

# THE STATUS OF CHURCHES AND PHILOSOPHICAL AND NON-CONFESSIONAL ORGANIZATIONS WITHIN THE FRAMEWORK OF THE EUROPEAN UNION REFORM

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## Abstract

*The Treaty on the Functioning of the European Union, signed at Lisbon in December 2007, includes, for the first time, an entire article – article 17 – dedicated to the status of churches and non-confessional organisations in the Community framework. Through this disposition, it is recognized the contribution of the religions and the philosophical and non-confessional organisations explicitly into the European Union and, at the same time, the European Union commits itself to maintain “an open, transparent and regular dialogue” with them.*

*In this paper, firstly, we shall try to analyse which was the juridical position of both the churches and associations or religious communities, and the philosophical and non-confessional organisations before the signature of Lisbon Treaty. In this sense, we shall specially pay attention to the failed European Constitution that, in its article I-52, refers exactly to the status of churches and non-confessional organizations in the European Union. And, secondly, we shall study the contents of the article 17 of the Treaty on the Functioning of the European Union.*

**Key words:** *Treaty of the Functioning of the European Union, European Union, European Constitution, status of churches, status of non-confessional organizations.*

## Introduction

Article 17 of the Treaty on the Functioning of the European Union (hereinafter TFEU) can be seen as one of the most significant developments introduced by the Treaty set up to reform the Treaties which had established the European Community and the European Union, which was signed in Lisbon in December 2007, concerning the democratic participation of European citizens. For the first time ever, an article is devoted entirely to the issue of the status of churches and of philosophical and non-confessional organizations within the Union.

The first two paragraphs of article 17 require the European Union (hereinafter EU) to respect and not to prejudice the status of churches and religious associations or communities, as well as relevant philosophical and non-confessional organizations that are recognized by its member States, under their respective jurisdictions. Meanwhile, the last paragraph of this article highlights the recognition in the Union of the identity of, and the specific contribution made by churches and religious associations or communities, and of philosophical and non-confessional organizations, with which the EU "will maintain an open, transparent and regular dialogue". These provisions have been interpreted during the process of drafting of the rejected Treaty establishing a Constitution for Europe<sup>1</sup> by numerous persons as "threatening" the principle of separation between Church and State, excluding the principle of secularism that characterizes all current EU Member States.

It is, as we shall see, one of the issues about which more debate has been aroused in recent years when it comes to the reform of the original Community Law. This has, at the same time, highlighted the important differences that exist in the 27 EU Member States with

respect to the issue of religion. What was being questioned was not religious freedom, but rather the legal position that churches and philosophical and non-confessional organizations should occupy within the Union. Nowadays nobody doubts religious freedom is a fundamental right for all human beings, which is supported by art. 9 of the European Convention on Human Rights (hereinafter ECHR)<sup>2</sup> and, moreover, this is reflected in the abundant writing which exists on the topic.<sup>3</sup> On the other hand, the novel nature of article 17 of the TFEU and the fact that it has not, as yet, come into force, might well explain the existence of so few commentaries within specialist legal writings.

With the intention of showing the path taken by churches and philosophical and non-confessional organizations up until their current situation of recognition within the framework of the EU, this study will be divided into two parts. In the first part, we will analyse the legal position of both churches and religious associations or communities, as well as that of philosophical and non-confessional organizations before the signing of the Lisbon Reform Treaty, with particular attention to activities carried out under the European Convention (I), and, in the second part, try to present the scope and content of article 17 of the TFEU which, as we have mentioned above, consists of the official recognition by the Union of churches and the philosophical and non-confessional organizations (II).

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### **I. The legal position of churches and philosophical and non-confessional organizations within the European Union before the signing of the Treaty on the Functioning of the European Union**

It should be stressed from the outset that the original Treaties of the European Communities did not make any reference to the fundamental rights of human beings in general, and the freedom of religion or religions existing in the Member States in particular. It was not until the Maastricht Treaty that it was recognized that "the Union shall respect

fundamental rights as guaranteed in the European Convention on Human Rights and Fundamental Freedoms of November 4, 1950, and those which result from the constitutional traditions common to the Member States as general principles of Community law "(article F.2 TEU).

In the following years, and especially during the Intergovernmental Conference (hereinafter IGC) held in 1996, the Foreign Ministers of the fifteen Member States of the EU discussed what would be the best way to protect the rights and fundamental freedoms within the new European Community Treaty (hereinafter the EC Treaty). For example, the German delegation proposed the introduction of the following article on the legal status of Churches: "The Union considers that the constitutional position of religious communities in the Member States is both an expression of the identity of the Member States and their culture, as part of their common cultural heritage."

With respect to this, it is worthwhile to note the response of the then President of the European Commission, Mr. Santer, to a written question by a member of the European People's Party on this proposal. Mr. Santer said he felt that the proposal was part of the wider scope of protection of freedoms and fundamental rights of European citizens, and also noted that the IGC, which had been responsible for reforming the Maastricht Treaty, had considered the possibility that the EU joined the ECHR. He also emphasized the scope and content of article 9.1 of the ECHR, which stipulates that "everyone has the right to freedom of thought, conscience and religion".<sup>4</sup> Lastly, noting that the German proposal was not a unique option, given that it had also been supported by the delegations of other States in the IGC'96. This proposal was also supported by the Vatican, which wanted the Church, in general, and the Catholic Church, in particular, to receive specific legal recognition within the foundational Community Law.

Finally, there was no update of article F.2 of the TEU which, after the reform of Amsterdam, became article 6.2 of the TEU, but rather it was decided to draw up a Declaration on the status of churches and non-confessional organizations, which was to be inserted as an appendix in the final Act of this IGC. At this point Greece considered necessary to recall the Joint Declaration regarding Mount Athos, which had been included as an appendix to the Final Act of the Treaty on its accession to the European Communities.<sup>5</sup>

Thus, the Declaration No. 11 was issued as an appendix to the Final Act of the EC Treaty signed in Amsterdam, under the title "Status of churches and non-confessional organisations", foresaw that "The European Union respects and will not prejudge the status under national law, of churches and religious associations or communities within the Member States. The European Union also respects the status of philosophical and non-confessional organizations".<sup>6</sup>

With relation to this point, it should be noted that this Declaration has no binding legal value for the EU or its Member States, being merely a political statement. Nobody, however, can fail to detect the recognition, which those who had drawn up the reform of the Maastricht Treaty were giving, especially to the Church, within the EU framework and, hence, the legal significance it holds within the Union. In addition, as this was a statement made jointly by the Heads of State and Government of all Member States, Declaration No. 11 is a general rule of interpretation according to Article 31 of the Vienna Convention on the Law of Treaties passed in 1969. Hence, it is an integral part of EU law and can therefore be invoked before the Court of Justice of the European Communities (hereinafter ECJ).

It is also worthy of mention that this was the first time in which a specific and explicit reference to religion was made, and also that the presence of churches and religious communities within the life of the EU was being recognised. For years an ongoing informal dialogue had been taking place between churches and faith-based and non-confessional organizations, on the one hand, and EU institutions, on the other.<sup>7</sup> This dialogue went back to

the year 1963 when the Jesuits established an office in Brussels. These were followed ten years later by the Protestants and, in 1980, by the Committee of Bishops in the European Community (COMECE) and the Ecumenical Commission for the Church, which in 1999 became the Church and Society Commission of the Conference of European Churches (CEC). Also, the Vatican appointed in 1999 an apostolic nuncio to the EC. Among the demands made by these interlocutors of the European Commission were the following: the existence of a pre-legislative consultation process, regular working sessions to be organized on matters which might prove relevant to the Church, occasional work meetings, and a liaison "bureau" to be included within the main seat of the Commission.<sup>8</sup>

With respect to the contributions made by the Community Institutions to this dialogue, it must be mentioned that in 1989, the then President of the EU, Mr. Delors, decided to create a Forward Studies Unit which was to work as a service under his authority which would have control, among other things, over the carrying out of reports on various issues which would later form part of the working agenda of the Commission itself. Among the achievements of this Forward Studies Unit, it is worth mentioning the various meetings held in order to contribute to an inter-religious dialogue within the Community, and which may have inspired Mr. Delors to propose in 1992 the project entitled "A soul for Europe: Ethics and spirituality" which would serve as a point of support for European construction and integration.<sup>9</sup>

On the other hand, Mr. Romano Prodi, during his term as President of the European Commission, changed the Forward Studies Unit into the Group of Political Advisers to the President (GOPA), made up of various diplomats, and whose main activity consisted of regulating the relationships between the different Churches and the EU Institutions.<sup>10</sup>

Among the precedents of article 17 of the TFUE there can be found certain documents from the Community Institutions, which discuss religious matters within the framework of the EU, and a number of sentences from the ECJ referring to various aspects of religion.

Thus, the European Commission, in its White Paper on European Government, recognised the special contribution made by churches and religious communities, as an integral part of civil society, to allow European citizens to "express their concerns and offer services which respond to the needs of the population".<sup>11</sup> The Council also adopted a number of Resolutions on this subject. The first of these was the Directive 89/552/CEE on television broadcasting.<sup>12</sup> Article 11.5 of this contains the prohibition of placing advertising during the broadcast of religious services of less than 30 minutes duration, and article 12.c) states that TV advertising must not "go against religious convictions". The Directive 2000/78/CE, however, relativizes the importance of establishing a general framework for equal treatment in employment and occupation, and is, thus far, the most important ruling in secondary legislation.<sup>13</sup> As regards the topic at hand, besides the principle of non-discrimination on the grounds of religion, belief, disability, age or sexual orientation in employment and occupation (Article 1), this Directive states that Member States have complete freedom to maintain or adopt whatsoever national legislation they deem appropriate, including the justification of differential treatment on the grounds of religion or the belief that it may be necessary to respect the ethics of the organization, "acting in accordance with national constitutional and legal proceedings", with the ability to require, furthermore, "of the people working for them to act in good faith and loyalty to the organisation's ethos "(article 4.2).

The European Parliament also adopted two reports quite recently on the role of religion in certain EU policies. Reports which emphasized, among other features, the negative aspects of "the interference of churches and religious communities in public and political life" of the Member States.<sup>14</sup> This was interpreted by doctrine as an intrusion of this EU institution within the internal affairs of its Member States, directly affecting the cultural and religious traditions of their nationals.<sup>15</sup> Even so, in our opinion, these Parliamentary documents have provided a

breakthrough in the path taken by churches and religious associations or communities towards the official recognition that was given in Lisbon in 2007.

As such it is worth mentioning that the absence of an express provision in the founding Treaties on the issue of religion has not prevented the ECJ from taking into account the fundamental right of religious freedom contained in article 9 of the ECHR. The Praetorium from Luxembourg has estimated that this law is fully protected by Community law for the time being, given that all EU Member States ratified the Convention. The first judgement of the ECJ in this regard has been delivered in the case of *Prais/Council*, of October 27, 1976.<sup>16</sup> This judgement was followed by others, especially with regards to the free movement of people<sup>17</sup>, and the free movement of services, and social security for migrant workers<sup>18</sup>. Suffice to say that now, the *Udo Steymann* case of October 5, 1988, in which the Court ruled that that economic activities are any activities carried out by members of a community based on religion or any other spiritual or philosophical inspiration within the framework of the commercial activities of this community, to the extent that the services performed by the community in favour of its members may be regarded as indirect compensation for real and effective activities.<sup>19</sup>

In our view, the real turning point with respect to the introduction of a whole article devoted to the legal status of churches and philosophical and non-confessional organizations in original Community law has been fruit of the work undertaken within the framework of the European Convention. In this connection, one might recall that at the European Council at Laeken in December 2001, the Heads of State and Government of Member States agreed to convene a European Convention to prepare a future IGC to be made responsible for the reform of the Treaties that had established the European Communities and the EU.

The study of issues concerning the status of churches and non-confessional organizations, developed under the European Convention was prepared in various contact groups in civil society, as well as various plenary sessions devoted to civil society which took into account the contributions of organizations represented in the Forum established by the Laeken Declaration to provide greater transparency to the public of the work undertaken by the European Convention. With this in mind, it should be noted the large number of petitions that were submitted to this Convention by various religious organizations existing in the EU. In these petitions it was requested that the future Project for a European Constitution should “contain a spiritual element, with an explicit recognition of the religious and spiritual heritage of Europe” or that it should contain the Declaration No. 11 on the respect for the status of churches.<sup>20</sup>

Furthermore, on June 12, 2002 a meeting of the Contact Group with various organizations from civil society working in the field of culture was held in Brussels under the chairmanship of Mr. Meterle. Among the selected topics to be discussed on that occasion was that of churches and religious associations. Many of the participants interested in this subject showed their commitment to Declaration No. 11, which was an appendix to the Amsterdam Treaty. As it was felt that the values of the European continent, such as peace, freedom, dignity, solidarity and democracy, were in debt to the religious heritage of Europe, and especially Christianity, this should not be forgotten and should thus be enshrined in European texts. On the other hand, one participant in the meeting said quite the opposite - that an increasingly significant proportion of the population of the EU no longer feels related to this religious heritage, “and that any mention of it would lead to the introduction of divisions between believers and non-believers” among European citizens.<sup>21</sup>

The possible inclusion in the draft European Constitution of a separate article referring to the status of churches and non-confessional organizations was undoubtedly one of the most widely discussed topics during the European Convention. Proof of this could be seen in the large number of amendments that were received by the Secretary of the European

Convention. Thus, many people sought to delete this article in its entirety, or requested that it should include some reference to a specific religion or belief. Because, it was believed, otherwise it would not be possible to guarantee religious freedom, the change of religion, the expression of religion through worship and religious association. This is also contrary to the principle of the secular nature of the state and of the separation of and independence between the State and the Church. Along these lines can be seen the contribution which Mr Borrell (member of the European Convention) and Mrs. Carnero and Lopez Garrido (alternate members of the European Convention), filed with the Secretary General of the European Convention on “Respect for the principles of the freedom of religion and the secular nature of the state” which was eventually signed by 163 members of the European Parliament, from seven different political parties.<sup>22</sup>

Finally, the Declaration No. 11 became the first two paragraphs of Article I-51 of the Draft Treaty on establishing a Constitution for Europe.<sup>23</sup> Later a third paragraph was added to the article on the status of churches and non-confessional organizations.

This is an article that has been widely discussed and debated. Specifically, the amendments to the first two paragraphs, among other things it was requested: to add the word “faith” in the title thereof, or to delete the words “philosophical” in the first paragraph, or to clarify that the statute for schools was also to be included in the first paragraph in order to guarantee in this way that freedom of recruitment of teachers according to religious criteria could not be considered to be discriminatory, or that it should not attack the integrity of the human being, with a view to combating sects, or requests for the inclusion not only of the “status” but also of the “activities” of churches, religious associations or communities, as well as the philosophical and non-confessional organizations within the contents of this item.<sup>24</sup>

With respect to the third paragraph of article I-51 of the Draft Treaty on establishing a Constitution for Europe, most of the amendments received asked the European Convention to delete this paragraph. On the other hand, those who were in favour of its introduction into the final text of the draft European Constitution suggested, among other things: that dialogue with churches and non-confessional organizations should not lead to the granting by the EU of “financing” in order to facilitate such a dialogue; limit its scope only to the churches as non-confessional organizations were included under the provisions of the article which referred to the principle of participatory democracy; ensure that the dialogue should not only be “regular” but also “open and transparent”; clarify the fact that the dialogue with the churches is to be carried out while respecting the “profoundly secular character of the EU”. Some proposals were even made adding a first paragraph to the article on the status of churches and non-confessional organizations, to ensure religious freedom within the Community and even a new, separate article, which would deal with the same issues, but with regard to the regions and local collectives.<sup>25</sup>

Despite the numerous requests that were made within the framework of the European Convention in the sense that this article on the status of churches and non-confessional organizations should not be included within the text of the draft European Constitution, the majority of the Delegates who spoke during the Plenary meeting held in Brussels on April 24 and 25, 2003 were in favour of it being maintained in the legal text. Meanwhile, others felt that the term “philosophical” was not really understood and suggested that it be replaced with “cultural”, or thought that the third paragraph should not include religious or non-confessional organizations which threaten the integrity of the human being or which do not respect values embodied in this project. Finally, one Delegate showed his concern about the legal consequences of this provision at a national level. It is, however, remarkable that, in general, many Delegates who spoke on these issues explicitly supported the inclusion of an article that related to the status of churches and non-confessional organizations. And all this took place

despite the doubts which some Delegates expressed in relation to the third paragraph on the organization of a structured dialogue.<sup>26</sup>

Finally, the Praesidium of the European Convention adopted a defensive and prudent stance, deciding not to modify the content of Declaration No. 11, which was an appendix to the Amsterdam Treaty, and just proceeded to lighten the text. The Praesidium felt that if it ventured to rewrite this text, it would risk reopening a more debate which would turn out to be more general and more difficult, than the one that had previously been held.<sup>27</sup>

As regards the contribution of CIG'2003 respecting the article dealing with the status of churches and non-confessional organizations, it is worth noting that only Belgium in recent discussions, in December 2003, opposed any mention of religion and formally proposed the suspension of this article. This initiative ultimately failed.<sup>28</sup> Moreover, from a formal point of view, article I-51 became article I-52 in the Treaty establishing a Constitution for Europe.

## **II. The range and contents of article 17 of Treaty on the Functioning of the European Union**

### *a) Article 17.1 and 2 of the Treaty on the Functioning of the European Union:*

As we have mentioned, the first two paragraphs of Article 17 of the TFEU reflect in its entirety the Declaration No. 11, which had been included as an appendix to the Treaty signed in Amsterdam. Thus, this Declaration has a greater significance as it is included in the original articles of Community Law. The CIG'2007 which was responsible for the reform of the Treaties establishing the European Community and the EU after the rejection of the European Constitution in the Netherlands and France<sup>29</sup> maintained in full the old article I-52, which went on to become now article 17.

For the first time the role of religions and the philosophical and non-confessional organizations in the EU were explicitly recognised. In this connection, it should be stressed that, unlike the text of the European Constitution which situated article I-52 along with other provisions relating to the democratic life of the Union (namely the principle of democratic equality, the principle of representative democracy, the principle of participatory democracy, etc.)<sup>30</sup>, only this article on the status of churches and non-confessional organisations became part of the TFEU, while the other articles in question are mentioned in the new EU Treaty. But this fact should not be interpreted in any way as diminishing the relevance of any explicit recognition that the EU makes regarding the role of churches and non-confessional organisations within the Union.

Article 17.1 and 2 of the TFEU, by establishing that the EU must respect the status of churches and religious associations or communities which has been recognized under the national law of each Member State, means that the States of the Union can have whatever religion they want. And, hence, the EU cannot fix a common EU-wide model of relationships which its Member States must maintain with churches, religious associations or communities, and with the philosophical and non-confessional organizations in their territories.

Ultimately, therefore, the Union is, in respect to these organisations, in a neutral position.<sup>31</sup> Thus it is the Member States who have to choose the system of their relationships with churches, confessions and philosophical and non-confessional organizations that coexist in their territories, in accordance with their respective domestic legal systems<sup>32</sup>, and fully respecting the principle of subsidiary relations. In accordance, therefore, with article 5.3 of the new EU Treaty, “in areas which do not fall within its exclusive competence, the Union will intervene only if, and to the extent that the objectives of the proposed action cannot be sufficiently achieved by Member States whether at a central level or at regional and local

levels, but which could be better achieved due to the scale and impact of the proposed action, at an EU level”.

What has been interpreted by some in the sense that religious freedom is compatible with the confessional state or with the secular state. Equal rights of freedom of religious beliefs and ideologies for European citizens appear to be guaranteed, as any discrimination based on religion is prohibited.<sup>33</sup> From our point of view, this is in line with the policy that has been maintained by the EU since the beginning of its existence.

In this context, we find it to be of the utmost importance that in all 27 Member States there should be an adequate legal framework for the recognition of religious institutions and philosophical and non-confessional organizations within its territory. Unfortunately, many EU States do not have, at present, a registration system for religious bodies that has been drawn up in accordance with its domestic legal system. This means that the average citizen is threatened by the danger that certain entities could put their life, or their physical and mental integrity, in jeopardy. Without doubt, the establishment of the limits of freedom of association for religious communities is not a peaceful issue. This has also become clear in light of the judgement of the European Court of Human Rights of April 5, 2007, pronounced in the case of the *Church of Scientology of Moscow v. Russia*.<sup>34</sup>

A reading of article 17.1 and 2 also reveals that the EU has no competence in this area. This is also apparent in articles. 3, 4 and 6 of the TFEU, in which there is no reference to be found about any possible power held by the Union on these issues. In addition, in order to assure that the EU “respects and does not prejudice the status in its Member States” of churches and philosophical and non-confessional organizations, we believe that the Union has the obvious intention of remaining neutral with respect to all faiths and ideologies existing in its Member States, and as such this also constitutes an important step forward in terms of freedom of conscience.<sup>35</sup>

It should also be noted that the reference to non-confessional organisations in article 17.2 can be interpreted as an attempt by the EU to soften possible reactions to such explicit recognition of the status of churches and religious associations or communities within the EU. Such a reference has been criticized by some of the more conservative sectors of the Catholic Church, who believe that they had been equated to "social clubs". In our view, this provision of the TFEU represents the desire of the Union itself to institute the principle of equality between religions on the one hand and philosophical and non-confessional organizations, on the other. In this way, it echoes the position of the European Commission of Human Rights, which, in the case of the *Atheists Union v. France*, sanctioned a treatment which it considered to be discriminatory between religious and non-religious associations which pursue the same objective, that is, the defending of convictions.<sup>36</sup>

Lastly, it should be noted that article 17.1 and 2 of the TFEU, which mentions the recognition of the domestic law of the Member States regarding the status of churches and organizations of philosophical and non-confessional organizations, should not be confused with certain provisions of the Charter of Fundamental Rights of the EU<sup>37</sup> now that this has become part of original Community Law, by means of reference<sup>38</sup>, under Art. 6.1 of the new EU Treaty which stipulates that “The Union recognises the rights, freedoms and principles set forth in the Charter of Fundamental Rights of the European Union [...], which will have the same legal value as the Treaties”.

These are, firstly, Article 10.1 of the Charter which recognizes freedom of thought, conscience and religion – “Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom to manifest one's religion or belief individually or collectively, in public or private, through worship, teaching, practice and observance of rituals”. The great difference between article 17.1 and 2 of the TFEU and article 10.1 of the Charter is the fact that the first one refers only to the



status of the organizations listed above<sup>39</sup>, while the latter deals with the situation and the rights of individuals with regard to religion or their beliefs, so that the practical application of article 22 of the Charter is that concerning the respect for “cultural diversity, religious and linguistic diversity”.

From our point of view, it would be ridiculous to think that the EU has now renounced the secular identity now that article 17 of the TFEU reflects the status of churches and religious associations or communities. Nor should we forget that article 14.3 of the Charter of Fundamental Rights of the EU provides for the freedom of the establishment of schools within “while respecting democratic principles and the right of parents to ensure education and teaching their children according to their religious philosophical and pedagogical beliefs”.

Finally, it should be noted that, when the Charter of Fundamental Rights of the EU reaches the same legal value as the new TEU and TFEU, the involvement of churches and non-confessional organizations in the democratic life of the Union is strengthened and at the same time, it also reaffirms the secular nature which exists within the EU. In our view, the Union remains a diverse and pluralistic space in terms of cultural and ideology, representing a secular space, within which Christians, Jews and Muslims, among others, have long lived together, and in a peaceful manner for decades.

*b) Article 17.3 of the Treaty on the Functioning of the European Union:*

Undoubtedly, article 17.3 of the TFEU represents the greatest innovation for the subject matter of this essay, institutionalizing an “open, transparent and regular dialogue” between churches and non-confessional organizations with the Union itself. This is a dialogue that had already existed, but on an informal basis until now.<sup>40</sup> In our view, this provision is part of the efforts made by the EU for a greater democratization of its activities. Such efforts have also been patents as a result of article 10 of the new EU Treaty which reflects the principle of representative democracy, and Article 11 of the new EU Treaty referring to the principle of participatory democracy.

As such, this section provides the conviction held by the Union itself that churches and philosophical and non-confessional organizations can have a positive role in contemporary society.

But who are the interlocutors of the EU institutions in this "open, transparent and regular" dialogue, which hitherto had been a mostly informal dialogue with the European Commission? These are mainly from: the Commission on Bishops in the European Community (COMECE), the Church and Society Commission of the Conference of European Churches (CEC), the Bureau of the Orthodox Church to the European Union, the Conference of European Rabbis, the Muslim Council of Cooperation in Europe (CMCE), the European Humanist Federation, the European Evangelical Alliance (EEA), the World Conference on Religion and Peace, and the Spiritual and Socio-Cultural Spaces within European Society.<sup>41</sup> In other words, these would include representatives of the Catholic Church, of Protestantism, of the Orthodox Churches, of Judaism, of Islam, and of various non-confessional organizations.

At the same time, it must be noted that the repeated mention of the word “respect” implies certain positive obligations for the Union in favour of the members of European civil society, mentioned in article 17, because, as the European Court of Human Rights has stated, “respect [...] means more than (recognizing) or (taking into consideration): In addition to a compromise which is above all negative, this verb implies a certain positive obligation on the part of the State”.<sup>42</sup>

It is therefore an additional paragraph referring to "open, transparent and regular" dialogue that the EU institutions are bound to keep with the said churches and organizations also referred to in Article 11.2 of the new EU Treaty. It is this same article that has led many to think that it would be excessive to incorporate article 17.3 of the TFEU as this was considered to be redundant. What we cannot get away from is the fact that Union has wanted to give the Church and those organizations a more prominent power than that granted to the rest of civil society.

## CONCLUSION

Throughout this essay, we have focused on the analysis of the scope and content of article 17 of the TFEU on the status of churches and non-confessional organizations, which also institutionalizes an "open, transparent and regular" dialogue with these community institutions.

This is undoubtedly a great advance that has contributed to the founding Treaties, one which helps reduce, in our view, the traditional democratic deficit of the Union. It is an advance that also falls within the process of rapprochement of European citizens to EU institutions, which could clarify within this area, the position of the EU. Undoubtedly article 17 of the TFEU represents a step forward in this area, but it really should go somewhat deeper.

In the first part of our study, we have had an opportunity to review the most important moments related to the legal position of churches and non-confessional organizations within the EU. Thus, we have analysed the emergence and consolidation of a dialogue, at first informal and later of an institutionalized nature, of these organizations with the Union itself. In this regard, we have paid particular attention to the work of the drafting of the text of a Treaty through which there could be established a Constitution for Europe.

In the second part, we have focused on the study of the said article itself. The first two paragraphs set out and give greater scope to legal Declaration No. 11, an appendix to the Treaty of Amsterdam, under which the Union respects and does not prejudice the status of churches and philosophical and non-confessional organizations, recognized as such by Member States according to their relevant national laws. But this lack of EU powers in the religious sphere should not be interpreted as a possible lack of action by the Church in the everyday life of the Union since, under the principle of participatory democracy; it institutionalizes a possible right of the Church to interfere in the EU institutions. In such a way it culminates the requests constantly formulated by the Vatican since the CIG'96 and which have continued to be made up until the present. In our view, it is obvious that through article 17 of the TFEU the way is open for the Church to intervene, directly in the Union's policies on many matters concerning the life of European citizens, and especially on issues that are of particular interest to the Church, such as: abortion, euthanasia, family planning, religious education, etc.

However, we believe that this situation represents, at the same time, a possibility for the EU to control these and not only to favour them.

The article of the Treaty Reform which has been subject of our attention in this paper ends with a reference to an "open, transparent and regular" dialogue which the EU is committed to keeping up with churches and non-confessional organizations, which gives them a prominent place within the broader dialogue that it seeks to develop with the various participants of civil society.

One might conclude by stating that the controversy which has been generated in recent years over the religious factor has highlighted the need for the opening of a debate between the Union and various religious and philosophical and non-confessional organizations, to be characterized, we believe, by a spirit of tolerance in line with a multiethnic and multicultural society such as that which exists within the EU at the present time.

## End Notes

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- <sup>1</sup> Treaty establishing a Constitution for Europe, *OJ C* 310, 16.12.2004, pp. 1-474.
- <sup>2</sup> Art. 9 ECHR establishes that: “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others”.
- <sup>3</sup> For this, see: J. A. Frowein, “Article 9.1”, in *La Convention Européenne des Droits de l'Homme. Commentaire article par article*, dir. by Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (Paris : Economica, 1995), 353-360; María Encarna García Jiménez, *El Convenio Europeo de Derechos Humanos en el umbral del Siglo XXI* (Valencia: Tirant lo Blanch, 1998); Alejandro Torres Gutiérrez, “La libertad de pensamiento, conciencia y religión (Art. 9 CEDH)”, in *La Europa de los Derechos. El Convenio Europeo de Derechos Humanos*, coord. Javier García Roca and Pablo Santolaya (Madrid: Centro de Estudios Políticos y Constitucionales, 2005), 509-527.
- <sup>4</sup> Written Question No. 1121/97, by Bartho Pronk to the Commission. German proposal to include a “churches clause” in the revised Maastricht Treaty, *OJ C* 319, 18.10.1997, p. 232.
- <sup>5</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Declarations of which the Conference took note – Declaration by Greece concerning the Declaration on the status of churches and non-confessional organisations, *OJ C* 340, 10.11.1997, p. 144. This Declaration says: “With reference to the Declaration on the status of churches and non-confessional organizations, Greece recalls the Joint Declaration on Mount Athos annexed to the Final Act of the Treaty of Accession of Greece to the European Communities”.
- <sup>6</sup> *OJ C* 314, 10.11.1997.
- <sup>7</sup> For this, see: Bérengère Massignon, “Les relations entre les institutions religieuses et l'Union européenne: un laboratoire de gestion de la pluralité religieuse et philosophique?”, in *Les mutations contemporaines du religieux*, ed. Armogathe and Willaime (Brepols: Turnhout, 2003), 25-43.
- <sup>8</sup> In this case, see: COMECE/KEK, June 2002.
- <sup>9</sup> For this, see: Massignon, “Les relations entre les institutions religieuses et l'Union européenne: un laboratoire de gestion de la pluralité religieuse et philosophique?”, 29.
- <sup>10</sup> See: Pierre de Charentenay, “Les relations entre l'Union européenne et les religions”, *Revue du Marché commun et de l'Union européenne* 465 (2003): 94; Bérengère Massignon, “Les relations entre les institutions religieuses et l'Union européenne : un laboratoire de gestion de la pluralité religieuse et philosophique?”, in *Les mutations contemporaines du religieux*, ed. Armogathe and Willaime (Brepols: Turnhout, 2003), 29-30.
- <sup>11</sup> COM(2001) 428 final: European Governance – A White Paper, *OJ C* 287, 12.10.2001, p. 16.
- <sup>12</sup> *Council Directive 89/552/EEC*, of 3 October 1989, on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, *OJ L* 298, 17.10.1989, pp. 23-30.
- <sup>13</sup> *Council Directive 2000/78/EC*, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, *OJ L* 303, 2.12.2000, pp. 16-22.
- <sup>14</sup> This is specifically: European Parliament resolution on women and fundamentalism, P5\_TA (2002)0110, adopted 13.03.2002; *OJ C* 47 E, 27.02.2003, p. 406; European Parliament resolution on sexual and reproductive health and rights, P5\_TA (2002)0359, adopted 3.07.2002; *OJ C* 271 E, 12.11.2003, p. 369.
- <sup>15</sup> In this case, see: Charentenay, “Les relations entre l'Union européenne et les religions”, 95-96.
- <sup>16</sup> Case 130/75, *Prais/Council*, [1976] ECR, p. 1589.
- <sup>17</sup> This deals with matters which were brought up, for example, the Luxembourg Tribunal with reference to the recognition of higher education qualifications of people who, because of their work in educational institutions depending on the Church (see: Case C-102/02, *Beuttenmüller*, [2004] ECR, p. I-5405); income tax for EU citizens carrying out practical work for the Church (see: Case C-169/03, *Wallentin*, [2004] ECR, p. I-6443), etc.
- <sup>18</sup> Case 300/84, *van Roosmalen*, [1986] ECR, p. 3097.
- <sup>19</sup> Case 196/87, *Udo Steymann/Staatssecretaris van Justitie*, [1988] ECR, p. 6159, point 14.
- <sup>20</sup> European Convention: “Digest of contributions to the Forum”, CONV 112/02, 17.06.2002, p. 8.
- <sup>21</sup> European Convention: “Contact groups (Civil Society)”, CONV 120/02, 19.06. 2002, AnnexVIII.

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<sup>22</sup> European Convention: “Respect for the principles of freedom of religion and laicism of the State”, CONV 587/03, 26.02.2003.

<sup>23</sup> Draft Treaty establishing a Constitution for Europe, *OJ C* 169, 18.07.2003, pp. 1-105.

<sup>24</sup> European Convention: “Summary sheet of the proposals for amendments relating to the democratic life of the Union: Draft articles for Part One of the Constitution, Title VI”, CONV 670/03, 15.04. 2003, pp. 24-25.

<sup>25</sup> *Ibidem*, p. 25.

<sup>26</sup> European Convention: “Summary Report of the Plenary Session - Brussels, 24 and 25 April 2003”, CONV 696/03, 30.04.2003, pp. 6-8.

<sup>27</sup> European Convention: “Draft Constitution, Volume I. Revised text of Part One”, CONV 724/03, 24.05.2003, p. 118.

<sup>28</sup> COMECE: *Lettre Circulaire*, Bruxelles, 9.12. 2003.

<sup>29</sup> For an ample study of the process of ratification of the Treaty for the Establishment of a Constitution for Europe within the Member States, as well as the candidate countries for membership of the EU, see: Anneli Albi and Jacques Ziller, eds., *The European Constitution and National Constitutions: Ratification and Beyond* (The Netherlands: Kluwer Law International, 2007).

<sup>30</sup> This is specifically: articles I-45 to I-52 of the European Constitution. See: Patrice Rolland, “Article I-52”, in *Traité établissant une Constitution pour l’Europe. Commentaire article par article. Parties I et IV “Architecture constitutionnelle”*, Tome 1, dir. Laurence Burgorgue-Larsen, Anne Levade and Fabrice Picod (Bruxelles: Bruylant, 2007), 674-676.

<sup>31</sup> In this case, see: Massignon, “Les relations entre les institutions religieuses et l’Union européenne : un laboratoire de gestion de la pluralité religieuse et philosophique?”, 30-32; Torres Gutiérrez, “La libertad de pensamiento, conciencia y religión (Art. 9 CEDH)”, 510-512.

<sup>32</sup> It is considered that nowadays there are three different types of relationships between State and Church in the EU Member States: firstly, the system in which there is a Church of State; secondly, the system characterized by a strictly separation between State and Church; and, thirdly, the system where there is an idea of the Church separated from the State, but that allows to the Church to have social and legal privileges. For this, see: Gerhard Robbers, *State and Church in the European Union*, 2<sup>nd</sup> ed. (Nomos, Baden-Baden, 2005); Louis-Léon Christians, “Droit et religion dans le Traité d’Amsterdam: une étape décisive?”, in *Le Traité d’Amsterdam. Espoirs et déceptions*, coord. Yves Lejeune (Bruxelles: Bruylant, 1998), 206-209.

<sup>33</sup> See: Ana Fernández-Coronado González, “La influencia de la religión en la configuración del Derecho de la Unión Europea”, *Revista de Ciencias de las Religiones* XI (2004): 37.

<sup>34</sup> Case 18147/02, *Church of Scientology Moscow v. Russia*, 5.04.2007. See: José Daniel Pelayo Olmedo, “La legitimidad o ilegitimidad de la intervención administrativa en la formación de las comunidades religiosas. Comentario a la Sentencia del Tribunal Europeo de Derechos Humanos de 5 de abril de 2007, asunto Iglesia de Scientology c. Rusia (demanda nº 18147/02)”, *Revista General de Derecho Europeo* 14 (2007): 1-21.

<sup>35</sup> In this case, see: Fernández-Coronado González, “La influencia de la religión en la configuración del Derecho de la Unión Europea”, 39.

<sup>36</sup> ECHR Report, *Union of Atheists v. France*, 14635/89, 6.07.1994; see especially points 62 and 78.

<sup>37</sup> Charter of Fundamental Rights of the European Union, *OJ C* 364, 18.12.2000, pp. 1-22.

<sup>38</sup> In this sense, see: Antonio F. Fernández Tomás, “La Carta de los Derechos Fundamentales de la Unión Europea tras el Tratado de Lisboa. Limitaciones a su eficacia y alcance generadas por el Protocolo para la aplicación de la Carta al Reino Unido y Polonia”, in *El Tratado de Lisboa. La salida de la crisis constitucional*, coord. José Martín y Pérez de Nanclares (Madrid: Iustel, 2008), 123.

<sup>39</sup> For this, see: Marianne Dony and Emmanuelle Bribosia, eds., *Commentaire de la Constitution de l’Union européenne* (Bruxelles : Editions de l’Université de Bruxelles, 2005), 96.

<sup>40</sup> Massignon, “Les relations entre les institutions religieuses et l’Union européenne : un laboratoire de gestion de la pluralité religieuse et philosophique?”, 25-43.

<sup>41</sup> Esther Souto Galván, “El estatuto de las iglesias y de las organizaciones no confesionales”, in *Libro II. Los derechos y libertades*, dir. Enrique Álvarez Conde and Vicente Garrido Mayol (Valencia: Tirant lo Blanch, 2004), 372-376.

<sup>42</sup> Case 7511/76 and 7743/76, *Campell and Cosans v. United Kingdom*, 22.03.1983, point 37.

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