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## **Interpreting Article 17 TFEU: New Openings towards a European Law and Religion System \***

**SUMMARY: 1. Introduction: From the Traditional Interpretation towards New Openings - 2. Some interpretative difficulties - 3. The Necessary Balance with Other European Interests - 4. Conclusions.**

### **1 - Introduction: From the Traditional Interpretation towards New Openings**

Recent contributions to studies in Law and Religion in the European Union<sup>1</sup> show that Article 17 TFEU has gradually gained a central position in the EU legal system. Nevertheless, its interpretations still remain unclear.

Declaration 11 attached to the Treaty of Amsterdam (the direct ancestor of Article 17 TFEU's first two paragraphs)<sup>2</sup> meant to satisfy the

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\* Article peer evaluated.

<sup>1</sup> The Italian expression "*diritto ecclesiastico europeo*" (which means, in the impossibility of giving a literal translation, "European Law and Religion System") has already appeared in several contributions, including: **M. LUGLI, J. PASQUALI CERIOLI, I. PISTOLESI**, *Elementi di diritto ecclesiastico europeo*, Giappichelli, Torino, 2012; **G. MACRÌ, M. PARISI, V. TOZZI**, *Diritto ecclesiastico europeo*, Laterza, Bari, 2006; **G. DALLA TORRE**, *Verso un diritto ecclesiastico europeo? Annotazioni preliminari sulla Costituzione*, in *Quaderni di diritto e politica ecclesiastica*, n. 2, 2005, p. 399 ff.; **J. PASQUALI CERIOLI**, *Parità di trattamento e organizzazioni di tendenza religiose nel "nuovo" diritto ecclesiastico europeo*, in *Quaderni di diritto e politica ecclesiastica*, n. 1, 2013, p. 71 ff.

<sup>2</sup> On Declaration n. 11 see **M. VENTURA**, *La laicità dell'Unione europea. Diritti, mercato, religione*, Giappichelli, Torino, 2001, p. 239 ff.; **G. ROBBERS**, *Europa e religione: la dichiarazione sullo status delle Chiese e delle organizzazioni non confessionali nell'atto finale del Trattato di Amsterdam*, in *Quaderni di diritto e politica ecclesiastica*, n. 2, 1998, p. 393 ff.; **M. PARISI**, *Dalla dichiarazione n. 11 alla futura Carta Costituzionale dell'Unione europea: quale ruolo per le confessioni religiose nel processo di integrazione europea?*, in *Il Diritto Ecclesiastico*, n. 1, 2003, p. 334 ff.; **S. BERLINGÒ**, *La condizione delle Chiese in Europa*, in *Il Diritto ecclesiastico*, n. 1, 2002, p. 1314 ff.; **A. LICASTRO**, *Unione europea e "status" delle confessioni religiose: fra tutela dei diritti umani fondamentali e salvaguardia delle identità costituzionali*, Giuffrè, Milano, 2014, p. 132 ff.; **A. PIERUCCI**, *Après Amsterdam: quelles relations entre Institutions*



interest of the Member States in maintaining their sovereignty in religious matters and, at the same time, the interest of the dominant religious denominations in preserving the favorable *status* they enjoyed at a national level<sup>3</sup>. Its formulation was the result of a consistent lobbying activity<sup>4</sup> carried out by some churches (in particular the Catholic Church and the German Protestant Churches) worried that, in the wake of the reforms brought by the Maastricht Treaty<sup>5</sup>, European Union's incompetence in relationships between the State and the churches could be subverted<sup>6</sup>. However, the text of the Declaration allowed the interpreters to undertake new paths, diverging from the intentions of its promoters. As a matter of

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*Européennes et Eglises*, in A.G. CHIZZONITI (ed.), *Chiese, associazioni, comunità religiose e organizzazioni non confessionali nell'Unione europea*, Vita e Pensiero, Milano, 2002, p. 13 ff.

<sup>3</sup> Cf. **S. FERRARI**, *Integrazione Europea e prospettive di evoluzione della disciplina giuridica del fenomeno religioso*, in V. TOZZI (ed.), *Integrazione europea e società multi-etnica. Nuove dimensioni della libertà religiosa*, Giappichelli, Torino, 2000, p. 138 ff.; **G. ROBBERS**, *An article on religious communities in European primary law*, in *Commission des Episcopats de la Communauté européenne, La construction européen et les institutions religieuses*, Bruylant, Bruxelles, 1997, pp. 66 and 70; **I.C. IBAN**, *Europa, diritto, religione*, il Mulino, Bologna, 2010, p. 171; **G. CASUSCELLI**, *Le laicità e le democrazie: la laicità della "Repubblica democratica" secondo la Costituzione italiana*, in *Quaderni di diritto e politica ecclesiastica*, n. 1, 2007, p. 196 ff.; **A. LICASTRO**, *Unione europea*, cit., p. 123; **A. NICORA**, *Il ruolo della COMECE nel quadro dei rapporti tra Chiesa cattolica e Unione europea*, in A.G. CHIZZONITI (ed.), *Chiese, associazioni, comunità religiose e organizzazioni non confessionali nell'Unione Europea*, Vita e Pensiero, Milano, 2002, p. 48.

<sup>4</sup> On religious lobbying in the EU see **G. MACRÌ**, *Il ruolo delle organizzazioni religiose in Italia e in Europa tra rappresentanza degli interessi e attività di lobbying*, in *Stato, Chiese e pluralismo confessionale*, Online journal ([www.statoechiese.it](http://www.statoechiese.it)), n. 8, 2013; **G.B. VARNIER**, *Laicità, radici cristiane e regolamentazione del fenomeno religioso nella dimensione dell'U.E.*, in *Stato, Chiese e pluralismo confessionale*, cit., June, 2008, p. 7 ff.

<sup>5</sup> Article F.1 of Maastricht Treaty recognised fundamental rights as general principles of EU law. Cf. **F. MARGIOTTA BROGLIO**, *Il fenomeno religioso nel sistema giuridico dell'Unione europea*, in **F. MARGIOTTA BROGLIO, C. MIRABELLI, F. ONIDA**, *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, il Mulino, Bologna, 1997, p. 144 ff.

<sup>6</sup> The elaboration of the text of the Declaration was decisively influenced by the proposals which the main denominational groups put forward through the States. See, in particular, the proposals presented by Italy, Austria and Germany, which were endorsed by the Holy See, and by German churches and evangelical communities. Cf. **F. MARGIOTTA BROGLIO**, *Il fenomeno religioso nel sistema giuridico dell'Unione Europea*, in **F. MARGIOTTA BROGLIO, C. MIRABELLI, F. ONIDA**, *Religioni e sistemi giuridici*, cit., p. 159; **A. LICASTRO**, *Unione europea*, cit., p. 127 ff.; **D. DURISOTTO**, *Unione europea, chiese e organizzazioni filosofiche non confessionali (art. 17 TFUE)*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 23, 2016, p. 23.



fact, it lacked binding value and it put on the same level religious denominations and philosophical and non-denominational organizations<sup>7</sup>.

Since Declaration 11 proved to be an “inadequate barrier”<sup>8</sup>, CEC and COMECE<sup>9</sup> presented, on the occasion of the drafting of the European Constitution, a proposal aimed at curbing the impact of Union Law on their activities<sup>10</sup>. This document, in its first part, asked for a provision which could expressly secure the right of self determination of churches and religious communities in their teachings and organisation and, in particular, protect religiously motivated activities especially in the field of worship, charity, culture and pastoral care. The proposal joined a complicated political framework; there was at time an intense discussion about the opportunity to include a direct reference to the Christian-Jewish roots of Europe in the Constitution<sup>11</sup>.

A few years later, Article 17 TFEU recognized an exclusive national competence on the *status* of religious denominations. The provision seemed to be in accordance with principle of conferral, which find its legal basis in Articles 4, first paragraph, and 5, second paragraph, TEU, and the related,

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<sup>7</sup> Cf. **F. MARGIOTTA BROGLIO**, *In Europa il Vaticano è declassato*, in *Limes*, 2000, p. 157 ff.; **A. LICASTRO**, *Unione europea*, cit., p. 157; **M. VENTURA**, *La laicità dell’Unione Europea*, cit., p. 239 ff.

<sup>8</sup> So is defined by **I.C. IBÁN**, *Europa, diritto, religione*, cit., p. 157.

<sup>9</sup> On CEC (Conference of European Churches) see **G. LONG**, *La Conferenza delle chiese europee (Kek) e l’attuazione del Trattato di Lisbona*, in L. DE GREGORIO (ed.), *Le Confessioni religiose nel diritto dell’Unione europea*, il Mulino, Bologna, 2012, p. 69 ff.; **G. FELICIANI**, *Il Consiglio delle Conferenze d’Europa dopo gli avvenimenti del 1989*, in A.G. CHIZZONITI (ed.), *Chiese, associazioni*, cit., p. 57 ff.; on COMECE (Commission of the Bishops’ Conferences of the European Union) **D. DA CUNHA**, *Il Consiglio delle Conferenze dei vescovi d’Europa*, in L. DE GREGORIO (ed.), *Le Confessioni religiose*, cit., p. 63 ff.; **A. NICORA**, *Il ruolo della COMECE nel quadro dei rapporti tra Chiesa cattolica e Unione europea*, in A.G. CHIZZONITI (ed.), *Chiese, associazioni*, cit., p. 47 ff.

<sup>10</sup> Church and Society Commission of the Conference of European Churches, Commission of the Bishops’ Conferences of the European Community, *Churches and Religious Communities in a Constitutional Treaty of the European Union*, Bruxelles, 27 settembre 2002, in ([www.comece.org](http://www.comece.org)). For an exam of the proposal see **M. VENTURA**, *L’articolo 17 TFUE come fondamento del diritto e della politica ecclesiastica dell’Unione europea*, in *Quaderni di diritto e politica ecclesiastica*, n. 2, 2014, p. 295.

<sup>11</sup> On this issue see, among the others: **P. GROSSI**, *A proposito del preambolo della Costituzione dell’Unione europea*, in A. D’ATENA, P. GROSSI (eds.), *Tutela dei diritti fondamentali*, Giuffrè, Milano, 2004, p. 45 ff.; **G. LEZIROLI**, *La cristianità obliata della Costituzione europea*, in *Il Diritto Ecclesiastico*, n. 3, 2003, p. 1087 ff.; **M. PARISI**, *Il sistema europeo di relazioni tra gli Stati e le organizzazioni religiose: conservazione o innovazione nella prospettiva della Costituzione dell’Unione europea?*, in *Il Diritto Ecclesiastico*, n. 1, 2005, p. 347.



though unexpressed, principle of neutrality. The EU neutrality “by abstention”, which implies “the separation between the churches and the EU institutions”<sup>12</sup>, is not an explicit choice for secularism, but the result of the absence of a transfer of sovereignty with regard to religious and cultural identification.

Some scholars soon defined Article 17 TFEU a "safeguard clause" (in favor of national sovereignty and not directly of denominational autonomy)<sup>13</sup>; as to be expected, this traditional interpretation was later, explicitly and implicitly, endorsed by some Member States. Italy, for example, in its written observations submitted in the preliminary ruling *Jehovan todistajat*<sup>14</sup> (which leak out through the opinion of the Advocate General), declared that rules which concern religious organizations come out of the scope of EU Law and, therefore, should exclusively remain national competence<sup>15</sup>. Similarly, the *Bundesverfassungsgericht* in the (so-called) *Lissabon-Urteil* case<sup>16</sup>, after recalling EU's commitment (according to Article 4, second paragraph, TEU) to respect the identities of Member States, has brought back the determination of the *status* of religious denominations to the intangible core of German constitutional system (para. 249). As a matter of fact, the right to democratic self-determination of the German people would include, among the others, the power to decide on the *status* of churches and religious or ideological communities (para. 260). Some time later, France, in its observations to the Court of Justice in the *Achbita* case,

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<sup>12</sup> Decision of the European Ombudsman in his inquiry into complaint 2097/2011/RA against the European Commission, para 38.

<sup>13</sup> The Italian expression for “safeguard clause” (*clausola di salvaguardia*) has been used referring to the Declaration 11, *inter alia*, by **S. BERLINGÒ**, *La condizione delle Chiese in Europa*, in *Diritto ecclesiastico*, n. 1 del 2002, p. 1314, and **M. VENTURA**, *La laicità dell'Unione europea. Diritti, mercato, religione*, cit., p. 239; with regard to Article 17 TFEU it has been used by **C. HONORATI**, *Art. 17 TFEU*, in F. POCAR, M.C. BARUFFI (eds.), *Commentario breve ai trattati dell'Unione europea*, Padova, Cedam, 2014, p. 198 ff.; **A. LICASTRO**, *Unione europea*, cit., p. 144.

<sup>14</sup> Court of Justice, 10 July 2018, *Jehovan todistajat*, C-25/17.

<sup>15</sup> “The argument of the defendant in the main proceedings is, in essence, that proselytising, in connection with which the data of the persons visited by members of religious community are collected and processed, is an activity that falls outside the scope of EU law s provided for in that provision. The Italian government, for its part, in reaching the same conclusion as the defendant in the main proceedings, invokes Art. 17 TFEU, which provides that the Member States have exclusive competence to regulate religious organisations”: Opinion of the Advocate General Paolo Mengozzi delivered on 1 February 2018, *Jehovan todistajat*, C-25/17, para. 28.

<sup>16</sup> *Bundesverfassungsgericht*, 30 June 2009, n. 2 of 2008.



stated that European anti-discrimination law would not apply to the French public sector if the discriminatory treatment were justified by the principle of *laïcité*, which imposes a strict separation between the public sphere and the religious one<sup>17</sup>. The so-called negative secularism, which characterizes the French State, would be safeguarded not only by Article 4, second paragraph, TEU, but also by Article 17, first and second paragraphs, TFEU; the latter is, according to part of the legal scholars, a *species* of the former in the religious sphere<sup>18</sup>.

Although the traditional interpretation of Article 17 TFEU as an abstract “safeguard clause” seems to find confirmation in the letter of the provision and in the systematic reading with the Article 4, second paragraph, TEU, as well as in the original will of the parties, part of the doctrine has given credit to a different interpretation: the Article could allow the development of a European Law and Religion System<sup>19</sup>. If this interpretation prevailed, the provision would be subject to a certain “heterogony of ends”: the supposed clause of safeguard for national law would prove to be the foundation of the European Law and Religion system. This evolution could be favored by the essential vagueness of the provision, by the current opinion of the Court of Justice and by the growing importance acquired, in an axiological-systematic sense, by the Charter of Fundamental Rights of the European Union.

This article aims to analyze the aforementioned factors in order to verify if the situation could evolve in a (more or less) distant future.

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<sup>17</sup> For example, the prohibition of wearing religious symbols in the workplace could be discriminatory under EU Law. The French intervention is reported by the Opinion of Advocate General Juliane Kokott delivered on 31 May 2016, *Achbita*, C-157/15, para. 31. Cf. **L. SALVADEGO**, *Il divieto per i dipendenti di imprese private di esibire simboli religiosi all'esame della Corte di giustizia dell'Unione europea*, in *Rivista di diritto internazionale*, n. 3, 2017, p. 824 ff.

<sup>18</sup> See **M. LUGATO**, *L'Unione europea e le Chiese: l'art. 17 TFUE nella prospettiva del principio di attribuzione, del rispetto delle identità nazionali e della libertà religiosa*, in *Quaderni di diritto e politica ecclesiastica*, n. 2, 2014, p. 312; **M. PARISI**, *Vita democratica e processi politici nella sfera pubblica europea. Sul nuovo ruolo istituzionale delle organizzazioni confessionali dopo il Trattato di Lisbona*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 27, 2013, p. 14 ff.; **A. LICASTRO**, **A. RUGGERI**, *Diritto concordatario versus diritto eurounitario: a chi spetta la primauté? (a margine della pronunzia della Corte di Giustizia del 27 giugno 2017, C-74/16, in tema di agevolazioni fiscali per le “attività economiche” della Chiesa)*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 26, 2017, p. 25 ff.

<sup>19</sup> Cf. **M. VENTURA**, *L'articolo 17 TFUE*, cit., p. 304; **F. MARGIOTTA BROGLIO**, **M. ORLANDI**, *Art. 17 TFUE*, in **A. TIZZANO** (ed.), *Trattati dell'Unione europea*, Giuffrè, Milano, 2014, p. 454.





However, this work means primarily to be a reflection on the current situation, and only secondly predictive. As a matter of fact, this paper's purpose is not to draw a map of the imaginable interpretative paths but mainly to ascertain their legal ground to be in the light of the current circumstances.

Another methodological point: the (nearly) absence of reference to scientific works of foreign scholars, besides their numerical scarcity on this topic, is due to the precise will to bring out the specific point of view of the Italian legal literature which has, for clear historical reasons, a peculiar approach towards legal religious matters.

The two following sections deal with one of the evolutive factors above: Section 2 focuses on the provision's relevant interpretative difficulties, while Section 3 analyzes some EU interests which the Court of Justice balanced, in the past, and should balance, in the future, with Article 17 TFUE. Section 4 concludes the analysis by taking the stock of the situation.

## 2 - Some Interpretative Difficulties

As some scholars pointed out, to define the objective scope of Article 17 TFEU is extremely complex<sup>20</sup>. First of all, the meaning of the expression *status* is not clear; the latter could represent, alternatively, the whole national Law and Religion system, just its institutional dimension<sup>21</sup>, merely the legislation which results from a negotiation with denominations<sup>22</sup>, or the set of principles which characterize the State in its essence<sup>23</sup>.

To summarize Italian legal literature's opinion on this topic, two different positions could be identified: the first leads back the word *status* to the qualification of the denominational organizations before the State (namely every regulation about the corporate dimension of religious

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<sup>20</sup> Cf. **M. VENTURA**, *L'articolo 17 TFUE*, cit., p. 299.

<sup>21</sup> Cf. **I.C. IBÁN**, *Europa, diritto, religione*, cit., p. 266.

<sup>22</sup> See **S. MONTESANO**, *Brevi riflessioni sull'art. 17 TFUE e sul progetto di Direttiva del Consiglio recante disposizioni in materia di divieto di discriminazione*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 18, 2015, p. 16.

<sup>23</sup> **G. CASUSCELLI**, *Le fonti*, in G. CASUSCELLI (ed.), *Nozioni di diritto ecclesiastico*, 5<sup>th</sup> ed., Giappichelli, Torino, 2015, p. 30.



freedom<sup>24</sup>), while the second to the State's self-qualification in the religious field (namely the fundamental principles in matter of relationship between State and religion)<sup>25</sup>. According to both interpretations, Article 17 TFEU would not exclude a European competence in matters of religious freedom<sup>26</sup>. As a matter of fact, contrary to its corporate dimension, which, in accordance to the traditional interpretation of Article 17 TFUE, should be exclusively regulated by national disciplines, the individual dimension of religious freedom is also regulated at supranational level. However, the distinction between the two aspects, although is theoretically admissible, may actually prove fragile: the existence of an institutional dimension, in fact, is often a necessary condition for the effective enjoyment of the rights at an individual level<sup>27</sup>.

A former Italian President of the European Commission, way before the Lisbon Treaty, declared that the *status* has to be regulated in the national democratic and political context and that also the sphere of individual rights of the citizens falls in this framework. Besides, he admitted that there may be important differences between Member States<sup>28</sup>.

The legal *status* of churches and religious associations is regulated by Member Countries with juridical instruments of different nature: constitutional norms, instruments of international laws, ordinary laws. Furthermore, to identify the *status* to safeguard is more difficult in those national Law and Religion systems which reject forms of normative specialization in this legal sector and which refer the entire legal discipline

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<sup>24</sup> Critical on this "all-embracing" interpretation **R. PUZA**, *Effetti dell'ordinamento comunitario sullo status delle confessioni religiose nei paesi dell'Unione europea*, in L. DE GREGORIO (ed.), *Le Confessioni religiose*, cit., p. 51.

<sup>25</sup> Cf. **M. TOSCANO**, *La decisione del Mediatore europeo del 25 gennaio 2013: un passo avanti verso un'applicazione efficace dell'art. 17 del Trattato sul funzionamento dell'Unione europea?*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 5, 2014, p. 18.

<sup>26</sup> Cf. **C. HONORATI**, *Art. 17 TFUE*, in F. POCAR, M.C. BARUFFI (eds.), *Commentario breve*, cit., p. 199.

<sup>27</sup> Cf. **A. MORINI**, *Art. 17 TFUE*, in C. CURTI GIALDINO (ed.), *Codice dell'Unione europea operativo. TUE e TFUE commentati articolo per articolo con la Carta dei diritti fondamentali dell'Unione europea*, Simone, Napoli, 2012, p. 542 ff.; **S. FERRARI**, *Integrazione Europea e prospettive di evoluzione della disciplina giuridica del fenomeno religioso*, cit., p. 140; **IBAN I. C.**, *Europa, diritto, religione*, cit., p. 166 ff.; **A. PIERUCCI**, *La posizione degli Stati dell'Unione europea nel dibattito sulle "chiese" nella revisione del Trattato di Maastricht*, in A. CASTRO JOVER (ed.), *Iglesias, confesiones y comunidades religiosas en la Unión Europea*, Universidad del País Vasco, Bilbao, 1999, p. 89; **A. LICASTRO**, *Unione europea*, cit., p. 11 ff.

<sup>28</sup> **R. PRODI**, *Unione Europea, libertà religiosa e confessioni religiose. Problemi e prospettive*, in *Quaderni di diritto e politica ecclesiastica*, n. 2, 2003, p. 316.



of the religious phenomenon to ordinary law<sup>29</sup>. The typological variety of forms of legislation is, without any doubts, the uppermost obstacle in defining the term *status*; it would be a mistake trying to define it from a single national prospective.

The third paragraph of the Article, which commits the Union to maintain an "open, transparent and regular dialogue" with the churches and the organizations mentioned in the first two paragraphs, could be a useful instrument to go beyond an ineffective unidirectional approach. Some authors believe that this paragraph could be considered a direct expression of the principle of democratic participation *ex* Article 11, second paragraph, TEU<sup>30</sup>. As a matter of fact, both provisions would be part of a shared sovereignty project inspired to the principle of subsidiarity<sup>31</sup> (already stated by the Treaty of Maastricht and then reiterated in the White Paper on European Governance<sup>32</sup>).

The (so-called) "horizontal subsidiarity" is a legal instrument through which private subjects can provide not only general services, but also public services<sup>33</sup>. Religious bodies often carry out services which are of collective interest; the sector of personal services, in particular, is a field where the activities of religious denominations frequently interweave with

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<sup>29</sup> A. LICASTRO, *Unione europea*, cit., p. 210.

<sup>30</sup> On Article I-52 of the European Constitution see N. COLAIANNI, *Stato e confessioni religiose in Europa tra separazione e cooperazione*, in *Quaderni di diritto e politica ecclesiastica*, n. 2, 2009, p. 289; on Article 17 TFEU see S. MONTESANO, *Brevi riflessioni sull'art. 17 TFUE*, cit., p. 9 ff.; F. MARGIOTTA BROGLIO, M. ORLANDI, *Art. 17 TFUE*, in A. TIZZANO (ed.), *Trattati dell'Unione europea*, cit., p. 461; C. HONORATI, *Art. 17 TFUE*, in F. POCAR, M.C. BARUFFI (eds.), *Commentario breve*, cit., p. 201; F. ALICINO, *Costituzionalismo e diritto europeo delle religioni*, Cedam, Padova, 2011, p. 139. The European Ombudsman in the Decision n. 2097 of 25 January 2013 has connected Article 17, third paragraph, TFEU to the principle of participatory democracy.

<sup>31</sup> Cf. M. VENTURA, *Sussidiarietà, governance e gruppi religiosi nel sistema giuridico dell'Unione europea*, in G. CIMBALO, J.I. ALONSO Pérez (eds.), *Federalismo, regionalismo e principio di sussidiarietà orizzontale. Le azioni, le strutture, le regole della collaborazione con enti confessionali*, Giappichelli, Torino, 2005, p. 206 ff.; R. MAZZOLA, *Confessioni, organizzazioni filosofiche e associazioni religiose nell'Unione Europea tra speranze disilluse e problemi emergenti*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 3, 2014, p. 3.

<sup>32</sup> European Commission, *European Governance - A White Paper*, COM (2001) 428. Among the others, the White Paper stated that "[c]hurches and religious communities have a particular contribution to make" (p. 15).

<sup>33</sup> F. BOTTI, *Le confessioni religiose e il principio di sussidiarietà nell'Unione europea: un nuovo giurisdizionalismo attraverso il mercato*, in *Stato, Chiese e pluralismo confessionale*, cit., January, 2011, p. 15. On 'horizontal subsidiarity' in general terms see P. DURET, *La sussidiarietà "orizzontale": le radici e le suggestioni di un concetto*, in *Ius*, 2001, p. 95 ff.





European Union Law<sup>34</sup>. In this area two opposing interests coexist: the European interest of safeguarding the competition in the Single Market and the interest of denominations of being bearers of a religious message.

Sometimes, in order to protect the specific denominational identities, it could be necessary to admit exceptions to the rules of the Single Market<sup>35</sup>. The dialogue between European Institutions and denominational and non-denominational authorities could be instrumental to the implementation of the principle of horizontal subsidiarity: its purpose could be to coordinate EU's activities with the ones of denominational subjects. The dialogue with the interested parties could be an instrument through which to identify and, therefore, to preserve the national disciplines which protect the denominational specificity<sup>36</sup>. Interpreting the Article as a whole, the "specificity" mentioned by the third paragraph could constitute, at the same time, the object of the dialogue and the object of the safeguard clause<sup>37</sup>.

Article 17 TFEU, interpreted in light of principle of proportionality and reasonableness, refrain the EU from regulating only those questions that are peculiarly religious, namely those which would be unreasonable

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<sup>34</sup> In the opinion in *Congregación de Escuelas Pías Provincia Betania contro Ayuntamiento de Getafe*, C-74/16, para 45, Advocate General Kokott underlines that "status entails the churches performing not only strictly religious tasks in society but also making significant contributions to social, cultural and educational objectives. To classify the activity of the churches in the social, cultural or educational areas generally as forming part of normal economic life, would be to ignore the special nature of that activity and, thus, ultimately also the special status of the churches".

<sup>35</sup> It is the case of the EC directive n. 78/2000, which at Article 4, second paragraph, allows States to retain previous disciplines in favor of trend organizations. Cf., among others, **F. ONIDA**, *Il problema delle organizzazioni di tendenza nella Direttiva CE 2000/78 attuativa dell'art. 13 del Trattato sull'Unione europea*, in *Il Diritto ecclesiastico*, n. 1, 2001, p. 905 ff.; **M. CORTI**, *Diritto dell'Unione europea e status delle confessioni religiose. Profili lavoristici*, in *Stato, Chiese e pluralismo confessionale*, cit., February 2011; **J. PASQUALI CERIOLI**, *Parità di trattamento e organizzazioni di tendenza religiose nel "nuovo" diritto ecclesiastico europeo*, cit., p. 71 ff.; **P. CHIECO**, *Le nuove direttive comunitarie sul divieto di discriminazione*, in *Rivista italiana di Diritto del Lavoro*, n. 75, 2002, p. 77 ff.

<sup>36</sup> Cf. **A. LICASTRO**, *Unione europea*, cit., p. 208 ff.

<sup>37</sup> Cf. **F. MARGIOTTA BROGLIO**, *Sussidiarietà e confessioni religiose*, in G. CIMBALO, J.I. ALONSO PÉREZ (eds.), *Federalismo, regionalismo*, cit., p. 467. The Commission, in the written statement presented to the European Ombudsman (decision n. 2097 of 2011), as well as in its guidelines on the Article (20 July 2013), showed to intend the dialogue in a different way; as a matter of fact, it should concern general topics included in the political agenda of the Union. Critically on this interpretation **M. TOSCANO**, *La decisione del mediatore europeo*, cit., p. 23 ff.; **P. ANNICCHINO**, *Il Dialogo con i gruppi religiosi e le organizzazioni non confessionali nel Diritto dell'Unione europea: a proposito di una recente pronuncia del Mediatore europeo*, in *Quaderni di diritto e politica ecclesiastica*, n. 3, 2013, p. 756.



(considering the specialty of the case, not only by a subjective but, first of all, by an objective point of view) to submit to the ordinary discipline. Sometimes denominations do not carry out religious activities; in these cases, they have to be considered like other market participants<sup>38</sup>. When a certain activity, although it formally involves religious subjects, does not pursue any specific religious aims there would be no reason to derogate from EU law. As a matter of fact, from a non-formalistic point of view, only those national disciplines which concretely protect the “*specific contribution*” of denominations should fall under the scope of Article 17, first paragraph, TFEU.

### 3 - The Necessary Balance with Other European Interests

As other provisions which outline the boundaries between the system they belong to and an outsider, Article 17 TFEU raises a problem of competence on the competence itself (which means to determine who has to solve a possible conflict of competence between two jurisdictions).

The interpretation of the Article 17 TFEU could not be handed over to States. As a matter of fact, in so doing, the effectiveness and the unity of the European Law would be affected by the discretion of the States which could label the most varied disciplines as “*status*” and subtract them from the application of EU rules. Therefore, the interpretation of the Article could only be a task of the European institutions and, in particular, of the Court of Justice.

The Court, moving away from traditional readings, denied that Article 17 TFEU represents an all-around exception and that EU Law could not deal with religious and denominational issues. In *Egenberger* judgment, the Court stated that Article 17 TFEU does not prevent a judicial review on employment relationships in the context of those organisations whose *ethos* is based on religion or belief (in favor of which the Directive n. 78/2000,

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<sup>38</sup> In *Steymann* case (Court of Justice, 5 October 1988, *Steymann v. Staatssecretaris Van Justitie*, 196/87, para 9) the Court stated that “in view of the objectives of the European Economic Community, participation in a community based on religion or another form of philosophy falls within the field of application of Community law only in so far as it can be regarded as an economic activity within the meaning of Article 2 of the Treaty”. In line with this statement, in the later *Association Eglise de Scientology de Paris* case (Court of Justice, 14 March 2000, *Association Eglise de Scientology de Paris, Scientology International Reserve Trus v. The Prime Minister*, C-54/99) the Court has neglected the religious aspects of the question and ensured the free movement of capital (ex Article 56 TEC, now Article 63 TFEU).



which establishes a general framework for equal treatment in employment and occupation, provide for derogations)<sup>39</sup>.

The Advocate General, in his conclusions, after excluding that the article could constitute “a kind of wholesale transfer to Member State law of judicial review of the justification for unequal treatment on the basis of religion of belief”, underlined the duty of the judge to balance the rights of the organization with those of the worker, with each other competing<sup>40</sup>. The Advocate General has also underlined that neutrality duty could not compromise the obligation for national States to respect the Law of the Union, under any circumstances<sup>41</sup>.

This interpretation has been confirmed in other pronouncements; first of all in *IR v. JQ*<sup>42</sup>, which is considered *Egenberger's* twin case<sup>43</sup>, then in *Cresco Investigation*<sup>44</sup> and *Jehovan Todistajat*<sup>45</sup>, which explicitly refer to *Egenberger*. In these recent rulings, the Court confirmed that the affirmation of a national competence in religious matters *ex* Article 17 TFEU should not be determined *ex ante*, but as a positive outcome of a concrete balance among other European interests, ruled by principle of proportionality<sup>46</sup>.

This balance is even more necessary since Article 17 TFEU is part of a system which protects Fundamental Rights, in particular freedom of religion<sup>47</sup>. Religious freedom is guaranteed by Article 10 of Charter of Fundamental Rights of the European Union<sup>48</sup>; the Court of Justice has

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<sup>39</sup> Court of Justice, 17 April 2018, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, C- 414/16, para. 56-69.

<sup>40</sup> Opinion of Advocate General in *Egenberger*, para. 98.

<sup>41</sup> Opinion of the Advocate General in *Egenberger*, para. 93.

<sup>42</sup> Court of Justice, 11 September 2018, *IR v. JQ*, C-68/17.

<sup>43</sup> **M.E. GENNUSA**, *Libertà religiosa collettiva e principio di non discriminazione nel sistema 'costituzionale' dell'Unione europea*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 2, 2019, p. 9.

<sup>44</sup> Court of Justice, 22 January 2019, *Cresco Investigation GmbH*, C-193/17.

<sup>45</sup> Court of Justice, 10 July 2018, *Jehovan todistajat*, C-25/17.

<sup>46</sup> Similarly, but before the Court's judgement **S. MONTESANO**, *Brevi riflessioni sull'art. 17 TFUE*, cit., p. 33.

<sup>47</sup> **P. FLORIS**, *Organizzazioni di tendenza religiosa tra Direttiva europea, diritti nazionali e Corte di giustizia UE*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 12, 2019, p. 16.

<sup>48</sup> On the Article, see **F. DONATI**, *Art. 10. Libertà di pensiero, di coscienza e di religione*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Carta dei diritti fondamentali dell'Unione Europea*, Giuffrè, Milano, 2017; **G. PERTILE**, *Libertà di pensiero, di coscienza e di religione*, in L. PINESCHI (ed.), *La tutela internazionale dei diritti umani. Norme, garanzie, prassi*, Giuffrè, Milano, 2006, p. 409 ff. Since under Art. 52, para. 3, of the



already clarified that this right includes both the freedom of the (so-called) *forum internum*, and the freedom of the (so-called) *forum externum*, namely the right to manifest religion or belief, either alone or in community with others and in public or private, in worship, teaching, practice and observance<sup>49</sup>. Apart from the *Achbita* case and few others, the Court had no possibility to express about Article 10 CFREU. One of the reasons for this scarcity in the number of pronouncements is, without any doubt, the narrow scope of application of the Article. As a matter of fact, as for other articles of the Charter, Article 10 is only a legitimacy parameter of the European Law and it could hardly be invoked in a horizontal controversy<sup>50</sup>.

A different discourse must be made for Article 21 of the Charter (that establishes a general principle of non-discrimination, including on the basis of religion), whose scope has recently been extended according to the same Court. As stated in more than a judgment, the provision, which is sufficiently clear, precise and unconditional, is capable of directly attributing rights to individuals and could, therefore, be invoked in horizontal disputes between privates<sup>51</sup>. It is enough to recall *Egenberger* and

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Charter the provision has the same meaning and scope of Article 9 ECHR, see also **J. PASQUALI CERIOLI**, *La tutela della libertà religiosa nella Convenzione europea dei diritti dell'uomo*, in *Stato, Chiese e pluralismo confessionale*, cit., January, 2011; **M. TOSCANO**, *Il fattore religioso nella Convenzione Europea dei Diritti dell'Uomo. Itinerari giurisprudenziali*, ETS, Pisa, 2018, p. 111 ff.; **R. MAZZOLA** (ed.), *Diritto e religione in Europa. Rapporto sulla giurisprudenza della Corte europea dei diritti dell'uomo in materia di libertà religiosa*, il Mulino, Bologna, 2012; **C. MORVIDUCCI**, *La protezione della libertà religiosa nel sistema del Consiglio d'Europa*, in **S. FERRARI**, **T. SCOVAZZI** (eds.), *La tutela della libertà di religione*, Cedam, Padova, 1988, p. 41 ff.; **B. CONFORTI**, *La tutela internazionale della libertà religiosa*, in *Rivista internazionale dei diritti dell'uomo*, n. 2, 2002, p. 207 ff.; **G. CASUSCELLI**, *Convenzione europea, giurisprudenza della Corte europea dei diritti dell'Uomo e sua incidenza sul diritto ecclesiastico italiano. Un'opportunità per la ripresa del pluralismo confessionale?*, in *Stato, Chiese e pluralismo confessionale*, cit., September, 2011; **F. ALICINO**, *Costituzionalismo e diritto europeo delle religioni*, cit., p. 246 ff.

<sup>49</sup> Court of Justice, 14 March 2017, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions*, C-157/15, para. 28.

<sup>50</sup> See **F. FERRARO**, **N. LAZZERINI**, *Art. 52*, in **R. MASTROIANNI**, **O. POLLICINO**, **S. ALLEGREZZA**, **F. PAPPALARDO**, **O. RAZZOLINI** (eds.), *Carta dei diritti fondamentali*, cit., p. 1058 ff.

<sup>51</sup> Cf. **C. FAVILLI**, **F. GUARRIELLO**, *Art. 21*, in **R. MASTROIANNI**, **O. POLLICINO**, **S. ALLEGREZZA**, **F. PAPPALARDO**, **O. RAZZOLINI** (eds.), *Carta dei diritti fondamentali*, cit., p. 417 ff.; **F. CROCI**, *Interazioni tra principi (e tra fonti) e criteri di bilanciamento nel diritto dell'Unione europea: la sentenza Egenberger e i successivi sviluppi*, in **AA. VV.** (Antonio Angelucci et al.), *Pluralismo religioso e integrazione europea: le nuove sfide*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 2, 2019, p.86 ff.; **L. CAPPUCCIO**, *L'efficacia diretta orizzontale della Carta*



*Cresco* cases, where the Court operated a balance between Article 21 of the Charter and Article 17 TFEU and recognized the prevalence, in the concrete case, of the former over the latter.

It is worth mentioning Article 22 of the Charter, which expresses EU commitment to respect cultural, religious and linguistic diversity. The Article should have made a direct reference to minority rights, but in the end, after the opposition of the French Government, it has been chosen the current formulation which calls into question the overall meaning of the article<sup>52</sup>. Given this vagueness, the Article allows two opposing interpretations: on the one hand, a rule aimed at promoting national identities, on the other, a rule in favor of the rights of the minorities<sup>53</sup>.

Another European interest which could be involved in the abovementioned balance is the right to privacy, which is protected by the system of Article 7 and Article 8 of the Charter. As a matter of fact, denominational organisations often process personal and sensitive data of their faithful (and also others). The General Data Protection Regulation (Regulation n. 2016/679), at Recital (165), makes an express reference to Article 17 TFEU, while, at Article 91, first paragraph, allows churches and religion associations to apply comprehensive rules relating to the protection of natural persons with regard to processing, provided that they are brought into line with this Regulation<sup>54</sup>. In this case, the EU legislator felt it

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*dei diritti fondamentali nella decisione Vera Egenberger*, in *Quaderni costituzionali*, n. 3, 2018, p. 708 ff.

<sup>52</sup> See **A. ALÌ**, *Art. 22*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Carta dei diritti fondamentali*, cit., p. 438; **C. PICIOCCHI**, *La Carta tra identità culturali nazionali ed individuali*, in R. TONIATTI (ed.), *Diritto, diritti e giurisdizione, la Carta dei diritti fondamentali dell'Unione Europea*, Cedam, Padova, 2002, p. 125 ff.

<sup>53</sup> For the first meaning see **M. PARISI**, *Vita democratica*, cit., p. 11; **P. FLORIS**, *L'Unione e il rispetto delle diversità. Intorno all'art. 22 della Carta di Nizza*, in C. CARDIA (ed.), *Studi in onore di Anna Ravà*, Giappichelli, Torino, 2003, p. 421 ff. Differently **A. LICASTRO**, *L'influenza della Carta di Nizza sui sistemi nazionali europei di disciplina del fenomeno religioso: verso un diritto ecclesiastico dell'Unione?*, in L. D'ANDREA, G. MOSCHELLA, A. RUGGERI, A. SAITTA (eds.), *La Carta dei diritti dell'Unione Europea e le altre Carte (ascendenze culturali e mutue implicazioni)*, Giappichelli, Torino, 2016, p. 332 ff.

<sup>54</sup> Article 91, second paragraph, subjects these comprehensive rules to the supervision of an independent authority, which may be specific, provided that it fulfils the conditions laid down in Chapter VI of the Regulation. On the Regulation in general see **K. MARIUSZ**, *Post-reform personal data protection in the European Union: general data protection regulation (EU) 2016/679*, Wolters Kluwer, Alphen aan den Rijn, 2016; while, on this specific issue **M. GANARIN**, *Salvaguardia dei dati sensibili di natura religiosa e autonomia confessionale. Spunti per un'interpretazione secundum Constitutionem del regolamento europeo n. 2016/679*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 11, 2018.





appropriate to make an exception in order to safeguard denominational autonomy and not to hinder their activities too much. However, the meaning of Article 91 is still not clear (in particular, it is not clear who has to verify the compliance of the denominational rules with the Regulation); also in this matter, the Court of Justice, which had not yet the opportunity to give its opinion on the matter<sup>55</sup>, has an important role to play.

## 5 - Conclusions

The current Court of Justice's jurisprudence denies that Article 17 TFEU prevents the EU from affecting (even indirectly) every national discipline which is formally qualified as religiously connoted. The neutrality principle, of which the Article is an expression, requires the Union to refrain from regulating only those questions that are characterized by a high rate of denominational specificity. To abstractly predetermine whether an issue is strictly related to the denominational *status*, would be not only extremely complicated, but also inadequate for a system that is inspired to principles of reasonableness and proportionality. The possibility of a European intervention must be assessed case by case. It is necessary to find, in concrete terms, a balance between State sovereignty in religious matters and other principles that belong to the EU system. Among them, it's important to remember the general principle of non-discrimination (Article 21 of the Charter) and the right of religious freedom (Article 10 of the Charter) which could be, in the future, the legal basis for European action in favor of religious pluralism. However, at least for now, it is possible to talk of a European Law and Religion System only in the sense that it is up to the EU, and in particular to the Court of Justice to determine if a question affects the religious specificity of a certain denomination.

These last considerations could be followed by another more general one, concerning the EU conferral principle, that is, despite the complexity of the topic, appropriate to mention at least in conclusion. As already pointed out, to pre-define what belongs or not to a certain legal area could be really difficult, especially when the boundaries of that area are delimited by notions which frequently change in time and space. This issue is particularly relevant for those legal disciplines which deal with religion and culture. As for the expression '*status*', some terms used by the legislator

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<sup>55</sup> The above mentioned *Jehovan Todistajat* judgment (C-25/17) concerned facts happened before the Regulation came into force.



could, as a consequence of the diversity from State to State, prove to be indeterminate. For this reason, it is the task of the Court of Justice to operate each time a balance between European interests and the States' claims for preserving their national identities (which are protected by Article 4, second paragraph, TEU)<sup>56</sup>. This “case by case” approach, instead of a general one, is not to be blamed: it could reduce the degree of certainty of the European legal system, but it is certainly more sensitive to the concrete needs of the people who are part of it<sup>57</sup>.

*Interpreting Article 17 TFEU: New Openings towards a European Law and Religion System*

ABSTRACT: Article 17 TFEU has been mainly interpreted as a “safeguard clause” aimed at preventing the EU from affecting (even indirectly) national disciplines religiously connoted. Although this traditional interpretation seems to find confirmation in the letter of the provision, in the systematic reading with Article 4 TEU, second paragraph, as well as in the original will of the parties, some scholars started giving credit to a different interpretation: the Article could allow the development of a European Law and Religion System. This article aims to investigate the current possibility for the aforementioned change of prospective. It focuses on three key factors: the interpretative difficulties concerning the Article, the recent jurisprudential evolution of the Court of Justice of the European Union and the growing axiological-systematic relevance of the Charter of Fundamental Rights of the European Union. This work argues that Article 17 TFEU does not recognize a national competence *ex ante* in all religious matters; it only requires the EU to refrain from regulating cases that are concretely characterized by a high rate of denominational specificity.

Keywords: 17, TFEU, EU, Egenberger, CJEU, CFREU

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<sup>56</sup> Cf. A. LICASTRO, A. RUGGERI, *Diritto concordatario*, cit., p. 29.

<sup>57</sup> Cf. C. LUZZATI, *Ancora sulla certezza*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 23, 2017, p. 6.