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# Juridical Challenges of the Dialogue between the European Union and Religious and Non-confessional Organisations

*di Stéphanie Wattier*

Since 2007, article 17 of the Treaty on the functioning of the European Union provides that «the Union shall maintain an open, transparent and regular dialogue» with religious and non-confessional organisations. In 2013, the European Ombudsman condemned the European Commission to clarify the content of article 17 in order to implement it. The paper focuses on the impact of the European Ombudsman's decision on the dialogue between the European Union and religious and non-confessional organisations.

*Keywords:* Dialogue, Religions, European Union

*SUMMARY:* 1. Introduction. – 2. The Emergence of a Dialogue between Religious and Non-confessional Organisations and the European Union. – 3. The Specific Role of Religions in Participatory Democracy. The White Paper on European Governance (2001). – 4. The Legal Basis for the Dialogue between the European Union and Religious and Non-confessional Organisations. – 5. Difficulties in Implementing the Dialogue provided by Article 17 TFEU. – 5.1. A Lack of Precision. – 5.2. A Problem of Efficiency? – 6. The European Ombudsman: Role and Decision of 25 January 2013 – 6.1. The Role and Powers of the European Ombudsman. – 6.2. The Decision of the European Ombudsman of 25 January 2013 against the European Commission. – 7. Guidelines on the Implementation of Article 17 TFEU adopted by the European Commission. – 7.1. An «Open» Dialogue. – 7.1.1. Interlocutors. – 7.1.2. Topics of Discussion. – 7.2. A «Transparent» Dialogue. – 7.3. A «Regular» Dialogue. – 8. Guidelines of the Council of the European Union on the Promotion and Protection of Freedom of Religion or Belief. – 9. Another Contemporary Challenge relating to the 'Dialogue': Interfaith and Interreligious Dialogue. – 10. Conclusion.

## 1. Introduction

Participatory democracy is not only an issue for political scientists or philosophers. It raises important questions for jurists especially in relation to its potential influence on the law-making process, the adoption of legal policies and also the legal actions to which it can lead. The dialogue

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between European institutions and religions is a very significant indicator of participatory democracy, which is based on the mutual independence between the European Union and religious organisations. This feature is particularly pronounced since the adoption of article 17 of the Treaty on the functioning of the European Union, which was inserted when the Lisbon Treaty was adopted in 2007.

The European Ombudsman – which is an organ of control of the European Union – is also an important actor of the democratic process because any citizen or entity of the Union may apply to the Ombudsman to complain about misadministration of a particular organ or institution of the European Union. In this respect, the decision taken by the European Ombudsman on 25 January 2013 against the European Commission – on the basis of a request submitted by the European Humanist Federation – constitutes a significant move in this area. The Ombudsman's decision was relating to the implementation of article 17 of the Treaty on the functioning of the European Union which provides that «the Union shall maintain an open, transparent and regular dialogue» with religious and non-confessional organisations<sup>1</sup>.

From the outset, it must be underlined that religious, humanist and cultural heritage have always had an important role in the European integration process. The preamble to the Treaty on European Union provides that the countries have decided to establish a European Union «drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law».

After tracing the emergence of an informal dialogue between religious and non-confessional organisations and the European Union, this paper analyses the legal basis of this dialogue and identifies difficulties in its implementation. The paper then focuses on the role of the European Ombudsman, especially in relation to the aforementioned decision, and also on the guidelines that have been adopted by the European Commission and Council of the European Union. This paper will also pose several questions surrounding interfaith and interreligious dialogue from a juridical point of view.

<sup>1</sup> About that decision, see also: Annicchino 2013a; Toscano 2014; Annicchino 2013b; Ventura 2014.

## 2. *The Emergence of a Dialogue between Religious and Non-confessional Organisations and the European Union*

The collapse of the Berlin Wall was undoubtedly a historical turning point for freedoms in Europe. This event was a very important step in the process of achieving a 'European Union' that had begun in the fifties. However, after the collapse of the wall, it seemed that something was missing. This 'Union' needed something more than perspectives dominated by economic integration. Jacques Delor – who was President of the European Commission from 1985 until 1995 – was convinced of the need for Europe to have a «soul». According to him, economic and judicial integration were not sufficient to create a real «Union». In his speech to the churches in Brussels on February 4<sup>th</sup>, 1992 Delor said: «If in the next ten years we haven't managed to give a Soul to Europe, to give it spirituality and meaning the game will be up».

As result of Delor's wish, the association «A Soul for Europe» was created in 1994. It was a non-profit association with the aims of contributing to the building of a Europe for the people and providing a forum for an interfaith dialogue on various levels.

«A Soul for Europe» was composed by six members: five were religious; one was non-confessional. They can be identified as follow: the Congress of European Rabbis; the Church and Society Commission of the Conference of European Churches; the Commission of the Bishops' Conferences of the European Community; the Liaison Office of the Orthodox Church to the European Union; the Muslim Council for Cooperation in Europe and the European Humanist Federation.

The Conference of European Rabbis (CER)<sup>2</sup> was founded in 1956 and is the primary Orthodox rabbinical alliance in Europe. It is composed by more than 700 religious leaders of the mainstream synagogue communities, and by a standing committee of 35 members.

The Church and Society Commission of the Conference of European Churches was a protestant organisation that was created in 1960. Nowadays, it is part of the wider ecumenical organisation Conference of European Churches (CEC)<sup>3</sup>.

The Commission of the Bishops' Conferences of the European Community (COMECE) was founded with the approval of the Holy See in 1980. The COMECE is composed of Bishops delegated by the Catholic Bishops' Conferences of the 28 Member States of the European Union. It is interesting to note that a «single Bishop represents Denmark, Sweden, and Finland; while the Bishops' Conference of the United Kingdom is

<sup>2</sup> See its official website: <http://www.rabbiscer.org>.

<sup>3</sup> See its official website: <http://www.ceceurope.org>.

represented by a Bishop of the Bishops' Conference of England and Wales, and by a Bishop of the Scottish Bishops' Conference».<sup>4</sup>

The Liaison Office of the Orthodox Church to the European Union was opened by the Ecumenical Patriarchate in 1994. The title of this organisation «suggests that it represents the whole Orthodox commonwealth in relation to European institutions. However, in the following years other churches opened their own representations, namely the Orthodox Church of Greece in 1998, the Russian Orthodox Church in 2002, and the Romanian Orthodox Church and the Orthodox Church of Cyprus, both in 2007. In addition, the Serbian Orthodox Church has a representative working for the Church and Society Commission of the Conference of European Churches. In 2010, Orthodox leaders from these offices decided to set up a 'Committee of Representatives of Orthodox Churches to the European Union' in an effort to coordinate a trans-Orthodox response to the political evolution of the European Union» (Leustean 2014, 15).

The Muslim Council for Co-operation in Europe was created in 1996 in Strasbourg. This organisation is composed by the Strasbourg Mosque, the Supreme Council of Muslims of the Muslim Executive of Belgium, the Union of Islamic Communities of Spain, the Central Council of Muslims in Germany, the mosque Adda'wa of Paris and the Italian Islamic Religious Community.

The European Humanist Federation (EHF) was founded in 1991 and is composed of more than 50 humanist associations coming from 20 European countries. EHF describes itself as an «organisation of humanist associations in Europe, promoting a secular Europe, defending equal treatment of everyone regardless of religion or belief, fighting religious conservatism and privilege in Europe and at the EU level».<sup>5</sup>

Although the association 'A Soul for Europe' discontinued in 2005, it initiated a dialogue on both an informal basis, as well as between religious and non-confessional organisations and the European Union. Nowadays – as explained below – this dialogue has a formalised legal basis in the Treaty.

### 3. *The Specific Role of Religions in Participatory Democracy. The White Paper on European Governance (2001)*

The White Paper on European Governance adopted by the Commission in 2001 underlined very clearly the importance of religions and churches in the implementation of participatory democracy. It explained

<sup>4</sup> See the official website of COMECE: <http://www.comece.eu/site/en/whoware>.

<sup>5</sup> See its official website: <http://humanistfederation.eu/about.php>.

that *civil society* should be more involved in European Governance and that «Civil society includes the following: trade unions and employers organisations (social partners); non-governmental organisations; professional associations; charities; grass-roots organisations; organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities».<sup>6</sup> It is also interesting to highlight the Opinion of the European Economic and Social Committee on the role and contribution of civil society organisations in the building of Europe that noted that: «civil society organisations include: the so-called labour-market players, i.e. the social partners; the organisations representing social and economic players, which are not social partners in the strict sense of the term; NGOs; CBOs; religious communities».<sup>7</sup> In relation to participatory democracy, the White Paper stated that «civil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people's needs. Churches and religious communities have a particular contribution to make».<sup>8</sup>

### 4. *The Legal Basis for the Dialogue between the European Union and Religious and Non-confessional Organisations*

The dialogue between religious and non-confessional organisations and the European Union has only recently been given a legal basis by the adoption of the Lisbon Treaty. However, the first traces of such a dialogue appeared in 1997 when Declaration n° 11 on the status of churches and non-confessional organisations, annexed to the Treaty of Amsterdam, was adopted. This Declaration stated that «The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations». A few years later, article 52-II of the European Constitution project – that was finally aborted – provided that the «Union shall maintain an open, transparent and regular dialogue» with the churches and non-confessional organisations.

Crucially, and since then, article 17 of the Treaty on the functioning of the European Union (hereafter «TFEU») stated:

<sup>6</sup> European Commission, *European Governance A White Paper*, 25 July 2001.

<sup>7</sup> European Economic and Social Committee, *The civil society organised at the European level*, Proceedings of the First Convention Brussels, 15 and 16 October 1999, p. 38.

<sup>8</sup> European Commission, *European Governance A White Paper*, 25 July 2001.

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

### 5. Difficulties in Implementing the Dialogue provided by Article 17 TFEU

Even with the dialogue between the European Union and the religious and non-confessional organisations possessing a legal basis, its realisation raises some fundamental questions and difficulties. Key issues centre on the precise terminology that is used (4.1.) and its efficiency and concrete implications in legal terms (4.2.). In that sense, it is not really surprising that by a decision of 2013, the European Ombudsman compelled the European Commission to clarify the content of article 17 TFEU with a view of its implementation.

#### 5.1. A Lack of Precision

Since the adoption of the Lisbon Treaty, this dialogue has a legal basis yet article 17.3 is not entirely clear as to its scope. It states that «the Union shall maintain an open, transparent and regular dialogue with these churches and organisations» but is this a dialogue between the Union, the religions and the non-confessional organisations «all together»? Similarly, is it, on the one hand, a dialogue between the EU and the religions or, on the other hand, a dialogue between the EU and the non-confessional organisations?

Moreover, article 17.3 TFEU aims to be applied to the «Union» but does it mean that it refers to all of the organs of the European Union? Since the decision of the European Ombudsman, it is at least arguable that the Commission has to respect and apply article 17.3 TFEU but as regards the other institutions the situation is still unclear.

#### 5.2. A Problem of Efficiency?

As already mentioned, «Since the beginning of European integration its [the Union's] most important competencies have traditionally been perceived to relate to economic matters and so as not directly relevant to the key interests of religious actors» (Foret 2013, 33). The only European

Union competences that affect religions are *indirect* competences. The clearest illustrations can be found in the ambit of media and employment regulation. By virtue of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation stating that:

(11) *Discrimination based on religion or belief*, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons. (12) To this end, *any direct or indirect discrimination based on religion or belief*, disability, age or sexual orientation as regards the areas covered by this Directive *should be prohibited throughout the Community*.

By virtue article 3b of the Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, it was stated that:

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction *do not contain any incitement to hatred based on race, sex, religion or nationality*. Furthermore, articles 3.e and 11 provide that «audiovisual commercial communications shall not: [...] include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation» and that «[...] No television advertising or teleshopping shall be inserted during *religious services*.

As noted in these examples, this absence of direct competence in the ambit of religious matters has an impact on the efficiency of the dialogue provided by article 17 TFEU. As explained by Foret, «the direct effects of this dialogue between religious and political authorities at the European level have been weak. The EU has no oversight of the regulation of religion, a field where state sovereignty continues to prevail» (Foret 2013, 33).

With national power and State sovereignty prevailing, the relationship between State and religions differs from one country to another. Also, articles 17.1 and 17.2 TFEU clearly stipulate that the Union respects and does not prejudice the status under national law of religious and non-confessional organisations in the Member States. As pointed out by Doe «[a]cademic lawyers frequently distinguished between three models of religion-state relations in Europe: state church systems, separation systems and hybrid systems» (Doe 2011, 627-628). The first type – which within

the European Union can be found in Greece, Denmark and England – is «characterized by the existence of close constitutional links between the State and a particular religious community, its ‘national’, ‘established», or ‘folk’ church, or ‘prevailing religion’ or ‘traditional religion’[...]» (Doe 2011, 627-628). The so-called «separation systems», including France, Slovenia and the Netherlands, are «systems which separate State and religion, with constitutional statements of the secular character of the State and prohibitions against state financial support for religion» (Doe 2011, 627-628). The «hybrid systems» also «known as cooperation systems» are numerous in Europe and they «have a basic separation but are like state-church systems in so far as the State favours particular religious organizations with formal agreements» (Doe 2011, 627-628). In the European Union, Belgium, Spain, Italy, Germany and Portugal are, amongst others, identified as «hybrid systems».

As distinct models of relations between States and religions exist, it is hard to find a *common language* between religions and public authorities amongst the countries of the European Union with a view to implementing this dialogue. In its guidelines of 2013, the European Commission tried to precisely state which religious organisations were covered by article 17.3 TFEU. However – as will be explored below<sup>9</sup> – the interpretation provided by the Commission can partly be seen as a form of discrimination among various religions depending on their national status.

## 6. The European Ombudsman: Role and Decision of 25 January 2013

A brief acknowledgment of the role and powers of the European Ombudsman<sup>10</sup> helps to understand the impact of the decision taken on 25 January 2013 against the European Commission. It is particularly important to note that the European Ombudsman also has the power to adopt «further remarks» to promote good administration of the European institutions.

### 6.1. The Role and Powers of the European Ombudsman

As a function created by the Treaty of Amsterdam, the first European Ombudsman – or «Mediator»<sup>11</sup> – was elected by the European Parliament in July 1995. The figure of the Mediator appeared for the first time in Scandinavian countries in the beginning of the 19<sup>th</sup> century but it only

<sup>9</sup> See below n° 6.

<sup>10</sup> For more details about the European Ombudsman, see: Heede 2000; Reif, 2013.

<sup>11</sup> The European Ombudsman can be a man or a woman.

emerged in the European organogram in the nineties (Martín 2014, 389). Jacob Söderman was the first European Ombudsman (July 1995 – April 2003) and he was succeeded by Nikiforos Diamandouros (April 2003 – September 2013). Currently, the Ombudsman is Emily O’Reilly who took the oath of office before the Court of Justice of the European Union on 30 September 2013.

Since 2009, article 228 TFEU defines the European Ombudsman’s competences. The Ombudsman receives «complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role». When the Ombudsman notes that there has been maladministration from an organ or an institution, he/she can finish his/her decision by making «further remarks». The goal of these remarks is to offer «an opportunity for the institution to improve its administration in the future» (Smith 2009, 163). The institution has three months to respond to the European Ombudsman’s remark. In the 2013 Annual Report, it was underlined that «Since the Treaty of Lisbon entered into force and the Charter of Fundamental Rights of the EU became legally binding, the Ombudsman has received an increasing number of complaints in the area of citizens’ rights, especially the right to participate in the EU decision-making process.»<sup>12</sup>

### 6.2. The Decision of the European Ombudsman of 25 January 2013 against the European Commission<sup>13</sup>

On 28 March 2011, the European Humanist Federation (EHF) contacted the European Commission to organise a dialogue seminar about «*Competing Rights Issues in Europe*». The aim of the seminar was to analyse the specific status reserved for churches in article 4 of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. According to the Commission, this seminar included questions of potential conflict between freedom of religion and/or thought and the principle of equality, which is not the purpose of article 17 of the TFEU. The Commission indicated that they had no competence for religious and

<sup>12</sup> European Ombudsman, 2013 *Annual Report*, Strasbourg, 2014, 20.

<sup>13</sup> For more details on the Ombudsman’s decision, see Decision of the European Ombudsman of 25 January 2013 in his inquiry into complaint 2097/2011/RA against the European Commission, available at: <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/49026/html>. See also: Toscano 2014; Annicchino 2013.

philosophical matters, but only for political matters (i.e. questions about economy, environment, energy, etc.). In response to those arguments, the European Humanist Federation pointed out several issues, including the fact that «The EU has adopted a Charter of Fundamental Rights which includes, alongside a right to manifest religion or belief and a right to conscientious objection, a right not to suffer discrimination. [...]»; and the fact that «The Commission is financing the RELIGARE<sup>14</sup> academic collaboration precisely on issues, including legal issues, concerning the place of religion in society»<sup>15</sup>.

After presenting the aforementioned arguments the EHF did not receive any further correspondence from the European Commission. For that reason, the Federation introduced a complaint to the European Ombudsman. According to the EHF, by refusing to organise a dialogue seminar, «the Commission has refused to implement Article 17(3) of the Treaty on the Functioning of the European Union, according to which the EU is obliged to ‘maintain an open, transparent and regular dialogue’ with churches, religious associations or communities, philosophical and non-confessional organisations»<sup>16</sup>.

The European Ombudsman, firstly, asked the Commission if *guidelines* about the implementation of article 17 TFEU had already been adopted. The Commission answered on 7 March 2012 and the European Humanist Federation replied on 27 April 2012. In light of the information provided by both parties, the Ombudsman took his decision on 25 January 2013. According to him, «the concept of ‘separation’ does not mean that there should not be an appropriate dialogue with churches and religious organisations, but rather that the churches and religious organisations should not have any inappropriate privileged position in relation to their dialogue with the EU institutions»<sup>17</sup>. The Ombudsman also pointed out that «The Commission’s statement that Article 17 TFEU is not about discussing religion or philosophy *per se* is correct. It is also clear, however, and not in principle problematic, that the views that will be put forward by the religious (and indeed humanist) communities during their dialogue with the institutions will reflect their opinions as religious

<sup>14</sup> The RELIGARE project was a three-year European research project funded by the European Commission. As a multidisciplinary project, it was composed of professors and researchers from 13 universities and research centres from across the European Union and Turkey. For more information, see its official website: <http://www.religareproject.eu>.

<sup>15</sup> Decision of the European Ombudsman of 25 January 2013 in his inquiry into complaint 2097/2011/RA against the European Commission, point 6.

<sup>16</sup> Decision of the European Ombudsman of 25 January 2013 above mentioned, point 8.

<sup>17</sup> Decision of the European Ombudsman of 25 January 2013 above mentioned, point 38.

(and indeed humanist) communities».<sup>18</sup> According to the Ombudsman, dialogue is positive act and conducting a discussion on the existing legislation defining the application of religious exemptions from the EU’s directive 2000/78/EC on employment would not go beyond the «spirit» of article 17 in such a way that was argued by the European Commission.

Noting that the European institutions are still in the process of implementation of the Lisbon Treaty, the Ombudsman found that it was an opportunity for the European Commission to describe in more details the meaning of an «open», «transparent» and «regular» dialogue as referred to in article 17 TFEU. He closed his decision by the following critical remark: «By rejecting the complainant’s proposal for a dialogue seminar, on the grounds that this would go beyond the spirit of Article 17 (1) and (2) TFEU, the Commission failed properly to implement Article 17(3) TFEU, according to which the EU is obliged to ‘maintain an open, transparent and regular dialogue’ with churches, religious associations or communities, philosophical and non-confessional organisations. *This constitutes an instance of maladministration*»<sup>19</sup>. His decision concludes with a further remark: «Taking into account the Ombudsman’s findings, the Commission should (i) clarify its practices and rules in this area, and, if necessary (ii) *draw up guidelines indicating how exactly it plans to implement Article 17 TFEU*»<sup>20</sup>.

#### 7. Guidelines on the Implementation of Article 17 TFEU adopted by the European Commission

Firstly, it must be stressed that the European Ombudsman’s decisions are generally followed and most of the time there is no need to adopt a special report against the concerned institution (Dupont-Lassalle 2013, 289). This observation was found to be true in the present case: the guidelines on the implementation of Article 17 TFEU were adopted by the European Commission in July 2013<sup>21</sup>.

These guidelines were presented by following the triptych order provided by Article 17 TFEU; namely, they explain what should be interpreted as an «open» (6.1.), «transparent» (6.2.) and «regular» (6.3.)

<sup>18</sup> Decision of the European Ombudsman of 25 January 2013 above mentioned, point 39.

<sup>19</sup> Decision of the European Ombudsman of 25 January 2013 above mentioned, conclusions (emphasis added).

<sup>20</sup> Decision of the European Ombudsman of 25 January 2013 above mentioned, further remark (emphasis added).

<sup>21</sup> In principle those guidelines should have been adopted within the three months after the decision of the Ombudsman but there is no specific sanction if this time limit is not respected.

dialogue between the European Union and religious and non-confessional organisations. Preliminarily, the guidelines underline the fact that Article 17 explicitly introduces such a dialogue between the European institutions and the religious and non-confessional organisations for the first time in EU primary Law. Furthermore, it must be stressed that the Commission stated that this dialogue concerns all the European institutions and not only itself. As a result of this observation, it would be particularly interesting to analyse whether Article 17 TFEU is correctly implemented by the other institutions and in this respect, another decision of the Ombudsman may be required.

### 7.1. An «Open» Dialogue

When interpreting the notion of «open» dialogue, the European Commission makes a difference between (6.1.1.) interlocutors and (6.1.2.) topics of discussion.

#### 7.1.1. Interlocutors

This part of the guidelines is undoubtedly one of the most remarkable aspects of the European Commission's interpretation. According to the Commission, «dialogue partners can be churches, religious associations or communities as well as philosophical and non-confessional organisations that are recognized or registered as such at national level and adhere to European values. There is no official recognition or registration of interlocutors at a European level»<sup>22</sup>.

This final sentence confirms the absence of competence of the European Union in determining a religious and non-confessional organisation's status (as provided by Article 17.1 TFEU which stipulates that «the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States»). However, by limiting the dialogue to *recognized or registered* religious and non-confessional organisations, the Commission clearly excludes several religious communities and creates a distinction between religions depending on their status in national law. For instance, and in relation to the situation of Belgium, this means that only six religions and one non-confessional organisation have access to the dialogue with the European Union conferred by Article 17 TFEU. As a matter of fact, six religions and one non-confessional organisation are recognised by the

<sup>22</sup> Guidelines on the implementation of Article 17 TFEU by the European Commission, p. 1 (our own emphasis).

Belgian State: Catholicism, Protestantism, Judaism, Anglicanism, Islam, Orthodoxy, and the Humanist movement. In contrast, its interpretation covers many more religions in Spanish and Italian Law. In Spain, the following religions fall under the scope of the Commission's interpretation: the Catholic Church that has signed a Concordat (*Concordato*) with the Spanish State<sup>23</sup>, religious communities that have signed an agreement (*Acuerdo*) with the State (i.e.: Evangelical<sup>24</sup>, Jewish<sup>25</sup> and Islamic<sup>26</sup> communities) and all the religious communities registered in the «Register of Religious Entities» (*Registro de Entidades Religiosas*).<sup>27</sup> In Italy, the Commission's interpretation also affects the Catholic Church, religious communities that have signed an agreement (*Intesa*) with the State (i.e.: *Tavolavalde*, *Unione delle Chiese Cristiane Avventiste del settimo giorno*, *Assemblee di Dio in Italia*, *Unione Comunità Ebraiche in Italia*, *Unione Cristiana Evangelica Battista d'Italia*, *Chiesa Evangelica Luterana in Italia*, *Sacra Arcidiocesi ortodossa d'Italia ed Esarcato per l'Europa Meridionale*, *Chiesa di Gesù Cristo dei Santi degli ultimi giorni*, *Chiesa Apostolica in Italia*, *Unione Induista Italiana*, and *Congregazione cristiana dei testimoni di Geova*<sup>28</sup>) and all the religious communities registered on the basis of

<sup>23</sup> To replace the Concordat of 1953, five agreements were signed in the seventies (one in 1976 and four in 1979) between the Catholic Church and the Spanish State. About these agreements see: Instrumento de Ratificación de España al Acuerdo entre la Santa Sede y el Estado Español, hecho en la Ciudad del Vaticano el 28 de julio de 1976, *B.O.E.*, 24 de septiembre de 1976; Instrumento de ratificación del Acuerdo entre el Estado Español y la Santa Sede sobre asuntos jurídicos, firmado el 3 de enero de 1979 en la Ciudad del Vaticano, *B.O.E.*, 15 de diciembre de 1979; Instrumento de Ratificación del Acuerdo entre el Estado español y la Santa Sede sobre Enseñanza y Asuntos Culturales, firmado en la Ciudad del Vaticano el 3 de enero de 1979, *B.O.E.*, 15 de diciembre de 1979; Instrumento de Ratificación del Acuerdo entre el Estado español y la Santa Sede sobre la asistencia religiosa a las Fuerzas Armadas y el Servicio Militar de clérigos y religiosos, firmado en Ciudad del Vaticano el 3 de enero de 1979, *B.O.E.*, 15 de diciembre de 1979; Instrumento de ratificación del Acuerdo entre el Estado Español y la Santa Sede sobre asuntos económicos, firmado en Ciudad del Vaticano el 3 de enero de 1979, *B.O.E.*, 15 de diciembre de 1979.

<sup>24</sup> Ley 24/1992, de 10 noviembre, por la que se aprueba el acuerdo de cooperación del Estado con la Federación de entidades religiosas evangélicas de España, *B.O.E.*, 12 noviembre de 1992.

<sup>25</sup> Ley 25/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Comunidades Judías de España, *B.O.E.*, 12 noviembre de 1992.

<sup>26</sup> Ley 26/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Comisión Islámica de España, *B.O.E.*, 12 noviembre de 1992.

<sup>27</sup> By virtue of the Organic Law of Religious Freedom of 5 July 1980, religious communities must be registered in the «Register of Religious Entities» to enjoy legal personality (see: Ley Orgánica 7/1980, de 5 de Julio, de libertad religiosa, *B.O.E.*, 24 de Julio de 1980, art. 5).

<sup>28</sup> However, it must be noted that at the moment the *intesa* signed with the *Congregazione cristiana dei testimoni di Geova* has not been approved by the Italian Parliament.

the Act of 24 June 1929 on Admitted Religions. Owing to the national variation surrounding the status of «*recognized*» and «*registered*» religious and non-confessional communities, the guidelines adopted by the European Commission create a two tier system of dialogue. For example, in principle Jehovah's Witnesses are *included* in the dialogue of Article 17 TFEU in accordance with applicable law in Italy but they are *excluded* from this dialogue in light of Belgian Law.

By limiting the dialogue to «*registered*» and «*recognized*» religions, the guidelines raise some pertinent issues regarding the place of minority religious groups. Even though absent from the guidelines, the aim of this limitation is probably to exclude radical and extremist religious groups from the dialogue with the European Union. This assertion is further confirmed by the fact that the Commission limits the dialogue to religions and non-confessional organisations that *adhere to European values*. However, in some countries, there are several religions and philosophies that respect the European values but are not explicitly recognised by the State. For instance, Hindu and Buddhist groups in Belgium must be deemed excluded from the dialogue provided by Article 17 TFEU because they are not recognised by the Belgian State.

In its guidelines, and independently of this dialogue, the European Commission encourages interlocutors to register themselves «*in the appropriate section of the European Transparency Register*»<sup>29</sup>. However, until now, this invitation has not been very successful. It is noteworthy to mention that currently only 40 religious communities are registered out of a total number of 9297 registered entities<sup>30</sup>.

### 7.1.2. Topics of Discussion

According to the guidelines of the Commission, «*all relevant topics related to the EU agenda can be addressed in this dialogue*»<sup>31</sup>. This part of the guidelines is probably a direct consequence of the Ombudsman's decision that the dialogue seminar proposed by the European Humanist Federation did not go beyond the «*spirit*» of article 17. According to the guidelines, the topic of discussion can be proposed by the European Commission or by the religious and non-confessional organisations. However, «*in the light of its policy priorities, the Commission may choose to suggest priority topics for discussion over a certain period of time with different interlocutors*» but «*this should not prevent both sides*

<sup>29</sup> See: <http://ec.europa.eu/transparencyregister/>

<sup>30</sup> Date accessed: 2 March 2016.

<sup>31</sup> Guidelines on the implementation of Article 17 TFEU by the European Commission, p. 1 (our own emphasis).

from addressing topical issues at any given time».<sup>32</sup> In any case the topic of discussion must be chosen by both sides in «*a spirit of constructive mutual understanding*»<sup>33</sup>.

The format of the dialogue must also be chosen jointly by the European Commission and the respective interlocutor. By using the word «*format*», it could have supposed that the guidelines meant the format of discussion; however, as it will be analysed below<sup>34</sup>, it is surprising that the part of the guidelines dedicated to the analysis of the meaning of «*regular dialogue*» contains specific detail of the various forms of dialogue covered by Article 17 TFEU.

### 7.2. A «Transparent» Dialogue

To ensure the transparency of the dialogue, the European Commission has a website where it releases to the general public all relevant information about the activities covered by the dialogue. Despite these efforts, maintaining transparency is a difficult task. One of the main challenges relates to fluctuations in the information published on the internet. For instance, it must be noted that under the current Presidency of Jean-Claude Juncker, the first Vice-president Frans Timmermans is responsible for the dialogue of Article 17 TFEU, whereas before it was a competence of the President of the European Commission himself. This kind of change impacts upon the fluidity of the information, especially on its availability on the internet.

### 7.3. A «Regular» Dialogue

Under the title of «*regular*», the guidelines state that «*the European Commission maintains a regular dialogue with interlocutors at various levels in the form of written exchanges, meetings or specific events. [...]*. This dialogue may be conducted through *inter alia* informal meetings hosted by the President of the European Commission, bilateral meetings with Commission representatives at all levels and, in particular, meetings with the responsible Adviser for the dialogue with churches,

<sup>32</sup> Guidelines on the implementation of Article 17 TFEU by the European Commission, p. 1.

<sup>33</sup> Guidelines on the implementation of Article 17 TFEU by the European Commission, p. 2.

<sup>34</sup> See below n° VI, C.

and religious associations or communities as well as philosophical and non-confessional organisations»<sup>35</sup>.

It is regrettable that the text does not contain any further detail about these «various levels». What is perhaps more striking is the fact that by «regular» the European Commission provides a list of the different forms that the dialogue can take. In common parlance, «regular» means «usual», «happening most often», «customary», «involving doing the same things at the same time each day», «permanent», «lasting», etc.<sup>36</sup>. By «regular», one might legitimately have expected that the guidelines would have given some precision – or at least some suggestions – about the frequency of the meetings. However, stipulating this aspect of the dialogue does not seem to have significance for the European Commission.

To conclude on the content of the guidelines on the implementation of Article 17 TFEU, we can welcome the effort made by the European Commission as a first step towards clarification of the so-called «dialogue» between the European Union and religions and non-confessional organisations.

#### 8. *Guidelines of the Council of the European Union on the Promotion and Protection of Freedom of Religion or Belief*

Before the adoption of the guidelines by the European Union, it is noteworthy that the Council of the European Union had adopted its own guidelines on the promotion and protection of freedom of religion or belief on 24 June 2013. Even if no formal link can be established between the Ombudsman's decision, the guidelines and guidelines produced by the European Commission<sup>37</sup>, their proximity in time cannot be denied.

In the Council's guidelines, the dialogue provided by Article 17 TFEU is only briefly mentioned. The Working Party on Human Rights (COHOM) will evaluate the implementation of the Council's guidelines after a period of three years. The COHOM's mission is to analyse human rights aspects of the external relations of the European Union and to support the Council's decision-making process in this area<sup>38</sup>. The COCOM will use reports submitted by Heads of Mission and consultation with civil society and relevant academic experts to make its evaluation of the guidelines' implementation. According to the Council's guidelines, «consultation

<sup>35</sup> Guidelines on the implementation of Article 17 TFEU by the European Commission, p. 2.

<sup>36</sup> Cambridge Dictionary, 2015.

<sup>37</sup> There is no formal cross-referencing between them in their respective text.

<sup>38</sup> See its website: <http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-human-rights/>

of civil society should involve human rights defenders, NGOs including domestic and international human rights and women's organisations. This consultation *will involve churches and religious associations, philosophical and non-confessional organisations in the context of the open, transparent and regular dialogue held under article 17 of the Treaty on the Functioning of the European Union*<sup>39</sup>. In this way, the Council's guidelines recall the important role that religious and non-confessional organisations must play as actors of the civil society, as it had previously pointed out in the White Paper on European Governance in 2001<sup>40</sup>.

The content of the Council's guidelines is focused on the right to freedom of thought, conscience, religion or belief as a fundamental right of every human being. The guidelines provide that «states must ensure that their legal systems provide adequate and effective guarantees of freedom of thought, conscience, religion or belief to all»<sup>41</sup>. It is interesting to read that assertion in connection with legal theory on human rights, and especially with the idea that it is out-dated to analyse human rights in terms of «generations» of rights. For a long time, a distinction had been made among human rights between the first and the second generations of rights. Among the first generation were generally listed freedoms such as freedom of speech, freedom of religion, etc. which required mostly *respect* by public authorities. Among the second generation were classically listed social, cultural and economic rights such as right to housing, right to health, right to strike, etc. which required *protection* by public authorities. Next to those two generations of rights was even identified a third generation which encompassed collective rights such as right to self-determination, right to peace, etc. which mostly needed to be *guaranteed* by states. Nowadays, even if this division among the first, second and third generation of rights remains of interest merely for historical (Gérard 2007, 38), chronological (Vasak 1974, 343-346) and pedagogical (Vasak 2004, 11-12) reasons, it has been abandoned more recently in favour of a «complementary» (Rigaux 2000, 379-280; Sudre 2006, 237) approach of human rights. Under this approach, every human right must be *respected, protected and guaranteed* by public authorities (Eide 2001, 30-31; Eide 1989; 35-52; Eide 1999, 581-598). In other words, every human right encompasses *positive obligations* for the state. Applied to religious freedom, it means providing adequate and effective guarantees

<sup>39</sup> Guidelines of the Council of the European Union on the promotion and protection of freedom of religion or belief, 24 June 2013, point 70, available on: [http://eeas.europa.eu/delegations/fiji/press\\_corner/all\\_news/news/2013/eu\\_guidelines\\_on\\_the\\_promotion\\_and\\_protection\\_of\\_freedom\\_of\\_religion\\_or\\_belief\\_\(june\\_24\\_2013\\_fac\).pdf](http://eeas.europa.eu/delegations/fiji/press_corner/all_news/news/2013/eu_guidelines_on_the_promotion_and_protection_of_freedom_of_religion_or_belief_(june_24_2013_fac).pdf) (emphasis added).

<sup>40</sup> See above n° II.

<sup>41</sup> Guidelines of the Council of the European Union on the promotion and protection of freedom of religion or belief, 24 June 2013, point 21.

of freedoms. As mentioned by the Council's guidelines, this effectiveness requires preventing and combating violations of religious freedom, and to react and punish them whether they occur.

Before shifting the focus away from the Council's guidelines, it is noteworthy that they constitute an example of this dialogue. As a matter of fact, according to the European Humanist Federation, the text initially proposed by the competent rapporteur to the whole European Parliament on 29 May 2013 «was very conservative and had a clear religious tone».<sup>42</sup> In relation to education, the report initially mentioned that «the liberty of parents and guardians to ensure religious and moral education cannot be restricted» and that «the rights of parents to educate their children according to their religious or non-religious convictions includes their right to deny any undue interference by state or non-state actors in their education opposed to their religious or non-religious convictions»<sup>43</sup>, which, according to the European Humanist Federation, ignored the emerging autonomy of the child and his/her right to receive pluralistic ideas and information that are protected by articles 13 and 14 of the United Nations Convention on the Rights of the Child. In relation to conscientious objection, the report initially stated «the guidelines should also include the right to well-defined conscientious objection as a legitimate exercise of the right to freedom of thought, conscience and religion in relation to other morally sensitive matters»<sup>44</sup>.

The European Humanist Federation therefore contacted members of the Parliament to ask them to correct those aspects of the guidelines. It is interesting to note that the final European Parliament's recommendation rejected the paragraph on conscientious objection, which illustrates the importance of the dialogue between the European Parliament and the European Humanist Federation. However, the Parliament's recommendation retained the paragraph concerning education. The guidelines finally adopted by the Council of the European Union restrict conscientious objection to military service and underline that the rights of people holding non-theistic and atheistic beliefs must be equally protected by the European Union as well as the right to change or abandon one's

<sup>42</sup> European Humanist Federation, *EU Guidelines on Freedom of Religion and Beliefs: Securing a secular and balanced approach*, 2013, available on the website of the European Humanist Federation: <http://humanistfederation.eu/our-work.php?page=eu-guidelines-of-freedom-of-religion-and-beliefs-securing-a-balanced-and-secular-approach>.

<sup>43</sup> Report of 5 June 2013 with a proposal for a European Parliament recommendation to the Council on the draft EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (2013/2082(INI)), available on <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2FBREPORT%2BA7-2013-0203%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=DE>.

<sup>44</sup> *Ibidem*.

religion or belief. According to the European Humanist Federation, the guidelines finally adopted constituted a «well-balanced text»<sup>45</sup>.

#### 9. *Another Contemporary Challenge relating to the 'Dialogue': Interfaith and Interreligious Dialogue*

Alongside questions relating to the dialogue between the European Union and religious and non-confessional organisations, the importance of creating a dialogue between them must also be underlined. Interfaith dialogue – which «means to hold on to one's faith while simultaneously trying to understand another's person faith» (Shafiq & Abu-Nimer 2012, 2) – is a frequent subject of study in theology and has also become a subject of interest in philosophy, history, political science and sociology. Contrastingly, it is rather regrettable that interreligious dialogue has stayed relatively unexplored in juridical sciences. However, interfaith dialogue and interreligious dialogue are now more frequently invoked in public debate. During his speeches, Pope Francis also regularly invites prayers for interreligious dialogue to yield fruits of peace and justice. Interfaith and interreligious dialogue also tends to have a place in diplomacy and tends to become a subject of discussion at the European Institutions' level. One of the recent examples is the conference that took place on 19 March 2015 at the European Parliament that was entitled «The rise of religious radicalism and fundamentalism and the role of inter-religious dialogue in the promotion of tolerance and respect for human dignity».<sup>46</sup> During this event, present as speakers were not only European parliamentarians but also religious leaders.

This kind of meeting is also regularly organised by the European People's Party group (EPP Group) of the European Parliament. On 10-11 March 2015, the EPP Group organised the 17<sup>th</sup> Dialogue Conference, which «aim[ed] to demonstrate the continuous commitment of the Group on the promotion of the human fundamental rights and the freedom of religion, as well as the protection of the religious minorities in the world, in cooperation with Churches and their organizations».<sup>47</sup>

Regardless of their own individual practices and divergence of their doctrines, most religions generally insist on the fundamental importance of common values such as respect, tolerance, love, sharing, mutual aid,

<sup>45</sup> European Humanist Federation, *EU Guidelines on Freedom of Religion and Beliefs: Securing a secular and balanced approach*, 2013, cit.

<sup>46</sup> See the program of the conference at: <http://www.europarl.europa.eu/resources/library/media/20150319RES35903/20150319RES35903.pdf>.

<sup>47</sup> See: <http://www.eppgroup.eu/event/The-17th-EPP-Group-Annual-Interreligious-Dialogue>.

peace, human rights, etc. In view of recent terrorist attacks committed by the so-called Islamic State, interfaith dialogue and interreligious dialogue have become one of the crucial ways to fight against radicalism, fundamentalism and terrorism, whilst also acting as a way to favour mutual comprehension between religions thereby avoiding feelings of isolation or misunderstanding that can lead to extremism. In this regard, one of the fundamental challenges for the law and the law-making process concerns the creation of public space for this interfaith dialogue.<sup>48</sup> Mutual understanding of the different religions needs to begin at school and to continue through lifelong education. Very often in Europe, courses about interreligious dialogue are only organised at University level at the Faculty of Theology or Religious Sciences. However, we believe that this kind of course should start at primary school, using pedagogical methods adapted to children. In Belgium, for instance, several propositions have been introduced to replace religious courses at primary and secondary school by a broader course about culture and history of all the religions. The creation of spaces for interreligious and interfaith dialogue that would be covered by law means that a delicate balance must be found between state's regulation and the respect of religious autonomy.

## 10. Conclusion

Born out of Delor's wish to give a «Soul» for Europe, the informal dialogue created between the European Union and religious and non-confessional organisations has now a juridical basis. Since 2007, article 17.3 of the Treaty on the functioning of the European Union provides that «the Union shall maintain an open, transparent and regular dialogue» with these churches and religious and non-confessional organisations.

However, we have seen that article 17.3 TFUE lacks clarity and its implementation raises some key issues that led to criticism of the European Commission by the European Ombudsman in January 2013. In spite of some limitations, the guidelines adopted by the Commission a few months later are surely a first step towards clarification of the so-called «dialogue» between the European Union and religions and non-confessional organisations.

In addition to the juridical issues surrounding the dialogue between the European Union and religious and non-confessional organisations, we have seen that another dialogue raised questions that must be taken into account by the Law; the interreligious dialogue. To realise participatory democracy and make it efficient, we believe that those two different

<sup>48</sup> On national experiences surrounding these public spaces of dialogue, see: De Pooter & Christians (*to be published*).

dialogues could be used by the authorities to help them in the adoption of their public policies. Implementing this form of participatory democracy will be one of the fundamental challenges for European and national law in the coming years. Yet by making religions the allies of human rights, peace and democracy, we believe that a way to further the «living together» of the Union will finally be achieved.

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## L'Accordo tra la Santa Sede e la Repubblica Democratica di Timor-Leste

di Francesco Ricciardi Celsi

*The Agreement between the Holy See and the Democratic Republic of Timor-Leste*

On March 3rd, 2016, the exchange of the instruments for the ratification of the Agreement between the Holy See and the Democratic Republic of Timor-Leste signed in Dili on August 14th, 2015 took place. The Agreement, taking into account the historical and current role played by the Catholic Church in the life of the nation, as well as the deep rooting of the Catholic religion in the Timorese society, stably determine the legal framework for the relations between the Holy See and the Democratic Republic of Timor-Leste.

*Keywords*: Agreement, Legal framework, Relations, Holy See, Timor-Leste

SOMMARIO: 1. Premessa storica. – 2. Contenuto dell'Accordo. – 3. Osservazioni conclusive.

### 1. Premessa storica

L'isola di Timor fu scoperta dai portoghesi agli inizi del XVI secolo (1515-1520). Questi ultimi colonizzarono la parte orientale, mentre quella occidentale fu conquistata dagli olandesi e dopo lunghe dispute, solo nel 1859 le due potenze coloniali conclusero un trattato in cui erano definiti i confini. La regione orientale dell'Isola rimase colonia del Portogallo, fino al 1975. Tuttavia, Timor Leste (o Timor-Est) divenne a tutti gli effetti uno stato indipendente solo il 20 maggio 2002 in quanto pochi giorni dopo la dichiarazione d'indipendenza dal Portogallo dovette subire i tentativi di annessione dell'Indonesia. L'evangelizzazione della parte orientale dell'isola di Timor iniziò nel XVI secolo grazie all'apporto dei missionari domenicani e proprio nell'anno delle celebrazioni del V centenario di questa ricorrenza, il 15 agosto 2015, è stato sottoscritto l'Accordo tra la Santa Sede e la Repubblica Democratica di Timor dopo che il Santo