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COMMENT

Religion and EU Institutions

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The implementation of Article 17(3) of the Treaty on the Functioning of the European Union (TFEU) has always been one of the central topics of discussion for legal scholars analysing the relationships between religious groups and European institutions. According to Article 17, the European Union shall maintain an open, transparent and regular dialogue with churches, religious associations or communities, philosophical organisations and non-confessional organisations.[1] In the case in hand, the complainant, the European Humanist Federation (EHF)[2] decided to lodge a complaint before the European Ombudsman when the European Commission rejected the proposal for a dialogue seminar.

THE COMPLAINANT'S PROPOSAL FOR A 'DIALOGUE SEMINAR' AND REFUSAL FROM THE COMMISSION

On 28 March 2001, the EHF proposed to the European Commission the organisation of a dialogue seminar on 'Competing rights issues in Europe' aimed at analysing issues of human rights, equality and non-discrimination arising from the exceptions provided by Article 4 of the Employment Equality

1 Article 17 TFEU states: '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 organizations. 3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organizations.'

2 According to their own definition, the European Humanist Federation is the 'largest umbrella organization of humanist associations in Europe, promoting a secular Europe, defending equal treatment of everyone regardless of religion or belief, fighting religious conservatism in Europe and at the EU level' (see <http://humanistfederation.eu/> accessed 29 April 2013).

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Directive[3] for 'churches and other public or private organizations the ethos of which is based on religion or belief'.[4] In replying to this proposal, the European Commission argued that it has no competence on religious and philosophical matters, and that dialogue seminars are held only at the initiative of the Commission. The EHF, in a letter, offered several rebuttals to this refusal and on 18 October 2001, in the absence of a reply from the Commission, lodged a complaint to the European Ombudsman, alleging a violation of Article 17(3) of the Lisbon Treaty. The Ombudsman opened the inquiry on 15 November 2011 and asked for the Commission's opinion on the issues at stake.

In its reply of 7 March 2012, the Commission highlighted how EU institutions are committed to the respect without any discrimination of all religious and non-religious groups but that

> given the limited administrative capacity and means available to organize its dialogue seminars, the Commission has insisted with all dialogue partners that the reduced number of meetings that can take place each year should concentrate on topics of main priorities of the Commission's policy agenda.[5]

The Commission also stated that no official guidelines for the implementation of Article 17(3) TFEU had been implemented, but detailed how the three key concepts of 'open, transparent and regular' dialogue are understood.

Moreover, according to the Commission, the topic suggested by the complainant for the dialogue seminar – namely 'problems that arise in defining the application of religious exemptions from EU Directive 2000/78/EC on employment' – was too focused on a specific point, contrary to the seminars that traditionally deal with wider topics (combating poverty, social exclusion, etc) and it could also impinge on the provisions of Articles 17 (1) and (2), according to which the Union respects and does not prejudice the status under national law of churches, religious associations and communities, and philosophical and non-confessional organisations.

In the EHF's reply, the complainant offered several rebuttals to the Commission's arguments. First of all, while the Commission initially refused to conduct a dialogue seminar on religious freedom upon the initiative of the complainant (5 May 2011), on 30 March 2012 it did organise a one-day dialogue seminar with religious groups on 'Freedom of religion: a fundamental right in a rapidly changing world'. According to the complainant, this constituted prima

3 Council Directive 2000/78/EC, 27 November 2000, establishing a general framework for equal treatment in employment and occupation.
4 Ibid, para 2.
5 Decision of the European Ombudsman in his inquiry into complaint 2097/2011/RA against the European Commission, para 13.

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facie discrimination, given the particular forum accorded to religious groups in this context. As a rebuttal to the Commission's arguments, the complainant also stressed that the Commission disposes of a monitoring role on the implementation of EU law within national law, and that this would be particularly relevant in the case of a directive.[6]

The complainant added that, after it had offered to co-organise a conference (similar to one organised in 2008), the Commission turned down the offer by simply expressing its interest in the organisation of a 'dialogue seminar'. The distinction that the Commission made in its communication with third parties between 'dialogue seminar', 'meetings' or 'conferences' is, therefore, unclear, according to the complainant. For the complainant, the Commission had not fully implemented the provision of Article 17(3) TFEU. For instance, as far as the 'transparency' of the dialogue was concerned: 'the Commission's website rarely contains the speeches made by EU representatives at these events, let alone those by their dialogue partners. Nor are minutes ever produced.'[7] As far as regular practice was concerned, the complainant stressed that it had always been the first mover in contacting the Commission, and always in order to obtain a fairer treatment.[8] In conclusion, according to the complainant, the refusal by the Commission would even represent a violation of the Commission's own interpretation of Article 17(3).

THE OMBUDSMAN'S ASSESSMENT

For the Ombudsman this case was to be understood through the framework that EU law reserves to participatory democracy and must therefore lead to the application of the relevant principles of law. As the same, the Ombudsman stated in the draft recommendation in the case 2558/2009/(TN)DK:

> participatory democracy, based on the principle of equality and transparency, improves citizens' trust in the EU and the EU administration. Increased trust in the EU and the EU administration is a key element in increasing the effectiveness of the EU and its administration.[9]

EU institutions have a margin of discretion in order to guarantee the full application of this principle, a margin that can also be applied to the different tools that the institutions can employ in order to foster dialogue with citizens and

6 Ibid, para 23.
7 Ibid, para 26.
8 Ibid, para 27.
9 Ibid, para 31, quoting from the Ombudsman's draft recommendation in the case 2558/2009/(TN)DK.

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civil society organisations, but they should always be able to justify the utilisation of this margin and should not discriminate or allow citizens to feel discriminated against by reason of the actions of EU institutions.

The Ombudsman understood the 'separation of religion and politics' endorsed by the Commission as a reflection of the French constitutional principle of laïcité,[10] but argued that

> the concept of separation does not mean that there should not be an appropriate dialogue with churches and religious organizations, but rather that the churches and religious organizations should not have any inappropriate privileged position in relation to their dialogue with EU institutions.[11]

In his analysis, the Ombudsman attempted to clarify the meaning of the three adjectives 'regular, transparent and open', which define the kind of dialogue that EU institutions should have with religious and civil society groups. 'Regular', according to the Ombudsman's interpretation, does not imply that Article 17 TFEU mandates the striking of a precise balance between religious and non-religious groups. The balance must merely take into account the different groups. In this specific case the Ombudsman stated that he 'is not convinced, however, by the figures put forward by the complainant, that the Commission has adopted a manifestly disproportionate approach'.[12] He stated that 'transparent' did not imply the production of detailed minutes of the various meetings in order for the Commission to comply with standards of good administrative behaviour. For meetings where the Commission does not exercise investigative and regulatory powers: 'it should be sufficient for the institution to note the subject matter, the participants, and to give an account of the general content of the meeting'.[13] The third aspect of the dialogue implies that it should be 'open'. In the case at hand, the Ombudsman was unable to identify a general unwillingness from the Commission to engage in a dialogue with the complainant; as such, 'the complainant's statement should therefore be understood as relating only to the Commission's refusal to meet the complainant in the context of the specific dialogue seminar related to the Employment Equality Directive'.[14]

The core argument raised by the Commission was that such a dialogue[15] might conflict with the competence of national member states in the domain

10 It is not specified in the text of the decision why the Ombudsman preferred this association with the French approach and understanding of the relationship between religion and public power.
11 Decision of the European Ombudsman re. 2097/2011/RA, para 38.
12 Ibid, para 41.
13 Ibid, para 42.
14 Ibid, para 43.
15 The exact topic of the dialogue would have been: 'problems that arise in defining the application of religious exemptions from the EU's directive 2000/78/EC on employment' (ibid, para 46).

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that Article 17(1)(2) TFEU reserves to them. The Ombudsman disagreed with this view. In his understanding, open dialogue between EU institutions and civil society organisations, 'except in the most extreme cases'[16], was positive. Therefore,

> It is furthermore his view that, unless the Commission were to demonstrate that a particular dialogue would be contrary to the Union's core values, as set out in Article 2 of the Treaty on European Union, the Commission is free to engage in an open talk and frank discussion.[17]

The Ombudsman was thus of the view that, by not accepting the proposal for a dialogue seminar from the complainant on such grounds, the Commission failed to implement Article 17(3) TFEU, resulting in a case of maladministration.

The Commission also advanced other arguments for the denial, mainly focused on defending the institution's discretion regarding the choice of the topics to address in the dialogue seminars and on the necessity of guarding against excessive administrative burdens, given the limited capacity of the offices of the institution. While the Ombudsman agreed that the Commission should maintain a certain discretion,[18] he was nonetheless of the opinion that, at the beginning of each year, the Commission should 'outline its priority topics for discussion in dialogue seminars for the year in question'.[19] This discretion should be exercised by the Commission in a manner that is non-discriminatory between religious and non-religious groups.

At the conclusion of his decision, the Ombudsman recognised that EU institutions were still engaged in a 'learning process' on the application of the new provisions of the Lisbon Treaty, and in this case he saw the opportunity for the Commission to improve its approach to the implementation of Article 17 TFEU, for example by drawing up 'guidelines in terms of how exactly it plans to implement Article 17 TFEU'.[20]

16 Ibid, para 48. The Ombudsman does not clarify this expression in the text of the Decision.
17 Ibid, para 48.
18 At para 58, the Ombudsman writes: 'The Ombudsman recalls that the Commission enjoys a broad margin of discretion in terms of defining its policy priorities and, in the context of this case, in terms of determining the topics it chooses to discuss as part of the Article 17 TFEU dialogue. Whether the complainant's proposal is a main priority and of wider common interest is for the Commission to determine.'
19 Ibid, para 56.
20 Ibid, para 63.

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ARTICLE 17 IS NOT A 'CONVERSATION STOPPER'

It is true that religion as such does not fall into the express competence of the European Union. The European Union, as is clear from the treaties, is competent in the fields that have been specifically attributed to it. According to traditional wisdom, this explicit lack of competence has always been, and still is in many cases, a main reason and justification for claiming the non-interference of the European Union in the regulation of religion. Over the years, the European Court of Justice has undermined this vision by showing through some cases that religion is a transversal phenomenon that might involve many fields of EU competence.[21] For instance, in 1974, in the well know *Van Duyn* case,[22] the Court was called upon to decide on the delicate issue of the right to immigration to the UK of a minister of the Church of Scientology from the Netherlands on the basis of the regime dealing with the EU circulation of workers, and not on any provision dealing with religious freedom. It was only under pressure from some religious groups that EU institutions introduced legal provisions (now Article 17 TFEU) in order to prevent EU law affecting the status of religious groups under national law. While a general priority in this field can, without a doubt, be attributed to national law (as is also clear from the doctrine of the margin of appreciation utilised by the European Court of Human Rights), this decision constitutes another confirmation of the fact that EU law and EU institutions cannot be prevented from taking part in the conversation on the role of religion in Europe, by virtue of the use of Article 17 TFEU as a conversation starter – rather than a conversation stopper[23] – between EU institutions and religious and non-religious groups.[24]

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21 On the role of European courts in this process see M Ventura, 'Law and religion issues in Strasbourg and Luxembourg: the virtues of European Courts', ReligioWest Project Kick-off meeting paper, <http://www.eui.eu/Projects/ReligioWest/Documents/conferencePapers/Ventura.pdf>, accessed 14 June 2013. More generally see also M Ventura, *La laicità dell'Unione Europea: diritti, mercato, religione* (Turin, 2001).

22 See *Van Duyn v Home Office*, C-41/74, European Court of Justice, 4 December 1974.

23 The reference here is to the famous metaphor coined by Richard Rorty: see R Rorty, 'Religion as a conversation stopper', in *Philosophy and Social Hope* (New York, 1999), pp 168–174.

24 As Ronan McCrea puts it: 'The Union's Treaty commitment to engagement with civil society recognizes that its law-and policy-making must be informed by diverse perspectives and views of the good life from across Europe. Thus, civil society plays a role in forming a European public morality that informs the Union's law-making.' R McCrea, *Religion and the Public Order of the European Union* (Oxford, 2010), p 73. For a critique of the logic of Article 17 see K Houston, 'The logic of structured dialogue between religious associations and the institutions of the European Union', (2009) 37 *Religion, State and Society* 207–222.