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OPINION

on the question if the support of research on embryonic stem cells under FP 7 is compatible with human rights

I. Facts

On 30 November 2011 the European Commission published its proposal for “Horizon 2020 – The Framework Programme for Research and Innovation” for the period 2014 to 2020. The proposal contains, inter alia, a Communication from the Commission on Horizon 2020, in which cornerstones of the future Framework for Research and Innovations have been laid. Moreover, the proposal for “Horizon 2020 – The Framework Programme for Research and Innovation” contains a proposal for a Regulation establishing Horizon 2020. Furthermore, the Commission’s proposal comprises a proposal for a Council Decision establishing the Specific Programme Implementing Horizon 2020. Horizon 2020 forms the legal basis of the research funding of the European Union for the period 2014 to 2020; it is intend to replace the actual 6th Framework Programme.

The Commission’s proposals for Horizon 2020 will be adopted in the ordinary legislative procedure by the European Parliament and the European Council (Article 289 para 1 TFEU); the Specific Programme will be adopted by the European Council with the participation of the European Parliament (Article 289 para 2 TFEU).

The subject of a possible funding of the research on embryos and embryonic stem cells is touched in consideration no. 25 of the proposal for a regulation establishing Horizon 2020. According to that, the European Commission does not explicitly solicit the use of embryonic stem cells. The use of human stem cells, be they adult or embryonic, if any, depends on the judgment of scientists in view of the objectives they want to achieve and is subject to stringent Ethic Review. Furthermore, the consideration refers to the substantial

control of the relevant research exercised by the Member States. No project involving the use of human embryonic stem cells should be funded that does not obtain the necessary approvals from the Member States. The more, no activity should be funded that is forbidden in all Member States. At last, no activity should be funded in a Member State where such activity is forbidden. These principles are laid down in Article 16 of the proposal of a regulation headlined “Ethical Principles”. Article 16 para 3 refers to a number of fields of research which shall not be financed and, therefore, are exempted from any funding under the Framework Programme Horizon 2020. According to lit. c leg. cit., research activities intended to create human embryos solely for the purpose of research or for the purpose of stem cell procurement, including by means of somatic cell nuclear transfer, shall not be financed. However, according to para 4 leg. cit., research on human stem cells, both adult and embryonic, may be financed, depending both on the contents of the scientific proposals and the legal framework of the Member States involved. Consequently, the funding of research on human embryonic stem cells is not forbidden a priori. The admissibility of financing research on human stem cells depends on the legal framework of the Member States involved. No funding shall be granted for research activities that are prohibited in all the Member States. Moreover, no activity shall be funded in a Member State where such activity is forbidden. Both exemptions from a funding under the 7th Framework Programme are established in the above mentioned consideration no. 25.

II. Questions

At October, 18th 2011 the European Court of Justice took the judgment on the Brüstle-Case: The European Court of Justice in Luxembourg decided that human embryos and cells generated from them must not be patented. It has now to be examined which consequences this decision has on other EU-legislation, especially on the proposal for Horizon 2020. It is argued by lawyers (for example Prof. Gärditz, “Human dignity and research programmes using embryonic stem cells: An Analysis of Brüstle/Greenpeace-judgment of the European Court of Justice”) that the Brüstle-Judgment of the European Court of Justice needs to have consequences also in Horizon 2020 and that a decision not to exclude embryonic stem cell research from support under Horizon 2020 may be successfully challenged at the European Court of Justice. On the other hand, it is said that a decision to exclude embryonic stem cells from support under FP 7 cannot be challenged.

Does the author share this view? In case yes, who could take legal action against Horizon 2020, the specific programmes or specific projects after adoption of Horizon 2020?

III. Analysis

Against the background of the facts and the questions posed to the author it will be discussed if the funding of research on embryonic stem cells by the European Union violates fundamental rights.

1. The Binding Effect of the Charter of Fundamental Rights.

According to Article 51 of the Charter of Fundamental Rights (CFR) the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union. By this, Article 51 CFR constitutes a comprehensive binding effect on the institutions, bodies, offices and agencies of the Union. The Framework Programme Horizon 2020 determines the objectives of research funding of the European Union in the legal form of a regulation. The other legal acts implementing and establishing Horizon 2020 are part of the legislation of the Union, too. The decisions to fund a specific project are taken by the Commission. Therefore, the competent authorities of the European Union are bound by the Charter of Fundamental Rights in setting, implementing and establishing the legal framework of Horizon 2020 and in deciding on the funding of specific research projects.

This binding effect of the CFR in establishing Horizon 2020 is strongly confirmed by Article 16 para 1 of the proposal for a Regulation establishing Horizon 2020. Article 16 para 1 requests all the research and innovation activities carried out under Horizon 2020 to comply with ethical principles and relevant national, Union and international legislation. The compliance with the Charter of Fundamental Rights and the European Convention on Human Rights is requested explicitly. By this provision of secondary law the duty to comply with the CFR is repeated and emphasized notwithstanding the fact, that the binding effect of the Charter is already determined by primary law. Therefore, Article 16 para 1 of the proposal for a Regulation establishing Horizon 2020 has to be seen as a clarification and affirmation.

It can be held that in establishing the legal framework of Horizon 2020 and in deciding on the funding of specific projects the European Union has to comply with the fundamental rights guaranteed by the CFR.

2. *Violation of the right to life (Article 2 CFR)*

According to Article 2 CFR everyone has the right to life. This right guarantees the physical existence of persons enjoying the right.¹ What is not clear is, however, if human embryos, that is to say persons not yet born, enjoy the right to life. In the Convention developing the Charter the question if also the *nasciturus* can rely on the right to life was discussed controversially among the Member States. A main reason for the difference of opinion was the quite different regulation of abortion in the Member States. No agreement was found on this question. Consequently, Article 2 CFR has to be interpreted as determination of the status quo.² The European Court of Justice did not yet decide on the question if the *nasciturus* can rely on the right to life. In the judgment in the case of *Brüstle*³ the Court held that for the purpose of the protection of human dignity a human embryo cannot constitute a patentable invention. It cannot be deduced from the reasoning in this judgment that human embryos can rely on the right to life. The question from which time an embryo is a legal person enjoying fundamental rights has not been answered in the case of *Brüstle*.⁴

Article 2 CFR corresponds to Article 2 para 1 sentence 1 of the European Convention on Human Rights (ECHR).⁵ Article 52 para 3 CFR requests that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR the meaning and scope of those rights shall be the same as those laid down by the Convention. In interpreting the correspondent rights of the CFR the case-law of the European Court of Human Rights (ECtHR) has to be considered, as well. In its established case-law the ECtHR noticed that there is no agreement between the Member States to the Convention

¹ Calliess, in: Calliess/Ruffert (eds.), EUV/AEUV. Kommentar, 4th ed. 2011, Article 2 CFR para 12; Jarass, Grundrechtecharta. Kommentar, 2010, Article 2 para 5.

² See Calliess, Article 2 CFR para 11; Borowsky, in: Meyer (ed.), Charta der Grundrechte der Europäischen Union, 3rd ed. 2011, Article 2 para 7 et seq.; Voß, Schutz der Grundrechte in Medizin und Biologie durch die Charta der Grundrechte der Europäischen Union, 2011, p. 109 et seq.

³ ECJ, judgment of 18 October 2011, Case C-34/10, *Brüstle vs. Greenpeace e.v.*

⁴ See Groh, Anmerkung, EuZW 2011, 910.

⁵ See Explanation relating to the Charter of Fundamental Rights, OJ 14 December 2007, C 303/17, Explanation on Article 2 para 1; Explanation on Article 52 para 1.

concerning the time from that fundamental rights protection begins in respect to human embryos. For that reason, the Court refrained from deciding on the question if the right to life according to Article 2 ECHR protects the *nasciturus*.⁶ Accordingly, also for the corresponding right laid down in Article 2 CFR it must be considered that the question from what time a human being is protected by the right to life is still unanswered.⁷

Some academics hold the view that the scope of Article 2 CFR encompassed human being, born or unborn, totally. According to that point of view, the production and the use of embryonic stem cells violated Article 2 CFR. Consequently, the funding of research with embryonic stem cells violated fundamental rights.⁸ In consideration of the development of Article 2 CFR and of the actual case-law of the European Court of Justice and of the European Court of Human Rights this position is not confirmed.

In the case that, relying on the legal framework of Horizon 2020, research on embryonic stem cells is funded no violation of the right to life (Article 2 CFR) can be found.

3. *Human Dignity (Article 1 CFR)*

a) Human Dignity as a Fundamental Right

Pursuant to Article 1 CFR human dignity is inviolable. It must be respected and protected. As it is shown by the Explanations Relating to the Charter, Article 2 CFR requests legal protection in two respects: Firstly, human dignity is a fundamental right in itself. Secondly, human dignity constitutes the real basis of all fundamental rights.⁹ Furthermore, the Explanations point out that the ECJ confirmed in 2001 that a fundamental right to human dignity is part of Union law.¹⁰

⁶ ECHR, judgment of 8 July 2004 (GC), *Vo vs. France*, No. 53924/00, para 82 and seq.; ECHR, judgment of 16 December 2010 (GC), *A, B and C vs. Ireland*, No. 25579/05, para 237. See *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*, 5th ed. 2012, chap. 20 para 3; *Meyer-Ladewig*, *Europäische Menschenrechtskonvention*, 3rd ed. 2011, Article 2 para 3.

⁷ *Jarass*, *Charta*, Article 2 para 6.

⁸ See, e.g., *Höfling*, in: *Tettinger/Stern* (ed.), *Europäische Grundrechte-Charta*, 2006, Article 2 para 52.

⁹ Explanation on Article 1; see also *Borowsky*, Article 1 para 32; online Commentary of the Charter of Fundamental Rights of the European Union, http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf (proved: 2012-06-14), p. 25; *Frenz*, *Handbuch Europarecht* vol 4, 2009, para 812 et seq.; *Voet van Vormizeele*, in: *Schwarze* (ed.), *EU-Kommentar*, 3rd ed. 2012, Artikel 1 GRC para 4.

¹⁰ Explanation on Article 1; ECJ, judgment of 9 October 2001, Case C-377/98, *Netherlands vs. European Parliament and Council*. See also online Commentary, p. 24; *Frenz*, para 819 et seq.

It was emphasized on many occasions that the fundamental right to human dignity is of vital importance especially for the area of biotechnology.¹¹ In this respect, the right to human dignity is of utmost importance when considering the compliance of research funding with fundamental rights.¹² The funding of research activities violating the right to human dignity is illegal.¹³

b) The Scope of the Guarantee of Human Dignity in Respect of the Protection of Embryos

In its recent case-law the ECJ referred to the right to human dignity in Union law in its before-mentioned judgment in the case of *Brüstle*.¹⁴ In the judgment on a preliminary ruling the ECJ determined that every human ovum must, as soon as fertilised, be regarded as a human embryo within the meaning and for the purpose of application of the Directive on the legal protection of biotechnological inventions since that fertilisation is such as to commence the process of development of a human being. According to the ECJ, that classification must also apply to a non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted and a non-fertilised human ovum whose division and further development has been stimulated by parthenogenesis (para 35 and 36). These human ova classified as human embryos are excluded from patentability according to the Directive.

The unpatentability of inventions using human embryos has been seen by the ECJ in the light of the protection of fundamental rights and, in particular, of human dignity (para 32). Without mentioning it explicitly, it can be deduced from the reasoning of the Court that, according to its view, human embryos are protected by the right to human dignity.¹⁵ This is proved by the reasoning in para 32 of the judgment. By this, the ECJ referred to recital 16 in the preamble of the Directive which emphasised that “patent law must be applied so as to respect the fundamental principles safeguarding the dignity and the integrity of the

¹¹ *Borowsky*, Article 1 para 41; *Höfling*, Article 1 para 22; *Voert van Vormizeele*, Artikel 1 GRC para. 6.

¹² Online commentary, p. 28. See also European Commission, 2011 Report on the Application of the EU Charter of Fundamental Rights, p. 30 and seq.

¹³ Online commentary, p. 28.

¹⁴ ECJ, judgment of 18 October 2011, Case C-34/10, *Brüstle vs. Greenpeace e.V.*, para 32 et seq.

¹⁵ See *Feldges*, Anmerkung, GRUR 2011, 1107. Even before the judgment in the case of *Brüstle*: *Frenz*, para 825 et seq.

person”. Moreover, para 34 of the judgment confirms that view. The ECJ noticed that the context and aim of the Directive show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected.¹⁶ It argued from that aim of the Directive a wide meaning of the concept of „human embryo“. In an all-over analysis of the judgment it can be concluded that the ECJ referred to the fundamental principle of human dignity as the main reason for the restriction of the patentability of biotechnological inventions.¹⁷ Further on, in the 2011 Report on the Application of the EU-Charter of Fundamental Rights of the European Commission, the judgment in the case of *Brüstle* is highlighted in the chapter on human dignity. The relation to human dignity and the need to respect fundamental rights in the field of patent law had been pointed out very clearly.¹⁸

In the discussion of the judgment in the case of *Brüstle* the ECJ has been criticised because of not having reasoned adequately the protection of human embryos by way of the fundamental right to human dignity.¹⁹ In fact, the judgment is not quite clear on the question if human dignity is really a right guaranteed to the embryo or if human dignity is just a principle that requires the protection of embryos. But even if one share that criticism the fact cannot be ignored that the Court considered human dignity as a benchmark to decide on the patentability of inventions. What is vital is the perspective taken by the ECJ that the protection of human embryos – in a very broad sense developed by the Court – follows from the fundamental right to human dignity.²⁰ This point of view is even more obvious in the opinion of Advocate General Bot. Relying on Article 5 para 1 of the Directive on the legal protection of biotechnological inventions and on Recital 16 to that Directive the Advocate General considered that human dignity is a principle which must be applied not only to an existing human person, to a child who has been born, but also to the human body from the first stage in its development, i.e. from fertilisation.²¹

In fact, the reasoning in the ECJ’s judgment and the reasoning in the opinion of the Advocate General were related to the interpretation of the Directive on the legal protection

¹⁶ See *Groh*, Anmerkung, EuZW 2011, 911.

¹⁷ *Gärditz*, Gutachten, S. 2.

¹⁸ 2011 Report on the Application of the EU Charter of Fundamental Rights, p. 30.

¹⁹ *Groh*, Anmerkung, EuZW 2011, 911. Relating to Article 1 CFR in general see *Borowsky* Article 1 para 37.

²⁰ See, for more arguments, *Frenz*, para 831; see also *Voet van Vormizeele*, Artikel 1 GRC para 8.

²¹ Opinion of Advocate General Bot, 10 March 2011, Case C-34/10, para 96.

of biotechnological inventions. There was no direct link to the fundamental right to human dignity enshrined in Article 1 CFR. However, it has to be considered that at the time when the directive has been adopted the Charter has not yet been into force; it did even not exist at that time. As it is proved by the above mentioned judgment of the ECJ, the principle of human dignity existed as a principle of Union law. The principle of human dignity substantiated in relation to the unpatentability of human embryos in the directive cannot differ from the principle of human dignity now guaranteed by Article 1 CFR. This argument is as well reflected by the history of the Charter, more specifically by the adoption of human dignity as a common value, as a principle and as a fundamental right.²² One main objective of the incorporation of the right to human dignity into the Charter was to prevent current and future threats to human beings and their dignity by the developing biotechnology.²³

It is for the ECJ to give an interpretation of the right to human dignity as stipulated in Article 1 CFR. By now, human dignity is well considered in its case-law.²⁴ In analysing Article 1 CFR the ECJ has to interpret it in harmony with the constitutional traditions common to the Member States in so far as this right results from such a common tradition (see Article 6 para 2 TEU). In this respect it has to be kept in mind that the wording of Article 1 CFR strongly reflects the wording of the guarantee of human dignity in Article 1 of the German Basic Law (Grundgesetz). Therefore, the case-law of the German Constitutional Court (Bundesverfassungsgericht) relating to Article 1 of the Basic Law might be useful to determine the scope of the right to human dignity.²⁵ According to Article 52 para 4 CFR, rights of the Charter shall be interpreted in harmony with the constitutional traditions common to the Member States. Pre-condition of that harmonised interpretation is there is a constitutional tradition common to the Member States. In respect of the protection of the unborn child the German Constitutional Court has decided that even the unborn child is protected by the right to human dignity.²⁶ However, this position is not common to the Member States. Therefore, it is not possible to transfer the

²² See *Borowsky*, Article 1 para 1.

²³ *Borowsky*, Article 1 para 6.

²⁴ See *Frenz*, para 817. The author strikes that, by now, the principle of human dignity is strongly confirmed in the case-law of the ECJ.

²⁵ See online Commentary, p. 26 et seq.; *Starck*, EuR 2006, 1 (12).

²⁶ Bundesverfassungsgericht, judgment of 25 February 1975, BVerfGE 39, 1; Bundesverfassungsgericht, judgment of 28 May 1993, BVerfGE 88, 203. See online Commentary, p. 27.

case-law of the German Constitutional Court in relation to the protection of the unborn child to the interpretation of Article 1 CFR without any modification.²⁷ Moreover, it is for the ECJ to develop a European standard for the protection of human dignity.²⁸ The approach in the case of *Brüstle* reflects that the ECJ is willing to award human embryos the legal protection by way of the guarantee of human dignity.

c) A Judicial Contradiction in Assessment

If the Union decides not to prohibit funding of research on human embryos it would get into a judicial contradiction in assessment of human dignity (in comparison to the *Brüstle*-judgment). This contradiction would have to be stated between actions, which are assessed being lawful (and are even funded) on the one hand, and the unpatentability of inventions developed out of these actions on the other hand.²⁹ What is at stake is not only an economic consequence – that is to say, that the Union would fund a research project which cannot be used economically by patenting the invention. What is at stake is a judicial contradiction: In patent law the patentability is excluded according to Directive 98/44/EG on the legal protection of biotechnological inventions with reference to the protection of human dignity. Just as under consideration of the importance of the patentability for the economic use of an invention (of that the legislator of the directive is quite conscious and that is stressed by the ECJ: protection of the single European market) the exemption in the directive clearly shows a valuation of human dignity. Apparently, there is no reason for that this valuation should be reflected only in respect of patentability but not in respect of research funding. This arguments count even more because Horizon 2020 does not only tolerate the conduct of a private person (here: research project of a researcher or a research group). Actually, Horizon 2020 allows for a financial funding. By allowing the funding of research on embryonic stem cells the Union can be accused of funding research what the Union itself considers not to be protected by law in another context.

d) Obligations to Protect

The fundamental right to human dignity is the basis not only for obligations not to violate the right (negative obligations) but also for positive obligations which has to be fulfilled

²⁷ *Calliess*, Article 1 CFR para 12 ff.

²⁸ See *Calliess*, Article 1 CFR para 15.

²⁹ *Feldges*, 1108.

by the institutions, bodies, offices and agencies of the Union. As it is proved by the wording of Article 1 CFR human dignity must be respected and protected.³⁰ To say it even more clearly: Human dignity must not only be respected but also be protected. It is hard to say to what extent and which positive obligations in detail follow from fundamental rights and notably from the right to human dignity. In fact, it has to be remarked that by way of admitting the funding of research on embryonic stem cells Horizon 2020 does not provide for any protection of human dignity in relation to the unborn life. Conversely, by providing for a ban on funding any research on embryonic stem cells in Horizon 2020 the Union supplied an implementation of the obligation to protect human dignity.

e) The Statements by the Commission on the 7th Framework Programme

It is remarkable that the European Commission noticed in its Statements on the 7th Framework Programme³¹ that it proposes for Horizon 2020 to continue with the same ethical framework for deciding on the EU funding of human embryonic stem cell research as in the 6th Framework Programme. In para 4 of the Statements it is explicated that in calling for proposals the European Commission does not explicitly solicit the use of human embryonic stem cells. The use of human stem cells should depend on the judgment of the scientists. This part of para 4 can be found in consideration no. 25 of the proposal for a regulation establishing Horizon 2020 and *mutatis mutandis* in Article 16 para 1 of the proposal for a Regulation establishing Horizon 2020. As mentioned in para 4 of the Statements the Commission aimed to keep the practice relating to the funding of stem cell research. It is stated that, in practice, by far the largest part of Community funds for stem cell research is devoted to the use of adult stem cells. The Commission does not see any reason to change this approach in the 7th Framework Programme. This ambition is not implemented in the proposal relating to Horizon 2020. Especially, there is no prohibition clause in Article 16 of the proposal for a Regulation establishing Horizon 2020. In fact, the responsibility for the decision on funding stem cell research, be it research on adult or embryonic stem cells, is delegated to the Member States. An implementation in legal terms of the Commission's ambition explicated in para 4 of the Statements would require a prohibition of financing research on embryonic stem cells.

³⁰ *Voet van Vormizeele*, Artikel 1 GRC para 5.

³¹ ABI L 412/42 (30.12.2006).

IV. Opportunities of Legal Action

1. Action of Annulment against Horizon 2020

In a first step it has to be examined if there is a possibility to apply with the ECJ because of a (potential) violation of fundamental rights because Horizon 2020 allows the funding of research on embryonic stem cells. In this context, an action of annulment according to Article 263 TFEU has to be considered.³² By way of the action of annulment any entitled person can apply for a review of the legality of legislative acts (what means the compliance with Union law) with the ECJ. Member States and the European Parliament are – besides other natural or legal persons – as preferential plaintiffs entitled to bring an action according to Article 263 TFEU. As legislative acts are meant to be subject of an action of annulment an action against Horizon 2020 is admissible. The plaintiff must rely on one of the grounds for action provided for in Article 263 para 2 TFEU. What is at stake is a (possible) infringement of the Treaties, i.e. the possible violation of fundamental rights enshrined in the Charter what has the same legal value as the Treaties.

It does not seem to be quite clear if the violation of the fundamental right to human dignity by way of funding research on embryonic stem cells is caused by the underlying legislative act (that is to say Horizon 2020). In this respect, the judgment of the ECJ is hardly foreseeable. On the one hand, the provisions of Horizon 2020 allow for a funding of research on embryonic stem cells. Article 16 of the proposal for a Regulation establishing Horizon 2020 abstains from prohibiting this specific research funding whereas the funding of other research projects is banned explicitly. On the other hand, the relevant provisions do not provide for an obligation to fund research on embryonic stem cells. The Commission administrating the provisions of Horizon 2020 acts in line with the legal requirements by refusing funding research projects using embryonic stem cells.

Even assuming a positive obligation of the Union pursuant to Article 1 CFR to protect human embryos (see above, III. 3. d.), a violation of the Charter by the legislative act of the framework itself cannot be considered definitely. As shown before, the obligation to protect fundamental rights as guaranteed by the fundamental rights does generally not mean an obligation to fulfil a very specific duty. It is difficult to argue (and might be an assailable argumentation) to deduce from Article 1 CFR the very specific duty to prohibit

³² As to the admissibility see, e.g., *Cremer*, in: Calliess/Ruffert, Art. 263 AEUV para 4 et seq.

the funding of research on embryonic stem cells. Hence, a prognosis on a decision of the ECJ on an action against Horizon 2020 seems to be difficult.

What is true is that a couple of convincing reasons argue for such a prohibition of the funding of research on embryonic stem cells. Firstly, a prohibition as mentioned before formed – in the context of the other cases of prohibited funding – a coherent concept of a policy on research funding by the Union which respects and protects fundamental rights. Secondly, a prohibition of the funding of research on embryonic stem cells meant to be a very clear cut and well executable provision which guarantees a high level of protection of human embryos in fulfilling the positive obligation of the Union. In contrast, it might leave to misunderstandings if the funding of research on embryonic stem cells is not prohibited in the same manner than the other research projects prohibited in Article 16 para 3 of the proposal for a Regulation establishing Horizon 2020. And thirdly, it is for the legislator of the Union to make a clear statement concerning the protection of human dignity in general and of human embryos in particular in Horizon 2020.

2. Annulment Action against an Individual (negative) Decision on Funding

In a second step an annulment action against an individual (negative) decision on funding a research project has to be considered. According to Article 263 TFEU not only an action against legislative acts but also against acts of the European institutions is admissible. Hence, action can be brought against an individual decision on funding.

The situation in which such an action could be admissible is the following: a researcher or a research group failed with their application for funding on the basis of Horizon 2020, and, at the same time, a researcher or a research group working on a project on embryonic stem cells get the decision to obtain funding. According to Article 263 para 4 TFEU any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them with the ECJ. In contrast to preferential plaintiffs, individuals must demonstrate an interest in taking action in order to request the annulment of a European act. Thus, the contested act must be addressed to the plaintiff or must concern him or her directly and individually. Under consideration of the results of the examination of fundamental rights (see above, III.) the decision of the Commission in the above mentioned situation violated human dignity as guaranteed in Article 1 CFR and, consequently, was contrary to primary law. However, it is doubtful whether the decision

has a direct effect on the researcher or research group who failed with their application for funding. An action would only have been successful if the direct consequence of the illegal decision on funding was a positive decision on funding in the case of the applicants. It seems to be very difficult to prove this interest in a specific case.

Furthermore, an action of annulment against the decision on funding can also be taken by the preferential plaintiffs mentioned in Article 263 para 1 TFEU, that is to say, e.g., the Member States and the European Parliament. In comparison to an action taken by a research group whose application for funding was refused the preferential plaintiffs do not have to demonstrate an interest in taking action. In fact, the action is aimed to review the legality of acts of authorities of the Union. According to the results of the examination of a violation of fundamental rights the action would probably be successful.

V. Summary

It can be summarised that the funding of research on embryonic stem cells violated human dignity as guaranteed in Article 1 CFR. A decision on funding a research project on embryonic stem cells on an (individual) application on funding in favour of the applicant violated fundamental rights enshrined in the Charter. At the same time it leads to a violation of Article 16 para 1 of the proposal for a Regulation establishing Horizon 2020 that approves the binding effect of the Charter of Fundamental Rights in relation to all research and innovation activities carried out under Horizon 2020.

Against the background of that result it would be in accordance with the principles of transparency and clarity of legal provisions if research on embryonic stem cells was integrated in the catalogues of fields of research stipulated in Article 16 para 3 of the proposal for a Regulation establishing Horizon 2020 which shall not be financed. Hence, it is proposed to enter a respectively exception in the catalogue of Article 16 para 3 of the proposal for a Regulation establishing Horizon 2020 (as lit. d).

Linz, ###

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