

Put bluntly, a kind of purposive switch is suggested, by asserting that the *effet utile* of a rabbit would be lessened if it were not interpreted as being a pigeon. But, unless some genuinely advanced magic is employed, and the audience is successfully induced to believe that the aim and purpose of looking at a rabbit is to see a pigeon, a rabbit remains a rabbit. (...) Closing with the metaphor already introduced, it is for the legislature to decide, if it wishes to, that there shall no longer be a rabbit, but indeed a pigeon, or even a cat or a whale for that matter.⁶⁷

The use of animalistic metaphors and comparisons seems far from the language of deliberation based on the equality of the parties. As a result, the Advocate General's position in this particular case does not strengthen the institutional position of the ECI as a rudimentary instrument of deliberation that builds the democratic legitimacy of the Union but discourages it from entering into dialogue.

⁶⁵ Pt. 31 of the Opinion of the Advocate General.

⁶⁶ Article 252(2) TFEU.

⁶⁷ Pt. 64 and 85 of the Opinion of the Advocate General.

5.2. Dignity, the Right to Life and the Right to the Integrity of Every Human Being from the Moment of Conception

As indicated by the organizers of the ECI “One of Us”, the main objective of the initiative was to strengthen the legal protection of dignity, the right to life and the right to integrity of every human being from the moment of conception.⁶⁸ In principle, however, the recognition and development of the scope of protection of the right to life during the fetal stage is the exclusive competence of the Member States.⁶⁹ National autonomy in shaping the level of protection of human life at the prenatal stage is recalled, for example, by the Protocol on Abortion in Malta⁷⁰ or the Polish Declaration on Public Morality, annexed to the Accession Treaty of 2003.⁷¹ The condition for the ratification of the Treaty of Lisbon by Ireland was that sensitive ethical issues such as abortion would remain within the exclusive competence of Ireland.⁷²

In the areas where Member States conferred some of their competencies, in particular in areas mentioned by “One of Us” ECI, the exercise of these powers has its limits. The diversity of ethical approaches among the Member States is reflected in Article 4(2) TEU⁷³ regarding the principle of respecting the national identity of the Member States.⁷⁴ An expression of abiding by the principle of respect for national identity is also demonstrated

⁶⁸ Pt. 12 of the Puppinck judgment.

⁶⁹ Cf. Alberta Sbragia and Francesco Stolfi, “Key Polices,” in *The European Union How Does it Work?*, eds. Elizabeth Bomberg, John Peterson, and Richard Corbett (Oxford: Oxford University Press, 2012), 104. See: Ireneusz C. Kamiński and Andrzej Wróbel, “Komentarz do art. 2,” in *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. Andrzej Wróbel (Warsaw: C.H. Beck, 2020), Nb 17.

⁷⁰ Protocol No 7 on abortion in Malta attached to the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (O.J.E.C. L236, 23 September 2003).

⁷¹ 39. Declaration by the Government of the Republic of Poland concerning public morality attached to the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (O.J.E.C. L236, 23 September 2003).

⁷² Alina Kaczorowska, *European Union Law* (London–New York: Routledge, 2013), 26.

⁷³ Treaty on the European Union (O.J.E.C. C202, 7 June 2016), hereinafter referred to as the TEU.

⁷⁴ Proposal for a regulation of the European Parliament and of the Council establishing Horizon 2020 – The Framework Programme for Research and Innovation (2014–2020), COM(2011) 809.

by derogation clauses in areas of competence entrusted to the Union, in particular the derogations from the free movement of goods provided for in Article 36 TFEU.⁷⁵ The best-known example of a state invoking derogation clauses on grounds of public morality is the case of Grogan.⁷⁶ It is consistent with the commented judgment in as much as it also concerned access to abortion. In 1986, the Irish Supreme Court ruled that assisting Irish women in having abortions by informing them of the identity and location of abortion clinics abroad was incompatible with the Irish Constitution. A number of Irish students' unions provided detailed information about abortion clinics in the UK. This information was provided free of charge. The Society for the Protection of the Unborn Children (SPUC) asked for an obligation that student organizations cease this activity. The students invoked EU law, arguing that their right to freedom of expression had been violated. The CJEU refrained from taking a position on the relationship between the right to freedom of expression and the right to life, showing that since the service was provided free of charge, it falls outside the area of competence of the Union. This position confirms the principle that fundamental rights must be protected only when they fall within the scope of EU law, but not when they fall outside that scope.⁷⁷

In the current state of the law, the principle of applying the EU standard of protection of fundamental rights exclusively to Union matters derives directly from Article 51(2) of the CFR. The Charter expressly provides that the catalogue of rights, freedoms and principles contained therein shall not extend the scope of EU law or the tasks of the Union beyond its

⁷⁵ Anna Wyrozumska, "Zasada poszanowania równości i tożsamości narodowej państw członkowskich," in *Instytucje i prawo Unii Europejskiej*, eds. Anna Wyrozumska, Jan Barcz, and Maciej Górka (Warsaw: Wolters Kluwer Polska, 2020), 126.

⁷⁶ CJEU Judgment of 4 October 1991, *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*, Case C-159/90, ECLI:EU:C:1991:378; see: Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law. Cases and Materials. Second Edition* (Cambridge: Cambridge University Press, 2011), 255. See: Diarmuid Rossa Phelan, "Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union," *The Modern Law Review* 55, no. 5 (1992): 670.

⁷⁷ See: *ibid.*, 256.

competence, nor alter the competences and tasks defined in the Treaties.⁷⁸ Therefore, the EU acts in accordance with the principle of conferred powers and only within the limits of the powers delegated to it by the Member States, as contained in the TEU and TFEU. The EU institutions, including the CJEU, are bound to the full extent by this principle. Thus, the CFR does not bind Member States to the full extent of national law, but in those areas that fall within EU competence.⁷⁹

The organizers of the “One of Us” initiative referred to the Brüstle case, in which the CJEU ruled on the patentability of human embryos,⁸⁰ however, withholding decisions on ethical issues.⁸¹ In the interpretation of the organizers, which resulted directly from the description of the initiative’s objective, it was clear that in their opinion, recognizing the human embryo in the Brüstle case as the beginning of the development of a human being confirms the recognition of the right to respect for its dignity and integrity in the EU legal system. However, in the commented judgment the CJEU indicated that such an interpretation is incorrect. The CJEU also added that its position in the Brüstle case does not contain any assessment according to which research using human embryos could under no circumstances be funded by the Union.⁸²

Also in the case of the ECI “One of Us”, the CJEU and the General Court try to refrain from assessing ethical approaches and assess the Commission’s justification, the correctness of which is the subject of the question referred for a preliminary ruling, from the perspective of respecting the procedural requirement. The General Court states in its ruling that:

⁷⁸ See: Andrzej Wróbel, “Komentarz do art. 51,” in *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. Andrzej Wróbel (Warsaw: C.H. Beck, 2020), Nb 69; similarly: Robert Grzeszczak and Artur Szmigielski, “Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych,” *Europejski Przegląd Sądowy*, no. 10 (2015): 11.

⁷⁹ Edyta Krzysztofik, “Ochrona praw podstawowych w unii europejskiej po Traktacie z Lizbony,” *Roczniki Administracji i Prawa* 14, no. 2 (2014): 67.

⁸⁰ Pt. 40 of the Brüstle judgment.

⁸¹ Pt. 30 of the Brüstle judgment.

⁸² Pt. 107 of the Puppinck judgment.

The ethical approach of the ECI at issue is the one whereby the human embryo is a human being which must enjoy human dignity and the right to life, whereas the Commission's ethical approach, as it appears from the contested communication, takes into account the right to life and human dignity of human embryos, but, at the same time, also takes into account the needs of hESC research, which may result in treatments for currently-incurable or life-threatening diseases... Therefore, it does not appear that the ethical approach followed by the Commission is vitiated by a manifest error of assessment in that regard and the applicants' arguments, which are based on a different ethical approach, do not demonstrate the existence of such an error.⁸³

The General Court also pointed to the "legitimate and laudable" action of the EU in the field of development cooperation, including access to safe abortions.⁸⁴

In conclusion, in all three areas of Union competence that the organizing committee of the "One of Us" initiative demanded to change, i.e. research and humanitarian cooperation and their funding, the CJEU and the General Court see a difference in the ethical approaches of the Commission and the ECI. While the CJEU seems to have more understanding of the ethical approach of the EC, the Court does not question the right of the organizing committee to have a different ethical approach.

The judgment under discussion upholds and confirms the position of the CJEU presented in the case *SPUC v Grogan*, and currently resulting from the literal interpretation of Article 51 CFR. Leaving the competence to protect the right to life in the fetal stage within the exclusive competence of the Member States is an essential element of respecting the national identity of states and their equality. On the one hand, this means that EU law cannot impose its own standards of the right to life or its own ethical approach on a Member State. On the other hand, in the area of its competences, the Union may have its own ethical position. In this particular case, this means that it is permissible under EU law, respecting the triple lock system, to conduct research involving the use of human embryonic stem cells and to fund abortion as part of the medical aid package offered to developing countries. A significant inconsistency in respecting the equality and

⁸³ Pt. 176 of the *One of Us* judgment.

⁸⁴ See: pt. 179 and 180 of the *One of Us* judgment.

national identity of the Member States is, however, the solidarity-oriented financial participation in the activities of the Union also of those countries which in their national legislation oppose abortion or research on hESC.

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