

## Decision of the European Ombudsman in his inquiry into complaint 2097/2011/RA against the European Commission

Decision

**Case** 2097/2011/RA - **Opened on** 15/11/2011 - **Decision on** 25/01/2013 - **Institution concerned** European Commission ( Critical remark ) |

Article 17(3) TFEU states that the EU is obliged to "*maintain an open, transparent and regular dialogue*" with churches, religious associations or communities, philosophical and non-confessional organisations. The European Humanist Federation turned to the Ombudsman alleging that the Commission wrongly refused its proposal for a "*dialogue seminar*" under Article 17 TFEU.

In its opinion, the Commission explained that: (i) a discussion on the subject matter proposed by the complainant, namely, the exemption for churches and other religious organisations provided in European employment rules, would go beyond the spirit of Article 17 (1) and (2), according to which the Union respects the status under national law of churches, religious associations or communities, and philosophical and non-confessional organisations; and (ii) given its limited administrative capacity to organise dialogue seminars, it has insisted with all dialogue partners that the reduced number of meetings that can take place each year should concentrate on the main priorities in its policy agenda. This condition has been upheld with all dialogue partners on an equal footing and without any discrimination. The complainant disagreed.

With regard to (i), the Ombudsman failed to see how engaging in a discussion with the complainant on the above subject matter could call into question the status under national law of churches, religious associations or communities, and philosophical and non-confessional organisations. He made a critical remark. With regard to (ii), the Ombudsman noted that the Commission does enjoy a broad margin of discretion in terms of determining the topics it chooses to discuss as part of the dialogue envisaged by Article 17 TFEU. He noted, however, that the Commission should always ensure that it can justify objectively how it has exercised its margin of discretion. It should, moreover, ensure that the manner in which it exercises that margin of discretion is not discriminatory, nor perceived to be discriminatory.

The Ombudsman found that the present case offers an opportunity for the Commission to clarify, in the interests of both its dialogue partners under Article 17 TFEU, and indeed of the public, the manner in which it carries out the dialogue. He therefore made a further remark, according to which 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.

## The background to the complaint

1. This case concerns an alleged failure by the European Commission to implement correctly Article 17 of the Treaty on the Functioning of the European Union (TFEU) [1] , which requires the European Union to maintain an open, transparent and regular dialogue with churches, religious associations or communities, philosophical organisations and non-confessional organisations. The complaint was lodged by the European Humanist Federation (EHF) ('the complainant'), which represents 50 humanist organisations from more than 20 countries [2] .

2. On 28 March 2011, the complainant presented a written proposal for a dialogue seminar [3] to the Commission on the topic '*Competing Rights Issues in Europe*' [4] . According to the complainant, the aim of the dialogue seminar was to examine issues of human rights, equality, and non-discrimination arising from the exemptions for "*churches and other public or private organisations the ethos of which is based on religion or belief*" in Article 4 of the Employment Equality Directive [5] and related matters. It explained that the seminar would focus on political issues, as well as the concerns of the humanist and secularist community in Europe.

3. In its reply to the complainant, dated 5 May 2011, the Commission requested the complainant to reconsider its proposal. In doing so, it noted that the complainant's proposal covered "*cases of possible conflict between freedom of religion and of belief and the right to equality*". It then stated that Article 17 TFEU mandates the Commission to set up dialogue meetings with religious communities and philosophical organisations, but not to engage in discussions about religion or philosophy. The Commission has no competence in religious or philosophical matters, it said. For this reason, dialogue meetings focus exclusively on Commission policy initiatives. It mentioned fields of action such as economic and financial governance, energy, environment and climate change, by way of example. The Commission added that the Council of Europe is the appropriate forum for a debate on freedom of religion and of belief. In that same letter, the Commission underlined that Commission President Barroso is very committed to protecting and promoting democratic rights and liberties. This is why the 2011 meetings between the Commission President and leading figures of religious communities and of non-confessional organisations would discuss the topic '*A Partnership for democracy and shared prosperity: a common willingness to promote democratic rights and liberties*' .

4. The Commission's reply also included a letter from 2009 in which it sets out its general approach to the dialogue with religious and non-confessional organisations. In the letter, the Commission informs the complainant that "*[i]f EHF experts seek an exchange of views with EC experts on Commission policy initiatives, this dialogue is the right setting (..) Please note that the very essence of this dialogue implies that the EHF mobilises its experts on migration, energy, environment, education, economic and financial policy, etc, to debate with EC experts on Commission policy initiatives in those areas.*"



5. In a letter to President Barroso, dated 30 September 2011, the complainant contested the reply it received from the Commission concerning its seminar proposal. It insisted that its proposal is *"by no means to 'articulate (our) views on religion'. (...) Rather we are very keen on maintaining a dialogue with the Commission to share our concerns, which include issues like non-discrimination and human rights"* .

6. The complainant went on to argue that its proposed topics relate to matters that fall within the Commission's remit. It argued 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. These rights often clash, and thus require adjudication. The EU's Employment Equality Directive goes some way to offering such adjudication, by defining circumstances in which differences of treatment may exceptionally be allowed on grounds of religion or belief. However, the Directive leaves many questions unresolved.
- The Commission proposed, in 2008, a new non-discrimination directive [6] , that, again, included exceptions for religion or belief. The complainant argued that the scope of such exceptions is therefore still open for discussion.
- The remit of the Commissioner for Justice, Fundamental Rights and Citizenship plainly covers the topics the complainant proposed for discussion.
- The Commission is financing the RELIGARE [7] academic collaboration precisely on issues, including legal issues, concerning the place of religion in society.

7. The complainant further contested the Commission's statement that the subjects it proposed were more appropriately left to the Council of Europe.

8. In the absence of a response from the Commission, the complainant turned to the Ombudsman [8] .

## **The subject matter of the inquiry**

9. The complainant made the following allegation and claim, which were included in the inquiry:

Allegation:

By rejecting the proposal from the European Humanist Federation for a seminar to discuss issues which the complainant argues fall within the powers and functions of the Commission, 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.

Claim:



The Commission should accept the proposal for a seminar.

**10.** The Ombudsman's letter to the Commission requesting its opinion on the complaint included the following questions:

- According to the complainant, the Commission has indicated that the principal means by which it wishes to conduct the dialogue under Article 17(3) TFEU is through dialogue seminars. Has the Commission adopted any internal guidelines or issued any instructions to staff outlining how it should implement Article 17(3) TFEU?
- Could the Commission comment specifically on the complainant's arguments that:
  - the proposed topic for its dialogue seminar falls within the powers and functions of the Commission?
  - the dialogue under Article 17(3) cannot be confined to subjects which the Commission is willing to discuss, otherwise it must be futile?
- As regards issues which fall within its competence, does the Commission have any guidelines determining how it should exercise its discretion in terms of the topics it chooses to discuss under Article 17(3)?
- Could the Commission comment on its understanding of the relationship between the more general provisions under Article 11 of the Treaty on European Union, in particular Article 11(1) to 11(3) [9] , and Article 17(3) TFEU?

## **The inquiry**

**11.** The complaint was submitted to the Ombudsman on 18 October 2011. On 15 November, the Ombudsman opened an inquiry by asking the Commission for an opinion. On 7 March 2012, the Commission sent its opinion, which was forwarded to the complainant with an invitation to submit observations. The complainant submitted observations on 27 April 2012.

## **The Ombudsman's analysis and conclusions**

### **A. Allegation of failure to implement Article 17(3) TFEU and related claim**

#### **Arguments presented to the Ombudsman**

**12.** In its opinion, the Commission states that the EU strongly endorses the principle of separation of religion and politics. The Commission, as all EU institutions, has neither religious nor philosophical beliefs. It respects all religious faiths and philosophical beliefs equally, without discrimination, provided that fundamental European values (human rights and fundamental liberties, democratic rule of law, solidarity and respect for freedom of thought and of belief) are, in turn, respected by all communities of belief involved in the Article 17 dialogue.



**13.** Given the limited administrative capacity and means available to organise 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. This condition has been upheld with all dialogue partners on an equal footing and without any discrimination, be they religious communities or philosophical and non-confessional organisations. According to the Commission, until now, all partners have understood its rationale and accepted this general condition. The Commission insists that it remains determined to maintain an inclusive dialogue, not only with churches and religious communities, but also with philosophical and non-confessional organisations. This is why it has expended much effort to maintaining good relations with the complainant, and hopes to maintain those good relations in the future.

**14.** In reply to the Ombudsman's question as to whether the Commission has adopted guidelines outlining how it should implement Article 17(3) TFEU, the Commission stated that, although it has not adopted formal internal guidelines as such, it interprets "*open, transparent and regular*" dialogue with churches, religious communities, and philosophical and non-confessional organisations under Article 17(3) TFEU in the following way:

"Open": all relevant topics of the EU agenda can be addressed in this informal dialogue that is of horizontal nature and commonly agreed. Dialogue partners can be all churches, religious communities, and philosophical and non-confessional organisations that are recognized as such at national level and adhere to European values.

"Transparent": the EU institutions commit themselves to convey to the public all relevant information about this dialogue. One concrete sign of this is the fact that a press conference is held after the annual high level meetings with the Presidents of the EU institutions. Also, a dedicated website lists all the recent events, with programmes, lists of participants, and speeches [10] . Finally, the responsible Commission service [11] replies to all questions posed via mail or telephone, be they by individuals or organisations.

"Regular": it has become common practice to organise, once a year, two separate informal meetings hosted by the President of the Commission and co-chaired by the Presidents of the European Parliament and of the European Council: one with high level representatives of religious communities and associations and the other with representatives of philosophical and non-confessional organisations, usually on the same topic. The dialogue also entails exchanges of views and meetings with members of the Commission, as well as speeches by the latter. In this spirit, the Commission organised, over the past years, several events with philosophical and non-confessional organisations. It provides relevant examples.

**15.** Specifically with regard to the complainant, the Commission states that Commission President Barroso, as well as the Commission's services, regularly meet with individual partners of this dialogue in bilateral meetings. In this spirit, President Barroso met with the EHF President and board members on 5 July 2007. Subsequently, the Commission's services were in regular contact through emails and meetings with the complainant.



**16.** In response to the Ombudsman's question as to whether the proposed topic for the dialogue seminar falls within the powers and functions of the Commission, the Commission states that the complainant explained that, as part of the topic '*Competing Rights Issues in Europe*', it wished to discuss "*problems that arise in defining the application of religious exemptions from the EU's directive 2000/78/EC on employment*". The Commission argues that it did not claim that the Directive does not fall under EU competence. However, it requested the complainant to reconsider its proposal for two reasons. First, dialogue seminars are meant to address wider issues, for example, combating poverty and social exclusion, youth and education (as the right response to the crisis), the reform of the labour market in Europe, or the impact of immigration in European school systems. The Commission requested the complainant to make a contribution to the European cause by choosing a topic of this nature. Second, the Commission refers to Articles 17 (1) and (2) TFEU, according to which the Union respects and does not prejudice the status under national law of churches, religious associations or communities, and philosophical and non-confessional organisations. These are competences of national authorities on the basis of their respective constitutions and legal systems and their diverse cultural traditions. The Commission respects this autonomy and diversity and strives to respect the principle of subsidiarity. In its view, therefore, a discussion on "*problems that arise in defining the application of religious exemptions from the EU's directive 2000/78/EC on employment*" concerns issues which may potentially arise in the implementation of EU law into national law and would go beyond the spirit of Article 17 (1) and (2).

**17.** In response to the Ombudsman's question regarding the complainant's argument that the dialogue under Article 17(3) cannot be confined to subjects which the Commission is willing to discuss, otherwise it must be futile, the Commission explains that it is its understanding that the dialogue takes place on issues that are of wider common interest. On that basis, the Commission is open to proposals from its religious or philosophical and non-confessional interlocutors and has taken up their proposals in the past. In particular, on 16 April 2008, the Commission participated in a colloquium organized by the complainant on the topic '*Laïcité et droits de l'homme*', where President Barroso gave the closing speech entitled "*Droits de l'homme: le point de convergence de tous les héritages européens*".

**18.** In terms of the parameters for choosing the topics of dialogue seminars, the Commission again states that the Treaty mentions in Article 17 (3) a dialogue with churches, religious communities, and philosophical and non-confessional organisations, and not a dialogue about religion and philosophy. The approach of the Commission has therefore been to address EU policy matters, rather than philosophical or religious ones. This approach seems relevant also with a view to the possible impact that this dialogue may have on EU policy making, it says.

**19.** Finally, as far as the interplay between Article 17(3) TFEU and Article 11(2) TEU is concerned, the Commission states that the notion of an "*open, transparent and regular dialogue*" is common to Articles 17(3) TFEU and 11(2) TEU. This latter Article clearly implies that the dialogue of the EU with civil society and representative organisations aims at implementing the principle of participatory democracy, in order to "*give citizens and representative associations the opportunity to make known and publicly exchange their views in*



*all areas of Union action"* , as laid down in Article 11(1) TEU. It is therefore reasonable to argue that the same expression "*open, transparent and regular dialogue*" which can be found in Article 17(3) TFEU means that, although the latter has a more restricted scope, it also aims to implement the principle of participatory democracy, that is, to give churches, religious communities, and philosophical and non-confessional organisations the opportunity to make known and publicly exchange their views in all areas of Union action.

**20.** In its observations on the Commission's opinion, the complainant welcomes the Commission's statement that the EU strongly endorses the principle of separation of religion and politics. The complainant insists, however, that recent events have only reinforced its impression that the Commission's implementation of the Article 17 dialogue displays a consistent bias in favour of religion.

**21.** With regard to the specific issue of the Commission's refusal to accept the complainant's proposal for a dialogue seminar, the complainant points out that, while the Commission stated, in its email dated 5 May 2011, that dialogue meetings focus exclusively on Commission policy initiatives and that a dialogue seminar on freedom of religion and of belief is not appropriate, on 30 March 2012, the Commission held a full-day dialogue seminar with the churches on '*Freedom of Religion: A Fundamental Right in a Rapidly Changing World*' [12] . That meeting was addressed by, inter alia, a Commission Director and Director-General. According to the complainant, the major part of the programme was on exactly the subject that it had been refused. The complainant insists that the Commission is therefore discriminating against it: whilst the churches were offered a full-day dialogue seminar with high-ranking officials to put their case for freedom of religion, the complainant was only offered a 90 minute low-level meeting to make representations about the risk that freedom of religion or belief might clash with other human rights. The complainant expresses the view that it is most worrying to note that the Commission's discriminatory policy is ongoing despite the current complaint to the Ombudsman.

**22.** The complainant further points out that the Commission claimed that the former's proposal would go beyond the spirit of Article 17 as the subject would raise issues which may potentially arise in the implementation of EU law into national law. The complainant underlines that the Commission has an explicit role in scrutinising and reporting on the transposition of EU law into national law: hence its wish to discuss the matter with the Commission. The complainant further draws attention to the fact that the Commission is responsible for ensuring that EU Member States respect fundamental rights when implementing EU laws. In its view, the lessons learnt from the Employment Equality Directive are highly relevant to the draft directive on non-discrimination now under discussion [13] .

**23.** With regard, more generally, to the parameters for choosing the topics of dialogue seminars, the complainant laments the fact that the Commission renews its attempt to argue that the complainant wishes to discuss religion rather than discrimination. The complainant fails to see why its proposed topic was less a policy matter than the aforementioned dialogue seminar on religious freedom.





**24.** The complainant goes on to contest the fact that, after offering to support a conference similar to the one organised by the EHF and supported by the Commission in 2008, the Commission unilaterally changed its offer in the summer of 2010 to a dialogue seminar. Moreover, the Commission itself sometimes uses the term "*meeting*" in lieu of "*seminar*". The complainant therefore claims that the Commission (i) unilaterally turned its offer of a conference into a dialogue seminar; (ii) let the complainant wrongly believe that it had agreed to stage a dialogue seminar; (iii) in any event, failed to explain in due time the difference in nature between a "*dialogue seminar*" and a "*meeting to exchange views*".

**25.** More generally, as far as guidelines are concerned, the complainant points out that the meaning the Commission gives to the term "*open*", namely that "*all relevant topics of the EU agenda can be addressed in this dialogue (...)*", is actually new: the previous version said nothing about subject matter. With regard to the dialogue partners, the complainant states that, even for the regular annual meetings co-chaired by the three Presidents, the Commission has been unwilling to entertain any suggestion of who might represent the complainant. The complainant contests who exactly is invited to the relevant meetings, drawing attention, in particular, to the annual summit meeting in 2010 when only three people were invited from the EHF and its 50-odd member organisations.

**26.** Turning to the requirement that the dialogue be "*transparent*", the complainant points out that 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. As to the press conferences referred to by the Commission, the remarks made by the EU representatives — the only ones who speak — have invariably been prepared in advance of the meetings they purport to describe.

**27.** With regard to the term "*regular*", the two series of annual high level meetings are indeed regular. Leaving aside the annual high-level meetings, however, the Commission's record, according to which 19 meetings out of 26 were with the churches, speaks for itself. Over four years, there has been just one engagement with the complainant, despite the fact that it is the most representative body in Europe for those entertaining philosophical and non- confessional beliefs. With regard to the Commission's reference to regular contact through emails and meetings between the responsible official and the complainant, that correspondence, other than in relation to the meetings organised by the Commission, was always initiated by the complainant, mainly in an attempt to obtain fairer treatment. The meetings referred to were almost all chance encounters at third-party events.

**28.** By way of conclusion, the complainant states that the Commission's suggestion that the EHF proposal was ineligible because it did not relate to a main priority of the Commission's policy agenda is not acceptable because (i) it would be a denial of the Commission's own interpretation of Article 17 ( "*open*" means that "*all relevant topics of the EU agenda can be addressed in this dialogue*" ); (ii) it goes directly against the priorities set by the Commission itself as quoted above; (iii) the subject was perfectly eligible when proposed by the churches.





## The Ombudsman's assessment

### Preliminary remarks

**29.** The present case concerns the implementation of a Treaty provision that entered into force relatively recently, namely on 1 December 2009 with the entry into force of the Treaty of Lisbon. This case therefore offers a welcome opportunity to develop the understanding of how the Treaty of Lisbon, improves the process of participatory democracy in the EU. It is thus not only of immediate relevance to the Commission, but equally to the Parliament and the Council, and all other EU institutions, bodies, offices, and agencies that are actively involved in dialogue with civil society.

**30.** As rightly argued by the Commission, Article 11 TEU and Article 17 TFEU give additional effect to the process of participatory democracy. The Ombudsman notes, in this context, the common reference to "*an open, transparent and regular dialogue*" in Article 17(3) TFEU and Article 11(2) TEU, the latter provision being found in Title II of the TEU under '*Provisions on Democratic Principles*' .

**31.** The Ombudsman has already had an opportunity, in his draft recommendation in case 2558/2009/(TN)DK [14] , to examine some of the Lisbon Treaty provisions relating to participatory democracy. In that case, the Ombudsman recalled that "*[p]articipatory democracy, based on the principles 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.*" [15]

**32.** The Ombudsman went on to underline that the precise manner by which participatory democracy is made effective in any given circumstance will depend upon the specific nature of the Union action in question. It also involves determining when and how participation is appropriate in a particular process [16] .

**33.** The Ombudsman further pointed out that the EU institutions necessarily have a margin of discretion when deciding upon the precise manner in which participatory democracy is made effective. However, they should always ensure that they can justify objectively how they have exercised that margin of discretion [17] .

**34.** Providing objective justifications necessarily means that the manner in which the institutions exercise that margin of discretion is not discriminatory, nor perceived to be discriminatory. In particular, in light of Article 21 of the Charter of Fundamental Rights of the EU, which prohibits discrimination on the grounds, inter alia, of religion, belief or any other opinion, the institutions, in implementing the dialogue referred to in Article 11 TEU and Article 17 TFEU, should avoid discriminating against certain groups, including against certain religious groups or against the non-religious community. They should also seek to avoid any perception of discrimination.

**35.** It should further be pointed out that the obligation to engage in dialogue with civil society is



not only a question of granting funding for certain actions, which is in part the issue raised in the present case. Indeed, one would imagine that this is rarely the case. Furthermore, the fact that the Commission chooses not to sponsor a particular initiative cannot, in itself, lead to the conclusion that it has breached its obligation to enter into a dialogue with the relevant organisation.

**36.** Moreover, as will be further detailed below (see paragraphs 56 and 57), the fact that the Commission chooses not to engage in a particular dialogue under Article 17 TFEU does not necessarily imply that civil society participation cannot be assured by other means, notably, under Article 11 TEU. In other words, refusal to discuss an issue under Article 17 TFEU should not preclude the right of civil society organisations to put forth and convey to the Commission ideas on the same, or other policy areas, under Article 11 TEU.

## Article 17 TFEU dialogue

**37.** Article 17 TFEU foresees a dialogue with the churches, religious associations or communities, and philosophical and non-confessional organisations.

**38.** The Commission states that it fully endorses "*the separation of religion and politics*". The Ombudsman understands this to reflect the principle of the separation of church and state ("*laïcité*" in French). Translated into the EU context, this principle might, more accurately, be reflected as the separation between the churches and the EU institutions. The Ombudsman notes, however, that 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.

**39.** 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 (and indeed humanist) communities.

**40.** The complainant's allegation is that, by rejecting its proposal for a seminar to discuss issues which the complainant argues fall within the powers and functions of the Commission, the Commission has refused 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. The Ombudsman will deal first with the complainant's arguments concerning the (ir)regularity and (lack of) transparency of the dialogue. He will then deal with the specific allegation that the Commission failed to implement Article 17 TFEU in a given case by rejecting the complainant's proposal for a dialogue seminar.

**41.** As far as a "*regular*" dialogue is concerned, the Ombudsman notes that evidence, such as



that put forward by the complainant, of more meetings with churches and religious organisations and communities is not in itself evidence of a problem. He notes that there is nothing in Article 17 TFEU which implies that a precise balance must be struck between the different groups. The Ombudsman indeed is of the view that a formalistic approach, which would seek to strike a precise balance would be inappropriate and indeed impossible given the nature of the subject matter. This notwithstanding, if an analysis of the series of meetings were to indicate that the Commission's approach is manifestly disproportionate, there could be a cause for concern. The Ombudsman is not convinced, however, by the figures put forward by the complainant, that the Commission has adopted a manifestly disproportionate approach.

**42.** In terms of a "*transparent*" dialogue, the Ombudsman notes the complainant's arguments, according to which no minutes are produced of the various meetings. The Ombudsman has looked into the issue of the Commission's duty, in line with principles of good administration, to take *sufficiently* detailed notes of meetings. The Ombudsman's view is that the Commission has an obligation in certain areas, notably where it exercises investigative and regulatory powers, to take sufficiently detailed notes [18]. However, for meetings of a more general nature, relating to the task of maintaining an open dialogue with civil society, the Ombudsman's view is that extensive formal note taking is not necessary in order for the institution to comply with its obligations in terms of good administrative behaviour. In such cases, 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. Placing relevant speeches on the Commission's website, like the Commission did in response to a request from the complainant, constitutes another appropriate means of ensuring transparency. With regard to the complainant's argument to the effect that press statements are prepared in advance of meetings, the Ombudsman notes that this does not imply that the statement will not at least reflect the Commission's participation in the meeting and its expected outcomes.

**43.** The Ombudsman now turns to the third aspect of the dialogue (namely, the extent to which it is "*open*"). Amongst the complainant's arguments is that the Commission has refused to meet it on the allegedly false ground that the subject the latter has proposed lies outside the powers and functions of the Commission. The Ombudsman has seen no evidence that the Commission has "*refused*" outright to meet the complainant. On the contrary, an examination of some of the Commission's correspondence with the complainant since 2009 confirms the Commission's willingness to engage in a dialogue with the complainant on various issues. 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.

**44.** With regard to the complainant's argument, according to which the Commission erred by saying that the subject the complainant proposed lies outside the powers and functions of the Commission, the Commission argues that it did not claim that the Directive falls outside the competences of the EU. The Ombudsman accepts this clarification, which is self-evidently correct.

**45.** The Commission goes on to state that there are, in its view, two valid reasons for



requesting the complainant to reconsider its proposal (see paragraph 16 above). The Ombudsman will first deal with the second of those two reasons.

**46.** The Commission notes that Articles 17 (1) and (2) TFEU state that the Union respects and does not prejudice the status under national law of churches, religious associations or communities in the Member States, and philosophical and non-confessional organisations. These are, says the Commission, competences of national authorities deriving from their respective constitutions and legal systems and from their diverse cultural traditions. The Commission states that it respects this autonomy and diversity and strives to respect the principle of subsidiarity. In its view, therefore, a discussion on *"problems that arise in defining the application of religious exemptions from the EU's directive 2000/78/EC on employment"* concerns issues which may potentially arise in the implementation of EU law into national law and would go beyond the spirit of Article 17 (1) and (2) TFEU.

**47.** The Ombudsman's understanding of this argument is that the Commission considers that if it were to apply Article 17(3) in the manner requested by the complainant, namely, to engage in a dialogue on *"problems that arise in defining the application of religious exemptions from the EU's directive 2000/78/EC on employment"*, it would somehow compromise its compliance with (at least) the *"spirit"* of Article 17(1) and (2) TFEU.

**48.** It is the Ombudsman's considered opinion that, except in the most extreme cases, open dialogue is positive. 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 \[Link\] 2 TEU \[19\]](#), the Commission is free to engage in an open and frank discussion. Conducting a dialogue on an issue dealt with in existing legislation cannot but constitute constructive action. In particular, it cannot, in itself, call into question *"the status under national law of churches, religious associations or communities, and philosophical and non-confessional organisations"*.

**49.** In this respect, the Ombudsman finds that the Commission was wrong to argue that, by engaging in the dialogue proposed by the complainant, it would go beyond the *"spirit"* of Article 17 (1) and (2) TFEU. 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 to implement Article 17(3) TFEU properly. This constitutes an instance of maladministration.

**50.** In light of this finding, the Ombudsman has considered the merits of proposing a friendly solution in this case [20]. As noted in paragraph 9 above, the complainant's claim is that the Commission should accept the proposal for a seminar. However, for the reasons explained below, the Ombudsman's view is that a friendly solution proposal would not be appropriate in this specific case.

**51.** The Ombudsman notes that the Commission put forward a second line of argumentation to explain why it had invited the complainant to reconsider its proposal. The Commission explained that dialogue seminars are meant to address wider issues, for example, combating poverty and



social exclusion, youth and education (as the right response to the crisis), the reform of the labour market in Europe, or the impact of immigration in European school systems. The Commission requested the complainant to make a contribution to the European cause by choosing a topic of this nature.

**52.** The complainant, for its part, disagrees with the Commission's position that its proposal is ineligible because it did not relate to a main priority of the Commission's policy agenda. It argues that (i) this constitutes a denial of the Commission's own interpretation of Article 17 TFEU (namely, that "*open*" means that "*all relevant topics of the EU agenda can be addressed in this dialogue*" ); (ii) this goes directly against the priorities set by the Commission itself as quoted in footnote 13 above; (iii) the very same subject was perfectly eligible when proposed by the churches.

**53.** With regard to (i), the Ombudsman notes that the Commission's definition refers to "*all relevant topics of the EU agenda*". His own view is that it falls within the Commission's margin of discretion to determine what it considers the "*relevant*" topics to be.

**54.** With regard to (ii), the Commission explains its policy as far as dialogue seminars under Article 17 TFEU are concerned, as follows (emphasis added by the Ombudsman):

(i) dialogue meetings focus exclusively on Commission **policy initiatives** ;

(ii) the reduced number of meetings that can take place each year should concentrate on **topics of main priorities** of the Commission's policy agenda — this condition has been upheld with all dialogue partners on an equal footing and without any discrimination, be they religious communities or philosophical and non-confessional organisations;

(iii) the approach has been to address **EU policy matters** rather than philosophical or religious ones;

(iv) dialogue seminars should aim to address issues that are of **wider common interest** .

**55.** The Ombudsman's view is that this approach reflects a more general, and laudable, policy that dialogue conducted by the Commission with civil society should serve as a basis for the institution to collect information and integrate in its reflections various points of view concerning the political priorities on the agenda. Each of the four criteria outlined under (i) to (iv) above can be interpreted as the Commission's attempt to ensure that the dialogue it conducts, also under Article 17 TFEU, can feed into the elaboration and implementation of the policy priorities and actions envisaged by the Commission.

**56.** While this approach is not, in and of itself, in any way problematic, the Ombudsman's view is that it might be helpful, at the start of each year, for the Commission to outline its priority topics for discussion in dialogue seminars for the year in question. The Ombudsman notes that the more general provision for dialogue with representative organisations and civil society, under Article 11 TEU, could then be used to enable organisations, such as the complainant, to



discuss other issues that the Commission does not deem a priority for discussion in the context of dialogue seminars.

**57.** The Ombudsman notes that it is precisely this that the Commission encouraged the complainant to do in this case.

**58.** 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.

**59.** The third argument put forth by the complainant, in paragraph 52 above, was that the very same subject that was suggested by the complainant, and rejected by the Commission, was perfectly eligible when proposed by the churches. As regards this argument, the Ombudsman agrees that the Commission should always ensure that it exercises its margin of discretion in a manner which is non-discriminatory.

**60.** The Ombudsman notes, first, that the topics proposed for the two dialogue seminars were not strictly identical.

**61.** Second, the Ombudsman notes that, absent a manifest error of judgment by the Commission, it is not possible to take a position on whether the Commission discriminates in favour of churches on the basis of a comparison involving only two proposals for a dialogue seminar. A view as regards whether such discrimination exists could normally only be taken after examining the Commission's practice over a sufficiently long period of time [21] .

**62.** Notwithstanding this conclusion, the Ombudsman finds that the present case offers an opportunity for the Commission to clarify, in the interests of its dialogue partners under Article 17 TFEU, and indeed the public, the manner in which it applies the dialogue. The Ombudsman therefore makes a further remark below.

**63.** As highlighted above, the institutions are still in a learning process regarding the application of this new provision of the Lisbon Treaty. The Ombudsman thereby urges the Commission to use this further remark as an opportunity to develop the understanding of how Article 17 TFEU should be interpreted and applied. The Ombudsman's further remark addresses the possible need for the Commission to clarify its practices and rules in this area, and, if necessary, to draw up guidelines in terms of how exactly it plans to implement Article 17 TFEU. When justifying the exercise of its broad margin of discretion, the Ombudsman notes that it suffices to have general guidelines as regards the terms "*open*" (in terms of who is involved in the dialogue and what may be discussed in order to serve the needs of the service), "*transparent*" (in terms of allowing the public to verify how the dialogue is implemented), and "*regular*" (in terms of a general indication of how often the various meetings and events are held with the different parties).



## B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with 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.**

The complainant and the Commission will be informed of this decision.

## 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.**

P. Nikiforos Diamandouros

Done in Strasbourg on 25 January 2013

[1] Article 17 TFEU reads as follows:

*"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."*

[2] According to the complainant, the EHF is the *"principal organisation in Europe representing the interests of people living ethical lives without a religious belief"* .





[3] According to the complainant, the Commission has indicated that the principal means by which it wishes to conduct the Article 17(3) Treaty dialogue is through "*dialogue seminars*" —meetings with a reduced number of individuals aimed at discussing specific topics.

[4] It should be noted that the complainant proposed a conference to the Commission already in 2010. The title proposed for that conference was '*Religion and Belief in Democratic Societies: Issues of Equality and Freedom*'. According to the complainant, it wanted to examine further some problems explored at a conference, organised by the Spanish Presidency of the Council of the EU, on the topic '*Religious Freedom in Democratic Societies*'. The EHF proposed conference never took place but led to the proposal for the dialogue seminar at issue in this case.

[5] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16. Article 4(2) of the Directive reads as follows:

*"Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.*

*Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."*

[6] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation; COM(2008) 426 final.

[7] The RELIGARE project is a three-year European research project funded by the Commission's Directorate General Research. According to its website, the RELIGARE project "*is about religions, belonging, beliefs and secularism in Europe. It examines the legal rules protecting or limiting (constraining) the experiences of religious or other belief-based communities*".

[8] It appears that the Commission wrote to the complainant on 16 November 2011 — one month after the complainant filed its complaint with the Ombudsman — proposing that a



meeting take place with experts from different Commission services during which the complainant could convey its views on the topic it wished to discuss during the dialogue seminar. It appears that the complainant replied positively to the Commission's offer of a meeting to discuss the topic in question, albeit on the (apparently wrong) understanding that the Commission had agreed to stage the dialogue seminar.

[9] Article 11 TEU reads as follows:

*"1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.*

*2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.*

*3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.*

*4. (...)."*

[10] <http://ec.europa.eu/bepa/activitiesoutreach-team/dialogue/> [Link]

[11] Namely, the Commission's Bureau of European Policy Advisers.

[12] The programme for this dialogue seminar is available at:

<http://ec.europa.eu/bepa/pdf/seminars/programme-dialogue-seminar-30-march-2012.pdf> [Link]

[13] In its Communication entitled '*Non-discrimination and equal opportunities: A renewed commitment*', the Commission states that it is: "*[...] strongly committed to fighting all forms of discrimination under Article 13 EC [now Article 19 TFEU] and will continue to monitor the transposition of the existing Directives carefully*". See COM (2008) 420 final, adopted on 2 July 2008, and available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0420:FIN:EN:PDF> [Link], at p.10.

[14] Available on the Ombudsman's website at:

<http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/11621/html.bookmark> [Link]

[15] *Idem*, at paragraph 9. While the Ombudsman's draft recommendation in case 2558/2009/(TN)DK referred to Article 11 TEU, the Ombudsman's view is that these considerations are equally relevant for Article 17 TFEU.

[16] *Idem*, at paragraph 12.

[17] *Idem*, at paragraph 13.



[18] See the Ombudsman's critical remark in his decision in case 1935/2008/FOR, available at: <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/4164/html.bookmark> [Link]

[19] Article 2 TEU states that "*[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*". The Ombudsman notes that such a restriction can also apply as regards the European Citizens' Initiative (ECI), whereby the Commission has stated that one of the conditions for registering a proposed ECI on its website is that it is not manifestly contrary to the EU values as set out in [Article \[Link\] 2 TEU](#). The Ombudsman recalls that ECIs constitute another form of "*participatory democracy*", provided for in Article 11(4) TEU.

[20] Article 3.5 of the Ombudsman's Statute states that, as far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complainant.

[21] Moreover, the Ombudsman has already pointed out, in paragraph 41 above, that there is nothing in Article 17 TFEU which implies that a precise balance must be struck between the different groups.