

## Remarks on Art. I-52 of the Constitutional Treaty: New Aspects of the European Ecclesiastical Law?

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### A. Introductory Remarks

The question of churches and religious communities in the EU/EC law arose for the first time in 1997, when Declaration No. 11 on the status of churches and non-confessional organisations was attached to the Amsterdam Treaty. According to this Declaration, “The European Union will respect and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union will equally respect the status of philosophical and non-confessional organisations.” The content of this Declaration was commented on many times by distinguished experts of the European ecclesiastical law.<sup>1</sup> Art. I-52 of the Treaty establishing a Constitution for Europe (Constitutional Treaty/CT) repeats in paragraph one and two Declaration No. 11, and introduces in paragraph three a provision on dialogue between the EU and religious bodies: “Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.” Instead of repeating opinions and statements referring to the above mentioned Declaration, which would be relevant for Art. I-52(1) and (2) CT, it should focus on two aspects:

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<sup>1</sup> Sophie C. van Bijsterveld, *Die Kirchenerklärung von Amsterdam – Genese und Bedeutung, mit spezieller Beachtung der Rolle der COMECE*, in: 1 ÖSTERREICHISCHES ARCHIV FÜR RECHT UND RELIGION, 46 (1999); Gerhard Robbers, *W sprawie ‘artykułu kościelnego’ w Traktacie Amsterdamskim*, in: EUROPA. FUNDAMENTY JEDNOŚCI, 158 (ANIELA DYLUŠ ED. 1999).

1) How far do the ten new Member States give a new meaning to Art. 52(1) and (2) CT – are their church-state systems very different from those of the old Member States?

2) Currently, how is the dialogue mentioned in Art. I-52(3) CT carried out?

## **B. Differentiated Church – State Relations in New Member States**

The plurality and differentiation of the church-state systems existing in the Member States of the EU is astonishing for anybody who starts dealing with this subject. Contemporarily, there are a few models of church-state relations, ranging from states with a State Church to states with a strict separation between church and state. For example, in the United Kingdom legal acts of the Church of England (called measures) are signed by the Queen and have the same legal force and effect like parliamentary statutes.<sup>2</sup> In Denmark, there is a Minister of Ecclesiastical Affairs who is a member of the Danish government and at the same time she/he is the highest administrative body<sup>3</sup> that may repeal bishops' decisions. In Greece, the President of Republic has to swear on the Holy Trinity, which means that only a person of Christian belief may take this office.<sup>4</sup> On the contrary, the French system does not recognise any church, so almost all of them are registered as "associations culturelles" (except for the Catholic Church, however this exception is not generally known).<sup>5</sup> For many years there has been a general opinion that systems in other European Member States can be described as being somewhere between two poles: (Danish or English) State Church and (French) *laïcité*. But is this statement true with regard to the new Member States? How far do they differ from the systems of the old Member States? Finding an answer to this question is not that easy.

Thanks to the European Consortium for Church-State Research, there are a number of valuable publications referring to different legal questions of the church-state relations in the fifteen Member States of the EU.<sup>6</sup> However, there are only a few

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<sup>2</sup> NORMAN DOE, *THE LEGAL FRAMEWORK OF THE CHURCH OF ENGLAND* 61 (1996).

<sup>3</sup> Valuable information available at: <http://www.km.dk>.

<sup>4</sup> Charalambos Papastathis, *State and Church in Greece*, in *STATE AND CHURCH IN THE EU* 115, 124 (Gerhard Robbers ed., 2005).

<sup>5</sup> Brigitte Basdevant-Gaudemet, *State and Church in France*, in *STATE AND CHURCH IN THE EU* 157, 163 (Gerhard Robbers ed., 2005).

<sup>6</sup> A few titles of volumes could be quoted: European Consortium for Church-State Research No. 8 *MARRIAGE AND RELIGION IN EUROPE* (1993); No. 9: *CHURCHES AND LABOUR LAW IN THE EC COUNTRIES*

publications that give an overview of the situation in the new Member States.<sup>7</sup> Some contributions, edited as an annual chronicle, were published in the *European Journal for Church-State Research*.<sup>8</sup> Another fact is that after some decades of (mostly Soviet) occupation, the ecclesiastical law in new Member States cannot be honestly regarded as a leading area of academic research. Moreover, since basically only their citizens know the language of a respective Member State, the access to the legal texts is very limited. Until a collection of the ecclesiastical norms by Salvatore Berlingò<sup>9</sup> includes vol. IV on the new Member States, one of a few reliable translations in English is the edition of Hungarian church-state laws, edited by Balázs Schanda.<sup>10</sup> Additionally, there are some separate articles describing the contemporary problems of the ecclesiastical law in eastern and central European states.<sup>11</sup> The first comprehensive handbook about all Member States, both old and new ones, is the 2<sup>nd</sup> edition of the book by Gerhard Robbers "Church and State in the European Union."

How is it possible to compare the legal position of churches and religious communities in different Member States?

First of all, there is no legal definition of a church, neither in the EC-legislation nor in the jurisprudence of the European Court of Justice. The European Court of Justice worked out its own "communitarian" definition of different terms, like it was with the term "worker."<sup>12</sup> However, to determine what is a church or religious community in a Member State is a decision of the legislation or jurisprudence of a given Member State. Generally, there are a few models:

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(1993); No. 10: THE LEGAL STATUS OF THE RELIGIOUS MINORITIES IN THE COUNTRIES OF THE EU (1994); No. 11: LE STATUT CONSTITUTIONNEL DES CULTES DANS LE PAYS DE L'UNION EUROPÉENNE (1995); No. 13, RELIGIONS IN EUROPEAN UNION LAW (1998).

<sup>7</sup> Vol. 17 of the *European Consortium: THE STATUS OF RELIGIOUS CONFESSIONS OF THE STATES APPLYING FOR MEMBERSHIP TO THE EUROPEAN UNION* (2002); in this volume contributions relating to: Hungary, Poland, Estonia, Czech Republic, Slovenia, Cyprus, Bulgaria and Turkey - others were missing.

<sup>8</sup> Rik Torfs, *Preface*, 1-9 *EUROPEAN JOURNAL FOR CHURCH AND STATE RESEARCH* (1994-2002).

<sup>9</sup> *CODE EUROPEEN DROIT ET RELIGIONS*, (Salvatore Berlingò ed., vol I 2001). It was planned as consisting of 3 volumes for 15 Member States, but maybe will include new Member States in its next volumes.

<sup>10</sup> BALÁZS SCHANDA, *LEGISLATION ON CHURCH-STATE RELATIONS IN HUNGARY* (2002).

<sup>11</sup> *DAS STAAT-KIRCHE-VERHÄLTNIS IN DEN ADALBERT-LÄNDERN: ERFahrungen und Perspektiven* (Hans Hermann Henrix ed., 2002); PETER ERDŐ, *Typen des Verhältnisses zwischen Kirche und Staat in den Beitrittsländern*, in *ÖSTERREICHISCHES ARCHIV FÜR RECHT UND RELIGION* 2 (2003).

<sup>12</sup> Case 53/81, *Levin v. Staatssecretaris van Justitie*, 1984 E.C.R. 1035.

- Churches and religious communities as legal entities of public law (Austria, Germany, Italy)<sup>13</sup>
- Churches and religious communities of private law (Estonia, France, in England all denominations except for Church of England)
- Churches as legal entities *sui generis* (Netherlands, Hungary)
- Such entities acquire their legal personality according to canon law (Austria, Hungary, Poland).

Some countries are mentioned in more than one category, which is not contradictory (e.g. Hungary: church entities acquire legal personality by the virtue of canon law and they are considered by the State as legal entities *sui generis*).

Concerning the position of religion in a state, it should be noticed that only in Malta there is a constitutionally prevailing religion (Art. 2 of the Maltese Constitution), although there is no formula such as "State Church." In some other states, the percentage of adherents of a given denomination is very high – Catholics in Poland and Orthodox in Cyprus, just like Catholics in Luxembourg and in Ireland – but none of these religions are *de iure* a predominant one. On the contrary, the constitutional provisions of those countries underline the equality of all denominations. However, another comparison is possible – the real social position of the Catholic Church in Poland and in Hungary differs significantly from the position of other churches, just like it is in the case of the Catholic Church in Italy. In Hungary, even the Constitutional Court referred to this issue in its judgement<sup>14</sup> stating: "Treating the Churches equally does not exclude taking the actual social roles of the individual Churches into account."<sup>15</sup>

Concerning church finances, there is quite a variety of options: in Belgium the clergy is entirely paid from the state budget (Art. 181 of the constitution)<sup>16</sup> and if a local administration of ecclesiastical temporal goods causes deficits, the local

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<sup>13</sup> "Catholic church which has public law legal capacity, even if it is in no way comparable to the bodies which form part of the State organisation," Silvio Ferrari, *State and Church in Italy*, in STATE AND CHURCH IN THE EU 209, 216 (Gerhard Robbers ed., 2005).

<sup>14</sup> Hungarian Constitutional Court, decision 4/1993 (II.12.) AB.

<sup>15</sup> Translation by Balázs Schanda, *State and Church in Hungary*, in STATE AND CHURCH IN THE EU 323, 331 (Gerhard Robbers ed., 2005).

<sup>16</sup> Rik Torfs, *Il finanziamento delle chiese in Belgio* in QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 1998/1, 219.

municipality is obliged to cover it.<sup>17</sup> The opposite situation is present in Portugal, where the State does not finance the religious communities, but the Catholic Church does not pay a single euro to the State – it is not obliged to pay CIT, real-estate tax or other taxes, except for PIT. The provision relating to VAT, resulting from concordates 1940 and 2004, required a special provision due to the communitarian obligations of Portugal.<sup>18</sup> In this respect, it legitimated the assumption that the situation in the new Member States must range somewhere between the Belgium and the Portuguese system. Indeed, churches are generally exempted from many taxes, especially real-estates tax, but on the other hand, in some countries they are not allowed to mortgage them.<sup>19</sup> Since tax year 1997, the Hungarian law has provided an option that 1% of personal income tax may be donated to a church or religious community, chosen by the taxpayer. Very much like the Spanish or Italian model, if a taxpayer does not decide, this 1% automatically goes to the State budget. In 2004, (tax declarations and return of the year 2003) the same model was launched in Poland. In Estonia churches may be included on the list of non-taxable non-profit-making organisations. Interestingly, in Malta – the only country with a constitutionally prevailing religion – neither the Catholic Church nor any other enjoys any kind of tax exemption.<sup>20</sup>

A majority of new Member States concluded treaties with the Holy See, called concordat (Poland), Basic Agreement (Slovakia), Agreement (Latvia, Estonia) or having no particular name, being a bundle of agreements devoted to separate questions (Hungary, Lithuania – system similar to the Spanish one). One of the consequences of such an agreement is the civil recognition of confessional marriages, like it is in Latvia, Lithuania, Malta, Poland, Slovakia, Czech Republic (although in the Czech Republic by virtue of a state law, and not concordat). This provision, in Poland was primarily meant for the Catholic Church, but was extended and currently applies to eleven of the major/oldest churches and religious communities. In Hungary, the state does not recognize confessional marriages and entering into one has no effect in civil law,<sup>21</sup> nor does it in the

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<sup>17</sup> Rik Torfs, *State and Church in Belgium* in *STATE AND CHURCH IN THE EU* 9, 14 (Gerhard Robbers ed., 2005).

<sup>18</sup> Vitalino Canas, *State and Church in Portugal*, in *STATE AND CHURCH IN THE EU* 439, 459 (Gerhard Robbers ed., 2005).

<sup>19</sup> Ringolds Balodis, *State and Church in Latvia*, in *STATE AND CHURCH IN THE EU* 253, 272 (Gerhard Robbers ed., 2005).

<sup>20</sup> Ugo Mifsud Bonnici, *State and Church in Malta*, in *STATE AND CHURCH IN THE EU* 347, 359 (Gerhard Robbers ed., 2005).

<sup>21</sup> Schanda, *supra* note 15, at 337.

Netherlands. However, in Belgium a priest who celebrates a religious marriage of a couple not married under state law, may be punished.<sup>22</sup> The Estonian system is similar to the British one: in Estonia it is a priest and not a church or religious community which is authorised by a state; in the United Kingdom a building is important, and not a priest or denomination. On the contrary, until 1989 Orthodox Cypriots could conclude only a religious marriage.<sup>23</sup>

As shown above, the models of church-state relations in new Member States are differentiated, but they do not exceed the existing framework of the fifteen (old) Member States. The first part of this paper may be concluded with a quotation from the Bible – which seems to be appropriate if questions relating to churches and religion are discussed: “Is there anything whereof it may be said, See, this is new? It hath been already of old time, which was before us.”<sup>24</sup>

### C. Dialogue between the EU and Churches and Non-Confessional Organisations

#### I. Who is Conducting the Dialogue?

There are a number of open questions concerning the dialogue of the EU with churches and religious communities.<sup>25</sup> Generally, it is clear who is in charge of this dialogue on both sides. In the European Commission there is a team called Bureau of European Policy Advisors (BEPA),<sup>26</sup> previously called Forward Studies Unit (FSU, 1992-2000) and Group of Policy Advisers (GOPA, 2000-2004). One of those advisers, Dr. Michael Weninger, is responsible for a field described as “Dialogue with Religions, Churches and Humanisms; Relationships with Non-Applicant Neighbouring States in Eastern Europe; South-East Europe, including Turkey.” Under the Prodi Commission his tasks were described in a narrower way as dialogue with religions, churches and humanism.<sup>27</sup> The website does not provide too many clues about activities of BEPA, stating merely: “In the political area the main items covered are, amongst others, external relations, EU institutional issues, trends in public opinion, trends in EU political forces, emerging actors in the world,

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<sup>22</sup> Art. 267 of the Belgium Code of Penal Law.

<sup>23</sup> A. Emilianides, *State and Church in Cyprus*, in *STATE AND CHURCH IN THE EU* 231, 245 (Gerhard Robbers ed., 2005).

<sup>24</sup> *Ecclesiastes* 1:10.

<sup>25</sup> MARCO VENTURA, *LA LAICITÀ DELL'UNIONE EUROPEA* 195 (2001).

<sup>26</sup> [http://www.europa.eu.int/comm/dgs/policy\\_advisers/team/index\\_en.htm](http://www.europa.eu.int/comm/dgs/policy_advisers/team/index_en.htm).

<sup>27</sup> More available at [http://www.europa.eu.int/comm/dgs/policy\\_advisers/index\\_en.htm](http://www.europa.eu.int/comm/dgs/policy_advisers/index_en.htm).

dialogue with communities of faith and conviction.” Hopefully, this page is under construction but there is no sign indicating it is. The still accessible website of GOPA lists meetings of Dr. Weninger with churches and religions. However, the most recent meeting was supposed to be held in March 2004. For over eighteen months there has been no update of this site.

Churches and religious communities established diversified umbrella-organisations and special offices in order to have a representation towards the EU institutions. Two of the most important players are COMECE (Commission of Bishops’ Conference of the EC) and CEC-KEK (Conference of European Churches). The first one represents the Catholic Church, the second one represents over 120 non-Catholic churches in Europe, which means that it unites different Protestant and Orthodox churches. There are other organisations (offices, entities), inter alia the Muslim Council for Cooperation in Europe and the Conference of European Rabbis.<sup>28</sup> Some other entities like Caritas Europa, Eurodiaconia, and Evangelische Kirche in Deutschland created their own offices.<sup>29</sup> Before their dialogue with the Commission will be discussed, as an example some basic data about structures and scopes of COMECE and CEC-KEK should be provided.

COMECE was founded in 1980 following a wish of Holy Father John Paul II. Every bishops’ conference in the EU-Member State delegates its one member to COMECE. Currently, it consists of twenty-one members. The number twenty-one and not the expected twenty-five can be explained due to the fact, that the structure of the Catholic Church does not necessarily mirror the state borders. There is only one bishops’ conference for Denmark, Finland and Sweden, but there is a common conference of England and Wales and separately of Scotland. Another question is Cyprus, with its bishop residing in Jerusalem. This is an interesting case because it is the first Member State of the EU with a bishop residing outside the borders of the EU. CEC-KEK – Conference of European Churches consists of 126 non-Catholic churches from almost all states in Europe. To be exact, even some catholic churches which do not recognise the Pope as its head – as it is in case of Polish Catholic Church<sup>30</sup> – are members of CEC-KEK. In order to improve the co-operation and contacts with the EC-institutions, the six major organisations established an advisory body of the initiative “Soul for Europe,” consisting of twelve representatives – two representatives of each: COMECE, CEC-KEK, Orthodox

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<sup>28</sup> More available at <http://www.cer-online.org>.

<sup>29</sup> MICHAŁ RYNKOWSKI, STATUS PRAWNY KOŚCIOŁÓW I ZWIĄZKÓW WYZNANIOWYCH W UNII EUROPEJSKIEJ 149 (2004).

<sup>30</sup> Church founded by Polish emigrants in the USA in the 19<sup>th</sup> century, does not recognise the Pope as Head of the Church.

Liaison Office, Muslim Council for Cooperation in Europe, Conference of European Rabbis, European Humanist Federation.<sup>31</sup> Interestingly, works of this initiative have been led for nine years by Humanist, Mr Claude Wachtelaer.<sup>32</sup> "Soul for Europe" was advising how to distribute money for different religious and ecumenic projects, which were covered from the budget heading 15 06 01 03 (the full and official name of this headline is: Grants to help cover the permanent work programme of a body which pursues an aim of general European interest in the field of active European citizenship or an objective forming part of the European Union's activities in this area).

COMECE, CEC-KEK and other religious institutions observe the work of European institutions and prepare different documents and statements. It would take too much space to mention all of them, so just to name the priorities of their work: human rights, migration, bio-ethic, civic society, education, legal affairs. They issue different publications: "*La construction européenne et les institutions religieuses*", "*L'euro et l'Europe*", "*Responsabilité de l'Europe pour le développement mondial: marchés et institutions après Seattle*" (all by COMECE), and some interesting analysis, e.g. "The European Convention," edited by COMECE, CEC-KEK, EKD. Almost all organisations issued statements referring to EU-enlargement or elections to the EP in 2004; COMECE regularly updates its homepage, providing news and comments on current events.<sup>33</sup>

## II. A Dialogue –What Should be the Content?

Representatives of all churches and religious communities contact BEPA and Dr. Weninger on more or less a regular basis. However, since the EU respects all denominations equally, the organisation of humanists and very small religious groups are received by Dr. Weninger in the same manner. Moreover, since there is no definition of 'sect'<sup>34</sup> some "new religious movements" are present during meetings, even those concerning combating illegal activities of sects. There is no legal reason for not inviting them, but their presence seems to be inappropriate. The European Commission is a hostage of the "political correctness" just like the European Parliament was a few years ago, when it issued on 29 February 1996 a

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<sup>31</sup> <http://www.humanism.be/new/english/1-1-ehf.htm>.

<sup>32</sup> A SOUL FOR EUROPE, FINAL ANNUAL REPORT: ETHICS AND SPIRITUALITY 2 (2004).

<sup>33</sup> Available at <http://www.comece.org>.

<sup>34</sup> Michał Rynkowski, *Freedom of Religion in the European Union*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 71, 82 (Adam Bodnar et al. eds., 2003).



resolution on sects.<sup>35</sup> The EP refrained from naming this sect, even when reminded of the “recent events in France,” during which sixteen persons, among them three children, were killed on 23 December 1995.

The meetings with Dr. Weninger are of purely consultative character, no decisions are being taken. Should this change one day, a special procedure – kind of qualified majority – should be launched for the representatives of COMECE and CEC-KEK. According to the newest statistics, among European citizens, 55% declare their affiliation to the Catholic Church, 13.4% are Protestants, 6.7% Anglicans, 3.1% Orthodox, 2.9% Muslims.<sup>36</sup> Taking into account, that CEC-KEK unites Protestants, Anglicans and Orthodox, it represents some 23% of Europeans. COMECE and CEC-KEK have the strongest positions, but if they had – hypothetically – only two votes, that would be a clear disadvantage in comparison with numerous split-up free churches and new religious movements.

Another important question is what can or should be a content of co-operation and dialogue between the EU and churches. The collection of the EU/EC legal acts referring to churches and religious communities<sup>37</sup> show that there are a variety of fields, being of interest both for churches and the EU, including free movement of persons, trade mark law, banking, slaughterery, custom law, etc. In this context another question may rise: is there any chance or any need for the concordat between the EU and the Holy See?

### III. *Is a Concordat Possible? Is it Needed?*

The lacking legal personality of the EU was finally granted in the constitutional treaty, but even without the constitutional treaty, it could be the EC concluding an international treaty. No doubts that the Holy See is a subject of international law, so there are legal preconditions for such an agreement. The fact that many Member States have already concluded concordats (not necessarily under this specific name) with the Holy See, show an additional agreement on the EU-level would not be a problem. The German Länder concluded treaties with the Holy See despite Reichskonkordat of 1933 on the federal level. An important remark is that the content of an EU-concordat should differ from those with the Member States, in

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<sup>35</sup> 18.3.1996 O.J. (C 78) 31.

<sup>36</sup> 0.3 % are Jews, 18.25 % other denomination and persons not belonging to a denomination, see Gerhard Robbers, *State and Church in the EU*, in *STATE AND CHURCH IN THE EU* 577, 578 (Gerhard Robbers ed., 2005).

<sup>37</sup> GERHARD ROBBERS, *RELIGION-RELATED NORMS IN EUROPEAN UNION LAW* (August 2, 2005), available at <http://www.uni-trier.de/~ievr/EUreligionlaw/>.

order not to repeat or not to overlap. Therefore, another follow-up question arises: what should/could be a content of a concordat, in order not to repeat the “national” concordats?

M. Kalbusch listed in his dissertation<sup>38</sup> some areas which would be of interest for both sides. However, his proposals were not really appealing: environmental issues, trade with less developed countries, protection of rights of employees. In my personal opinion, it seems that only two questions would be legitimated in the concordat: religious education in so-called “European schools” and religious service in the European militaries unit – once they will be functioning. Apparently, question of a concordat will not turn out in legislative works in the foreseeable future. In connection with those issues, there is a perpetual question of equality: if the EU/EC concludes an international treaty with the Holy See (being international representation of the Catholic Church), what would be the legal basis for agreements with other denominations? Gerhard Robbers suggested that Art. 282 or 308 TEC could be used as a basis. However, the ECJ underlined in its opinion 2/94 that Art. 308 should not be used for the widening of the EC-powers.

#### D. Conclusions and Outlook

Despite the new constitutional provision on an open, transparent and regular dialogue with churches, the situation is actually not that optimistic. Representatives of religious bodies admit that only J. Delors was really interested in the co-operation with them. His successors continued his work but did not add any new impulse. The financial support got more and more limited (recently reduced to 40 000 euro per year), and new administrative requirements had to be fulfilled. The advisory body of the initiative “Soul for Europe” had to become an association according to Belgium law in 2004.<sup>39</sup> The Commission signed a financial programme for 2004 on 14 October 2004, but the first portion of a grant arrived on 29 November.<sup>40</sup> During the official conference of the “Soul for Europe” that is traditionally held once a year in November, due to the change of Commission, there were neither rooms nor interpreters available, which made this international session very difficult. As a response to those actions of the Commission, the General Assembly decided to dissolve the associations. The co-ordinator of

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<sup>38</sup> MARCO KALBUSCH, RECHTLICHE BEZIEHUNGEN ZWISCHEN DER KATHOLISCHEN KIRCHE UND DER EUROPÄISCHEN UNION (Dissertation zur Erlangung des Lizentiats im kanonischen Recht, vorgelegt von Marco Kalbusch, Promotor: Prof. Dr. Rik Torfs, Faculteit Kerkelijk Recht, Katholieke Universiteit Leuven, 1999).

<sup>39</sup> A SOUL FOR EUROPE, FINAL ANNUAL REPORT: ETHICS AND SPIRITUALITY (2004) *supra* note 32, at 4.

<sup>40</sup> *Id.*

initiative, Ms. Win Burton, concluded in her final annual report (2004) that “the relations have been practically only administrative, even with the GOPA (...) there has been no dialogue as such.”

Hopefully an introduction of a provision on dialogue with churches will not coincide with the end of the dialogue that has been so far more or less successfully maintained.