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Religious Discrimination and Incitement to Religious Hatred. What Answer at EU Level?

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ABSTRACT: *Five years ago, the so called ‘cartoons’ crisis’ arose after the Danish newspaper Jyllands Posten published twelve drawings depicting Mohammed. Following some violent reactions against Denmark and European Union (EU) embassies, a joint statement was issued by the UN, the EU and the Organization of the Islamic Conference (OIC). Several EU political leaders made declarations in favour of intercultural dialogue, supporting freedom of religion and a responsible exercise of freedom of speech. The OIC called upon the EU to take measures to fight Islamophobia, but the EU lacks any legislative competence on this issue. However, the shift from its initial ‘market approach’ to a more ‘social approach’ has slowly introduced religion into EU policies by the back door. Accordingly, EU law may have some influence in the way that Member States face freedom of religion and freedom of speech conflicts. In this article I will focus on the problem of incitement to religious hatred in the framework of EU law. For this purpose, I will analyse how the Framework Decision 2008/913/JHA, Directive 78/2000/EC and the Audiovisual Media Services Directive could apply to this type of conflicts, taking also into account the links with the European Convention of Human Rights.*

1. Introduction

The cartoons’ controversy started in an EU¹ Member State (MS), Denmark, but in few months spread all over the world². Essentially, the root of the crisis lied in the friction between the right to freedom of religion and the right to freedom of expression. Muslims were offended by the publication of twelve drawings depicting the prophet Mohammed as a terrorist (e.g. with a bomb on his turban)³. Westerners in turn argued that freedom of religion does not entail a right to be exempted from critics and freedom of expression should not be curtailed in a democratic society. Intermediate positions condemned the violent attacks that took place against Danish citizens and diplomatic

¹ Throughout the article I will generally refer to the EU due to the new Lisbon Treaty institutional framework, even if some measures were adopted by the European Community.

² For a chronology and a summary of the facts see Rynning, S. and Holmgaard Schmidt, C., ‘Muhammad Cartoons in Denmark: From Freedom of Speech to Denmark’s Biggest International Crisis Since 1945’ (2006) *UNISCI Discussion Papers* No. 11, <http://redalyc.uaemex.mx/redalyc/src/inicio/ArtPdfRed.jsp?iCve=76701102> (accessed 10.05.2011); Combalía, Z., ‘Libertad de expresión y difamación de las religiones: el debate en Naciones Unidas a propósito del conflicto de las caricaturas de Mahoma’ (2009) *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 2-3. http://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=407426&d=1 (accessed 20.12.2010).

³ Ferreiro, J., ‘Las caricaturas sobre Mahoma y la jurisprudencia del Tribunal Europeo de Derechos Humanos’ (2006) *Revista Electrónica de Estudios Internacionales* 1, <http://ssrn.com/abstract=957584> (accessed 10.03.2011).

missions but recalled that freedom of expression should be exercised with responsibility.

EU representatives had to take a position towards the outside world by holding several meetings with the UN, the Council of Europe ('CoE') and the Organization of the Islamic Conference ('OIC') leaders in order to calm down the situation. This shows that, even if the EU does not have an explicit competence in religious issues, it has an increasing influence in religious matters and it can play a role in conflicts between the freedoms of expression and religion⁴.

OIC representatives urged the EU to take measures to fight Islamophobia, but the treaties do not attribute such powers to the Union. However, to a certain extent the EU has been able to influence national legislations with several regulations. One of them is the so called Framework Directive ('FD')⁵, which prohibits discrimination in employment on several grounds, among them religion or belief. Another one is the Framework Decision for combating racism and xenophobia by means of criminal law ('FDec')⁶. Finally, the Audiovisual Media Services Directive ('AVMSD II')⁷ also contains some provisions against incitement to hatred.

The aim of this contribution is to analyse the extent to which the EU might influence MSs' legislation on incitement to religious hatred, despite not having an express competence in religious matters. For this purpose, I will first examine EU institutional reactions to the cartoons crisis. Then, after shortly exploring the evolution in EU protection to freedom of religion and freedom of expression, I will analyse the relevance of the three above mentioned regulations for resolving incitement to religious hatred conflicts.

⁴ Despite the lack of competence, both rights are recognised in the EU Charter (which now has the same value than the treaties, art. 6.1 TEU): the right to religious freedom and the Union's respect for religious diversity are protected in arts. 10 and 22, whilst freedom of expression is enshrined in art. 11. This is now more visible thanks to the European Charter of Fundamental Rights, which has the same value than the treaties since December 2009 (art. 6.1 TEU).

⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

⁶ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] O.J. L 328/55.

⁷ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1.

2. The EU institutional reaction to the Cartoons' crisis

The so called 'Cartoons crisis' was followed by many international reactions, and the EU was not an exception. Some authors have qualified the EU reaction as a 'yes but' approach⁸ because European leaders criticised violent reactions following the cartoons' publication and recalled the importance of freedom of speech in a democratic society while at the same time stressing that it should be exercised with responsibility (e.g. avoiding unnecessary provocation), in line with international treaties⁹. From this perspective, EU position tried to find a balance between the two competing rights.

In my view, however, the position of EU Institutions was slightly more favourable to freedom of expression than to freedom of religion, and thus closer to the Danish position¹⁰. This can be inferred from the Council of the European Union ('the Council) conclusions lamenting that 'these cartoons *were considered* offensive and distressing by Muslims across the world'¹¹. The Council did not recognize that the cartoons *were* offensive; it simply regretted that Muslims *considered* them as such. A similar use of the language can be observed in the European Parliament ('EP') resolution on this matter: '[the EP] expresses [...] its respect for those who have *felt offended* by the cartoons'¹² and can also be found in several EU Commissioners speeches. For instance, Benita Ferrero-Waldner regretted 'that so many people *felt offended* by the publication of cartoons'¹³ and Barroso declared: 'I understand that [the cartoons] *offended* many people in the Muslim world, but it is better to have a system where some excesses are allowed or be in some countries where they don't even have the right to say this?'¹⁴.

⁸ S. Rynning and C. Holmgaard Schmidt, op. cit., p 12.

⁹ Art. 19.3 of the International Covenant on Civil and Political Rights ('ICCPR') affirms that the exercise of the right to freedom of expression 'carries with it special duties and responsibilities' and thus, it can be restricted, but only when it is provided by law and it is necessary for the protection of the rights of others or public interests.

¹⁰ Larsen, H., 'The Cartoons Crisis in Danish Foreign Policy: A new Balance between the EU and the US?', *Danish Foreign Policy Yearbook 2007*, p. 51, 67, http://dcism.dk/graphics/Publications/Books2007/Yearbook2007/yearbook07_hole.pdf#page=51 (accessed 20.03.2011).

¹¹ Council (EU), Conclusions on reactions in the Muslim world to publications in European media, 27.02.2006.

¹² EP (EU), Resolution on the right to freedom of expression and respect for religious beliefs, 16.02.2006, P6_TA(2006), OJ C290 E/399, at 5.

¹³ Speech by EU Commissioner Ferrero-Waldner, 'Dialogue of Cultures – clash of civilizations or clash of ignorance?', 27.03.2006, http://www.europa-eu-un.org/art.s/en/art._5845_en.htm (accessed 10.02.2011).

¹⁴ G. Bowley, 'EU chief speaks out for free expression; Barroso urges Europe to fight for values', *The International Herald Tribune* (16.02.2006), www.lexisnexis.com (24.02.2011).

Nevertheless, EU position was not uniform. Some other declarations were closer to the recognition that the drawings *were* actually offending, or put more emphasis in responsibility. For instance, the Commissioner Franco Frattini acknowledged that the cartoons' publication was 'somewhat imprudent'¹⁵. Still, he stressed that freedom of speech includes the right to criticise and that '[a] difference of opinion, even if it is bitter and disrespectful, often feeds into free polemic debate, in which satire plays a full part'¹⁶. The EP President, Josep Borrell, recalled that freedom expression is one of the fundamental values of the EU but declared to 'understand that, for many Muslims, the cartoons that have been published are an insult to their beliefs'¹⁷. Though, the clearest declaration can be found in the EU, UN and OIC the joint statement: '[w]e are deeply alarmed at the repercussions of the publication in Denmark several months ago of *insulting* caricatures of the Prophet Mohammed and their subsequent republication'¹⁸. This different language can certainly be explained by the fact that the joint statement had to be agreed between the EU, UN and OIC representatives, so the EU position was probably tempered in order to reach a consensus.

Despite this apparent ambiguity, EU position can broadly be defined as seeking a balance between freedom of expression and religion. The EU has firmly condemned incitement to religious hatred in UN resolutions¹⁹ but tends to emphasize the importance of *freedom* ('maximum freedom, minimum restriction'), in contrast with the Islamic approach, which tends to stress the need of *responsibility* in the exercise of freedom²⁰. The tendency to favour freedom -of expression, in this case- and the reluctance to restrict it can be subtly appreciated in most EU statements concerning the cartoons' crisis, and it is also reflected in the regulations which will be analysed in section 4.

¹⁵ Commission (EU), 'Statement by EU Commission VP Frattini on cartoons published by Danish newspaper', Ref. EC06-038 EN, 02.02.2006, http://www.europa-eu-un.org/art.s/fr/art._5660_fr.htm (accense 10.02.2011).

¹⁶ Ibid.

¹⁷ EP (EU), 'EU Parliament President Borrell on events following publication of cartoons', Ref. EP06-011 EN, 07.02.2006, http://www.europa-eu-un.org/art.s/es/art._5668_es.htm (accessed 10.02.2011).

¹⁸ Council (EU), 'EUHR Solana, UNSG Anna and OIC SG Ihsanoglu call for calm and restraint after caricature publications', Ref. CL06-047EN, 07.02.2006, http://www.europa-eu-un.org/art.s/en/art._5663_en.htm (accessed 10.02.2011).

¹⁹ E.g. UN Human Rights Council, Resolution 6/37, Elimination of all forms of intolerance and of discrimination based on religion or belief, at 6, http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_6_37.pdf (accessed 03.05.2011). This resolution was proposed by Portugal in the name of the EU.

²⁰ See Combalía, Z., op. cit., p. 8.

3. Freedom of religion and Freedom of expression in the EU

After revising the role played by EU Institutions in the cartoons' crisis, we shall now see if the EU might be able influence EU MSs legislations in this field by going beyond the political level to the regulatory level. For this purpose, I will first look at the evolution of freedom of religion and freedom of expression protection in the EU²¹.

a. Freedom of religion

Originally, no EU primary law provisions dealt with religious issues or conferred any competence to European Institutions. In its first stages, the European Communities were driven by a market rationale²². However, for the 'fathers of Europe' the economic union was not the objective, but the means to reach a political and a social union which would bring a peaceful coexistence to Europe. Robert Schuman conceived the European Coal and Steel Community ('ECSC') as the 'first step in the federation of Europe'²³; as the initial stage of a process which would unite the peoples of Europe on the basis of their common history and values. Schuman coined the expression that the ECSC 'needs a soul'²⁴, and the idea was retaken by Jacques Delors few decades later when he declared that 'we won't succeed with Europe solely on the basis of legal expertise or economic know-how. [...] If in the next ten years we haven't managed to give a soul to Europe, to give it spirituality and meaning, the game will be up'²⁵.

Thus, the EU has never been completely aside from religion, even if the treaties do not content any express legal competence in this field. This can be observed, in first instance, in the European Court of Justice ('ECJ') case law. Already in 1974, the ECJ ruled on a case concerning a Dutch woman who was refused the entrance to the UK on the ground that she was a secretary of the Scientologist Church, which was considered a

²¹ There is no room in this paper for a comprehensive overview. For further details see e.g.: McCrea, R., *Religion and the Public Order of the European Union* (OUP 2010); Woods, L., 'Freedom of Expression in the European Union' [2006] 12 *European Public Law* 371.

²² According to Tridimas: 'Although the EEC was perceived as a dynamic entity, bound to evolve in subsequent years, its goals were first and foremost economic. It was thought that the protection of human rights did not merit specific reference in a Treaty setting up a Community with enumerated competences mainly in the economic sphere. This applied *a fortiori* to the European Coal and Steel Community and Euroatom'. Tridimas, T., *The General Principles of EU Law* (OUP 2006), p. 300.

²³ Schuman, R., Declaration of 9 May 1950, http://europa.eu/abc/symbols/9-may/decl_en.htm (accessed 20.05.2011).

²⁴ Laudrup, C., 'A European Battlefield: Does the EU Have a Soul? Is Religion In or Out of Place in the European Union?' (2009) 37 *Religion, State & Society* 51, 52.

²⁵ Delors, J., Speech to European church leaders, February 1993, <http://www.liebreich.com/LDC/HTML/Europe/04-Religion.html> (accessed 31.05.2011).

danger for public order²⁶. But it was in *Prais* where the ECJ recognised for the first time the right to freedom of religion, not only as a negative obligation, but also as a duty for public powers to create the appropriate framework for its exercise²⁷.

Besides, legislative developments in other connected areas have indirectly affected religious issues in very diverse areas, such as labour law, social security, tax law, etc²⁸. That was the case of Directives 74/577/EEC²⁹ or 83/181/EEC³⁰. However, it was not until the adoption of the Amsterdam Treaty that religious issues were formally introduced in primary law through Declaration N°11: ‘[t]he Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States’³¹. The Lisbon Treaty introduced the declaration in the body of the treaties³², together with two other provisions concerning the status of ‘philosophical and non-confessional organisations’ in MS³³ and EU dialogue with churches and ethos based organisations³⁴.

The Amsterdam Treaty also introduced article 19 TFEU (ex article 13 TEC), which contents the legal basis for the adoption of secondary legislation for combating discrimination on different grounds, including religion or belief. However, this competence is limited to the scope of the Treaties, so anti-discrimination legislation based on article 19 TFEU can only be developed within the areas where the EU already has a competence³⁵. Nonetheless, religious discrimination is also addressed in article 10 TFEU, which creates the mainstreaming duty of combating religious discrimination in EU policies.

²⁶ Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337.

²⁷ Case 130/75 *Vivien Prais v Council of the European Communities* [1976] ECR 1589.

²⁸ Robbers, G., ‘Estado e Iglesia en la Unión Europea’, in Robbers, G. (ed), *Estado e Iglesia en la Unión Europea* (Nomos Verlagsgesellschaft 1996), p. 333.

²⁹ Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter [1974] OJ L 316.

³⁰ Council Directive 83/181/EEC of 28 March 1983 determining the scope of Art. 14 (1) (d) of Directive 77/388/EEC as regards exemption from value added tax on the final importation of certain goods [1983] OJ L 105. For comments and further examples see Relaño, E., ‘La Libertad Religiosa y de Conciencia en la Unión Europea: la Carta de los Derechos Fundamentales y la Futura Constitución Europea’ (2004) *Revista Española de Derecho Europeo* 563, 568-569.

³¹ Declaration No. 11 on the status of churches and non-confessional organisations, OJ C 340, 10/11/1997, p. 133.

³² Art. 17.1 TFEU.

³³ Art. 17.2 TFEU.

³⁴ Art. 17.3 TFEU.

³⁵ Art. 19 TFEU contains the following clause: ‘[w]ithout prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union’.

Overall, the recognition of the right to freedom of religion at EU level is in line with the Union's values, and especially with human dignity, freedom, tolerance, pluralism and respect for human rights 'including the rights of persons belonging to minorities'³⁶. The right to freedom of religion must obviously be included in the concepts of 'freedom' and 'respect for human rights' mentioned in article 2 TEU. However, it was with the adoption of the EU Charter that the right to freedom of religion received a statutory recognition at EU level. Article 10.1 recognizes the right to change ones' religious beliefs and the right to manifest them³⁷. The scope of this article is specified in articles 51 to 54 of the Charter, according to which it should be understood in the light of the ECHR, but the EU can extend further the level of protection³⁸. Article 52.1 points that the limits for its exercise must be set by law, should respect its essence and be proportional and necessary to protect the general interest or the rights of others. The Charter also refers to religious freedom in article 21.1, which prohibits religious discrimination, and article 22 which establishes an obligation of respect for religious diversity.

b. Freedom of expression

Freedom of expression is encompassed in the founding principles and values of the Union. It should be understood as indirectly included in the values of human dignity, freedom, democracy, the rule of law and respect for human rights mentioned in article 2 TEU. It is essential to one of the main traits of the European society, namely, pluralism, which is mentioned in article 2 TEU. Its importance has been confirmed in statutes and case law, but also by political representatives, as the Commissioner Benita Ferrero-Waldner, who stated that 'freedom of speech is central to Europe's values and traditions. It is also non-negotiable'³⁹.

Freedom of expression is now formally recognised in article 11.1 of the Charter, which is very similar in its wording to article 10.1 ECHR: 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority

³⁶ Art. 2 TEU.

³⁷ See comments on the drafting of this provision in González-Varas, A., 'Las innovaciones de la Carta de Derechos Fundamentales de la Unión Europea en materia de Libertad Religiosa', *Anuario de la Facultad de Derecho de Orense* (Universidad de Vigo 2002), p. 271.

³⁸ Art. 52.3 Charter. See also Tridimas., T, op. cit, p. 365.

³⁹ Speech by EU Commissioner Ferrero-Waldner, op. cit.

and regardless of frontiers'⁴⁰. Article 11.2 of the Charter also refers to the respect for freedom and pluralism of the media, but it omits any indication to the scope or the limits of this right, which are found in articles 51 to 54 of the Charter, as for freedom of religion.

This statutory recognition of freedom of expression comes after a prior development of the ECJ case law on this issue. Already in 1989 the Court upgraded the right to freedom of expression to the level of a 'jurisprudential fundament of the community'⁴¹ by stating that public derogations had to be 'appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights'⁴². A decade later, in *Schmidberger*, it confirmed that under certain circumstances⁴³, free movement of goods could be restricted to preserve the rights to freedom of expression and freedom of assembly, enshrined in articles 10 and 11 ECHR⁴⁴.

Building on the ECHR and some case law of the ECtHR⁴⁵, the ECJ has even provided some criterion for pondering freedom of expression with other competing interests. Essentially, any limitation of freedom of expression must be provided by law, should protect a legitimate aim and be necessary in a democratic society⁴⁶. Following these principles, the ECJ has been reticent to restrict freedom of expression where it plays a role in public interest discussions⁴⁷ or when freedom of expression is unlikely to cause '*serious harm* to the Communities' interests'⁴⁸. The ECJ has also pointed that 'the discretion enjoyed by the competent authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest which are referred to in Article 10(2) of the ECHR varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question'⁴⁹. Accordingly, a conflict between freedom of expression and a fundamental freedom (i.e.

⁴⁰ Art. 10.1 ECHR contents, however, a second sentence which has been omitted in art. 11 of the Charter: '[t]his art. shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'.

⁴¹ Apt, B. L., 'On the Right to Freedom of Expression in the European Union' [1998] 4 *Columbia Journal of European Law* 69, 91.

⁴² Case C-260/89 *ERT v DEP* [1991] ECR I-2925, at 45.

⁴³ There is no room in this article for further development, see for details Tridimas, T., op. cit, p. 337-341.

⁴⁴ Case C-12/00 *Schmidberger v Austria* [2003] ECR I-5659, at 77-94.

⁴⁵ See e.g. *Familiapress v Heinrich Bauer Verlag* [2003] ECR I-0000, at 73.

⁴⁶ Case C-71/02 *Karner v Troostwijk* [2004] ECR I-3025, at 50.

⁴⁷ Case *Karner*, op. cit., at 51.

⁴⁸ Case C- 340/00 *Commission v Michael Cwik* [2001] ECR I-10269, § 18. See also C-274/99 *P Connolly v Commission* 2001 ECR I-1611, at 53.

⁴⁹ Case C-380/03 *Germany v European Parliament and Council* [2006] ECR I-11573, at 155.

free movement of goods) is likely to have different implications than a conflict between freedom of expression and another human right, as freedom of religion.

The conflict between the freedoms of expression and religion raises some similar issues to the ones that were at stake in *SPUC v. Grogan*. The case concerned several Irish students which were sued for distributing information about UK abortion clinics; on the ground that aborting is forbidden in Ireland⁵⁰. The alleged limitation to freedom of expression was based on a constitutional provision and aimed at protecting a legitimate aim, the life of unborn, which is rooted in deep moral beliefs of the Irish society. However, in this case the ECJ eluded the central question alleging that where MS have a wide margin of discretion⁵¹ –as it is also the case in religious matters- it will only examine ‘the reasonableness and proportionality of the interference’⁵². But the ECJ did not even analyse these two elements and held that it was a matter of national law⁵³. Though, at a later stage the case reached the ECtHR, which considered that the restriction of freedom of expression was disproportionate to the protection of morals, and more precisely to the protection of the life of the unborn⁵⁴.

Other case law developments in freedom of expression have been fuelled by an increasing number of EU directives related with the information society and media services. For example, Directive 84/450/EEC introduced EU law rules against misleading advertising⁵⁵ which were discussed in *Karner*. Few years later, the Tobacco Advertising Directive was passed⁵⁶ and was successfully challenged by Germany⁵⁷. Following this ruling, a new directive was approved to modify some of its provisions⁵⁸, and Germany brought a new case before the ECJ⁵⁹. Another attempt of harmonisation of

⁵⁰ Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685.

⁵¹ According to the ECtHR, ‘a wider margin of appreciation of generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion’, *Handyside v the United Kingdom*, [1976] ECHR 5, at 48. See also Weber, A., *Manual on hate speech* (Council of Europe 2009), p. 32-36.

⁵² Case *Karner*, op. cit., at 51.

⁵³ Case *Grogan*, op. cit., at 31.

⁵⁴ *Open Door Counselling and Dublin Well Woman v. Ireland*, No. 24 (1993) 15 EHRR 244.

⁵⁵ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250.

⁵⁶ EP and Council Directive 98/43/EC of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L 213/9.

⁵⁷ Case C-376/98 *Germany v. European Parliament and Council* [2000] ECR I-8419.

⁵⁸ EP and Council Directive 2003/33/EC of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L153/16.

⁵⁹ Case C-380/03 *Germany v European Parliament & Council*, op. cit.

freedom of expression related aspects crystallized in 2001 in Directive 2001/29/EC on copyright and related rights in the information society⁶⁰ and was also challenged in *Laserdisken*⁶¹.

4. An emerging EU legal framework for addressing incitement to religious hatred?

A central issue to this debate is the extent to which institutional and diplomatic actions may surpass the *political* arena, be reflected in EU *policies and laws*, and so influence MSs' national legislation. In the framework of the cartoons' crisis, the OIC called upon the EU 'to identify Islamophobia as a dangerous phenomenon and to observe and combat it [...] by creating suitable observance mechanisms and *revising its legislation*'⁶² [emphasis added]. Even more explicitly, it invited the EU 'to adopt necessary legislative measures [...] against Islamophobia through the European Parliament'⁶³. However, referring to the cartoons' crisis, the commissioner Frattini clearly stated that '*[t]here have never been, nor will there be any plans by the European Commission to have some sort of EU regulation, nor is there any legal basis for doing so*'⁶⁴. I shall argue that this is not totally true. The Commission will probably not seek to establish EU measures against Islamophobia itself⁶⁵, but as I will explain below, there are already some EU norms against incitement to religious hatred.

In the following sections I will analyse the FD, the FDec and the AVMSD II to show that the EU has already a role in framing national rules for balancing the freedoms of expression and religion when a conflict arises.

⁶⁰ Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

⁶¹ Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-08089, at 60.

⁶² Press release of 11.02.2006, <http://www.oic-oci.org/oicold/press/english/2006/February%202006/contacts-sg.htm> (accessed 24.02.2011).

⁶³ Press release of 13.02.2006, <http://www.oic-oci.org/oicold/press/english/2006/February%202006/contacts-sg.htm> (accessed 24.02.2011).

⁶⁴ Statement by EU Commission VP Frattini on cartoons Publisher by Danish newspaper, 02.02.2006, http://www.europa-eu-un.org/art.s/fr/art._5660_fr.htm (accessed 24.02.2011).

⁶⁵ This can be inferred from discussions on several UN resolutions, where the EU was against singling out Islamophobia, if other forms of religious intolerance, as Anti-Semitism or 'Christianophobia', were not mentioned too. See Combalía, Z., op. cit, p. 15.

a. The Framework Directive: an effective tool against incitement to religious hatred?

The FD was adopted on the basis of article 19 TFEU (ex article 13 TEC). It prohibits different forms of religious discrimination, but not incitement to religious hatred as such. The concepts of incitement to religious hatred and religious discrimination are obviously related⁶⁶, as they are both external manifestations of intolerance, but there are some subtle differences between them. International definitions against incitement to religious hatred refer to aggressiveness, hostility, *discrimination* or *incitement to discrimination*⁶⁷. In my view, however, it is difficult to directly subsume hate speech actions under the discrimination concept. In the FD, discrimination *stricto sensu* is identified with a less favourable treatment of a person (*direct discrimination*)⁶⁸ or with an apparent neutral practice which puts a person at disadvantage (*indirect discrimination*)⁶⁹, by reference to a comparator in a similar situation. Yet, incitement to hatred refers to forms of *expression* which provoke, inflame, stimulate or justify hatred against a certain person or group of persons⁷⁰, but may not constitute an action (a *'treatment'*) itself, as the concept of discrimination would require.

However, in some cases incitement to discriminate could be addressed in the EU through the concept of 'instruction to discriminate' of article 2.4 FD. 'Incitement' and 'instruction' are not equivalent terms because 'incitement' refers to provocation whilst 'instruction' implies an order or direction, but the line between both concepts can easily be blurred because very firm inciting expressions can virtually turn into instructions. At this respect, Choudhury considers that article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') confirms the 'close relationship' between incitement to hatred and instructions to discriminate. He explains

⁶⁶ According to the Camden Principles on Freedom of Expression and Equality incitement to hatred creates 'an imminent risk if discrimination' (principle 12.1.iii.), available at <http://www.art.19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (accessed 29.03.2011).

⁶⁷ Art. 20.2 ICCPR provides that '[a]ny advocacy of [...] religious hatred that constitutes *incitement to discrimination*, hostility or violence shall be prohibited by law'. The Council of Europe considers that hate speech includes 'intolerance expressed by aggressive nationalism and ethnocentrism, *discrimination* and hostility'. See CoE, Recommendation 97(20) on Hate Speech, adopted by the Committee of Ministers on 30 October 1997, Appendix.

⁶⁸ Art. 1.2.a FD.

⁶⁹ Art. 1.2.b FD.

⁷⁰ The ECtHR associates hate speech to '*expressions* which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)'. See e.g. *Günduz v. Turkey* ECHR 2003-XI, at 40.

that '[t]he link between incitement to discriminate and instructions to discriminate lies in the fact that incitement concerns expressions of A to B that in turn affect C. Such expressions can take the form of instructions by A to B.'⁷¹ The European Agency for Fundamental Rights ('FRA'), the CoE and the ECtHR have also confirmed this close link by stating that in order to be effective, the EU concept of instruction to discriminate 'ought not to be confined to merely dealing with instructions that are mandatory in nature, but should extend to catch situations where there is an expressed preference or an encouragement to treat individuals less favourably due to one of the protected grounds'⁷². Therefore, national rules implementing article 2.4 FD can arguably play a role in fighting incitement to religious hatred.

The FD incorporates another form of discrimination, harassment, which could be relevant in the framework of incitement to hatred. Harassment concerns conducts which have 'the *'purpose or effect'* of undermining the dignity of the victim and create an 'intimidating, *hostile*, degrading, humiliating or offensive environment'⁷³. However, it is defined in article 1.3 FD as an '*unwanted* conduct'. *A priori* this would exclude incitement to hatred from the application of harassment provisions because provocations are normally done on purpose. But a hostile and offensive environment can also be fuelled by apparently unwanted conducts. For instance, if the cartoon with a bomb on Mohammed's turban was hanged on the notice board of an undertaking with only one Muslim employee, with the approval of the director, this could be considered an offensive and hostile working environment and this employee could feel harassed⁷⁴. Hence, indirect ways of expressing hate or hostility can have the effect of humiliating and offending others. Provisions against instructions to discriminate would not apply in the example because there is no express order to discriminate, but to the extent that the cartoon could indirectly stimulate a hostile and offensive environment, the concept of harassment could be used.

⁷¹ Choudhury, T., 'Chapter Five. Instructions to Discriminate and Victimization' in Schiek, D., Waddington, L. and Bell, M. (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 561, p. 564.

⁷² FRA, ECtHR and CoE, *Handbook on European non-discrimination law*, 2011, p. 33, http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub_handbook_caselaw_en.htm (accessed 10.05.2011).

⁷³ Art. 1.3 FD.

⁷⁴ For this example I draw inspiration from a real case, see Judgment of 08.09.2006, No. 572/2006, from the Canary Islands High Court.

Taken as whole, the FD constitutes an interesting tool for the protection against incitement to hatred due to the possibility of direct application in case of defective implementation⁷⁵. Besides, it provides for the adoption of judicial and administrative redress procedures⁷⁶ and several procedural safeguards, as the inversion of the burden of the proof⁷⁷ or protection against victimisation⁷⁸.

However, the role of the FD in freedoms of expression vs. religion conflicts may be limited for several reasons. First of all, it contains several exceptions. The most important derogation is based on open-ended grounds, such as public security, public order, public health and the rights of others⁷⁹. There is also a specific exception in the field of religion based on the organisation ethos, which can constitute a 'justified occupational requirement'⁸⁰. Secondly, the material scope of the FD remains very narrow because it is limited to the field of employment⁸¹. This shortcoming will be partially overcome with the proposal for a new anti-discrimination Directive⁸² which broadens the protection to new areas, namely, education, social protection and access to goods and services⁸³, but protection against religious discrimination will remain restricted to few areas of life.

b. The Framework Decision: a symbolic prohibition of religious incitement to hatred.

The FDec deals precisely with acts inciting to violence or hatred. It repeals and replaces the Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia⁸⁴.

The FDec clearly reflects the tensions between freedom of expression and freedom of religion. From Recital 14 of the Preamble, which explicitly mentions articles 10 and 11 of the Charter, it can be seen that the legislator had in mind the potential

⁷⁵ Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337, at 12.

⁷⁶ Art. 9(1) FD.

⁷⁷ Art. 10 FD.

⁷⁸ Art. 11 FD.

⁷⁹ Art. 2.5.

⁸⁰ Art. 4.2.

⁸¹ Art. 3.1.

⁸² Proposal of 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 ('the Proposal'), adoption still pending.

⁸³ art. 3.1 of the Proposal.

⁸⁴ [1996] OJ L 185, 24.7.1996, p. 5. See art. 11 of the FDec.

conflicts between both freedoms. Indeed, religion is broadly defined in Recital 8⁸⁵ and freedom of expression is also singled out in the body of the FDec⁸⁶.

The initial proposal was presented by the Commission in 2001, four years before the publication of the Mohammed Cartoons⁸⁷, but it was not until 2008 that it was finally adopted. When the act was proposed, the aims of the Commission were to strengthen and approximate criminal laws to combat racist and xenophobic offences⁸⁷ and to boost cooperation between MSs in this area⁸⁸. However, the scope of the FDec was narrowed down due to the need of a Council unanimous agreement for its adoption. This was widely criticised by academics⁸⁹ and NGOs⁹⁰, and even by some EP Members⁹¹.

The final act contents two types of offences: (1) public incitement to violence or hatred⁹² and (2) negationism⁹³. For our purposes, we will focus on the first type, which prohibits public incitement to violence or hatred ‘directed against a group of persons or a member of such group defined by reference to [...] religion’⁹⁴. Article 1.1.b exemplifies alternative forms of spreading hatred (tracts, pictures, and ‘other material’) which are also punishable. The Cartoons’ controversy might have had some influence in the explicit reference to ‘pictures’ because this provision was introduced by a Council amendment. However, it does not add a great value to the FDec because, no matter the form it might take, the conduct labelled in article 1.1.a should be considered an offence. It should also be noted that article 1.1.a requires the incitement to be perpetrated intentionally and in public.

The mere existence of this regulation at EU level is of great importance for its symbolism and because it may be a first step towards a wider approximation of laws or

⁸⁵ This definition has been criticised for its narrow scope. For a comment see Select Committee on the European Union, *The Proposed Framework Decision on Racism and Xenophobia –An Update*, 01.07.2003, p. 7; Bell, M., ‘European Union Strategies to Combat Racism and Xenophobia as a Crime’ in Nickel, R., Coomber, A., Bell, M., et al, *European Strategies to Combat Racism and Xenophobia as a Crime* (ENAR 2003) 31. 34.

⁸⁶ Art. 7 FDec.

⁸⁷ Recital 12.

⁸⁸ Proposal for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final, 28.22.2001, p. 2.

⁸⁹ Bell, M., op. cit., 31.

⁹⁰ See e.g. CEJI, Framework Decision on Racism and Xenophobia, Policy Response, 20.04.2007, <http://www.ceji.org/publications/2007-04-20%20CEJI%20Policy%20Response.pdf> (accessed 20.05.2011).

⁹¹ EP, Committee on Civil Liberties, Justice and Home Affairs, Draft Report on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, 19.09.2007, 2001/0270(CNS), p. 11.

⁹² Art. 1.1.a and 1.1.b FDec.

⁹³ Art. 1.1.c and 1.1.d FDec.

⁹⁴ Art. 1.1.a FDec.

even towards an EU framework against incitement to hatred. However, unlike the FD, the FDec does not have direct effect⁹⁵ and its implementation might not be scrutinized by the Commission and the ECJ, unless it is amended⁹⁶.

In addition, the FDec contents important derogations which may limit its real impact. First of all, article 1.2 confers a wide implementing margin to MS because they can choose ‘to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusing or insulting’⁹⁷. Obviously, these two implementing options would narrow down the scope of article 1.2 because they qualify the cases in which it would be applicable. The threshold for disturbing public order is especially high and might not catch many conducts which would otherwise be punishable under article 1.2 FDec.

Secondly, national rules on freedom of expression and assembly are blocked to any possible interference by the FDec⁹⁸ because articles 7.1 and 7.2 allow MSs not to modify them if they differ from or contradict the FDec. This exception may limit seriously the real effect of the FDec because it places freedom of expression at an untouchable level, even over the dignity of victims from serious incitement to hatred offences. At this respect, Bell considers that ‘[t]he breadth of this exception and its indeterminate nature raise serious concerns over its impact on the coherence of the Framework Decision. The attempt [...] to establish common definitions of racist offences will be undermined if these are then subject to an open-ended range of exceptions based on fundamental principles and rules located at the national level.’⁹⁹. Accordingly, it could be argued that the balance between the protected grounds (namely, race, colour, religion, descent or national or ethnic origin¹⁰⁰) and the right to freedom of expression is an illusion, as the FDec clearly leans in favour of freedom of expression.

⁹⁵ Ex art. 34.2.b TEU and art. 9 Protocol No. 36 on Transitional Provisions (‘Protocol’). Nevertheless, the ECJ has recognised an indirect effect to Framework Decisions, see *Criminal Proceeding against Maria Pupino* [2005] ECR I-5283.

⁹⁶ Art. 10.1 Protocol. In any event, both the Commission and the ECJ will be allowed to monitor its implementation from the end of the transitional period, in December 2014 (art. 10.3 Protocol No. 36 on Transitional Provisions).

⁹⁷ See Faleh, C., ‘La Persecución Penal de Graves Manifestaciones de Racismo y Xenofobia en la Unión Europea: Comentario a la Decisión Marco 2008/913/JAI del Consejo’ (2009) *Revista General de Derecho Europeo* 8.

⁹⁸ Art. 7.1 also refers to ‘fundamental rights and fundamental legal principles’ in general.

⁹⁹ Bell, M., op. cit., p. 35.

¹⁰⁰ Recital 9.

This is even more true for religion, which is featured as a ‘second level’ protected ground in article 1.3 FDec¹⁰¹. This provision allows MSs not to protect incitement to religious hatred as such, but only when it could be used to circumvent the law, as a covered means to offend a person or a group on any of the other protected grounds. Hence, hate speech against a North-African Muslim would fall within the scope of the FDec, whilst hate speech against an Italian convert to Islam could fall outside¹⁰², depending on MSs implementation measures. This has lead Carrera and Parkin to assert that ‘religion in this regulation is framed not as a fundamental right but as a marker on the basis of which groups or individuals may be singled out for abusive treatment’¹⁰³.

c. The Audiovisual Media Services Directive, a renewed compromise against incitement to religious hatred?

In 2010 the Council and the EP adopted the Audiovisual Media Services Directive (AVMSD II)¹⁰⁴, which contents three provisions against incitement to hatred¹⁰⁵ and discrimination¹⁰⁶ on several grounds, including religion. These provisions are not a novelty because the AVMSD II is a codification of the former Directive 89/552/EEC¹⁰⁷ and its two amendments. The first amendment was achieved through Directive 97/36/EC, which provided that ‘Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of [...] religion’¹⁰⁸. The second one¹⁰⁹

¹⁰¹ This is certainly the consequence of certain MSs reticence's to its inclusion. See Bell, M. op. cit., p.33.

¹⁰² Bell, M., op. cit., p. 34.

¹⁰³ Carrera, S. and Parkin, J., ‘The Place of Religion in European Law and Policy. Competing Approaches and Actors inside the European Commission’, *RELIGARE Working Document* No. 1, September 2010, p. 8, <http://www.religareproject.eu/publications>, (accessed 05.02.2011).

¹⁰⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1.

¹⁰⁵ Arts. 3.4.a.i and 6 AVMSD II.

¹⁰⁶ Art. 9.c.ii AVMSD II.

¹⁰⁷ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298.

¹⁰⁸ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L 202, art. 22.a.1.

¹⁰⁹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning [2007] OJ L 332/27 (‘ADMSD I’).

introduced exactly the same provisions that are now reproduced in the AVMSD II (see Table 1).

Table 1. Table of equivalences of intolerance related provisions between Directives 2007/65/EC and 2010/13/EU (AVMSD II).

FIELD	TERRITORIAL SCOPE	INTOLERANCE TYPE	COMPULSORY RESTRICTION	Dir 2007/65/EC (ADMSD I)	Dir 2010/13/EU (AVMSD II)
On-demand audiovisual media services	Transnational	Incitement to hatred	No	article 2(4)(a)(i)	article 3(4)(a)(i)
Audiovisual media services provided by media service providers	National	Incitement to hatred	Yes	article 3(b)	article 6
Audiovisual commercial communications	National	Discrimination	Yes	article 3(e)(1)(c)(ii)	article 9(1)(c)(ii)

Source: own elaboration.

Article 3.4.a.i *allows* MSs to restrict the reception or retransmission of ‘on-demand audiovisual media services’¹¹⁰ *from other MSs* when the contents incites to religious hatred¹¹¹. It is regrettable that this provision merely permits, but does not compel MSs to restrict this type of audiovisual content. In contrast, article 6 *obliges* MSs to adopt measures to ensure that ‘audiovisual media services *under their jurisdiction*’ do not encompass incitement to religious hatred. The concept of ‘audiovisual media services’ includes both television broadcasting and on-demand audiovisual media services. Hence, from a joint interpretation of articles 3.4.a.i and article 6 AVMSD II it can be inferred that MSs are compelled to restrict incitement to religious hatred broadcasted through on-demand audiovisual media from providers *under their jurisdiction*¹¹², but there is no obligation if the provider is under the jurisdiction of another MS. The lack of compulsory restriction obligation to non-national service providers certainly seeks to ensure that the development of a common audiovisual market freedom is not hindered unnecessarily.

MSs must also ensure that audiovisual commercial communications¹¹³ do not include religious discriminatory content¹¹⁴. In section 3.a we have seen that

¹¹⁰ E.g. mobile devices or the internet. See definition in art. 1.g.

¹¹¹ In order to do so, all the conditions laid down in art. 3.4.a and 3.4.b must be fulfilled, unless it is an urgent case (art. 3.5).

¹¹² Media providers under the jurisdiction of a MS are generally defined as those which have its head office in the territory of that MS. For details and special cases see arts. 2.2, 2.3 and 2.4 AVMSD II.

¹¹³ For instance, ‘television advertising, sponsorship, teleshopping and product placement’, art. 1.1.h.

¹¹⁴ Art. 9.1.c.ii AVMSD II.

discrimination is not exactly the same concept as incitement to hatred, but both types of conduct are related and can be reciprocally stimulated. Therefore, even if incitement to hatred is not prohibited as such for these types of communications, it can probably be indirectly addressed through the prohibition of discrimination combined with articles 3.4.a.i and 6 AVMSD II.

On the whole, these norms –even if limited- are to be welcome because audiovisual media play nowadays a key role in forming societies’ opinion and they can spread any message in a record time. The fact that they have been included in a directive is also positive in terms of direct applicability and national implementation monitoring by EU Institutions.

5. Final Remarks

Respect for human rights is one of the core values of EU legal order. Commitment to the protection of the rights to freedom of religion and freedom of expression is currently reflected in the EU Charter, but long time before both rights were recognized and developed by the ECJ in its case law.

Despite not having an explicit competence for developing internal policies in religious matters, externally, the EU has had to take positions on religious issues. In the frame of the cartoons’ crisis, the EU was constrained to give its view and make diplomatic efforts to calm down the situation. The EU demonstrated its compromise to the protection of both freedom of expression and freedom of religion. However, most institutional statements tended slightly to favour freedom of expression over its restriction, a trend which can be also appreciated in the FDec and the AVMSD II.

Internally, the EU has clearly influenced MSs’ legislation through the FD, the FDec and the AVMSD II. The FDec can probably be identified as the most significant EU legal tool against religious hatred. It strengthens national criminal measures against incitement to religious hatred, which is of great value, not only for the measures themselves, but also for its symbolism. However, its scope is limited, so the FD and the AVMSD II can play an interesting role in filling some gaps, The FD includes the concept of ‘instruction to discriminate’ and provides certain procedural safeguards that can boost its effectiveness; while the AVMSD II contents some basic provisions against intolerant messages to avoid their dissemination through the media.

In the future, the ECHR can also play an important role in framing EU approach to incitement to religious hatred. Articles 9 and 10 ECHR and the ECtHR case law have been an important source of inspiration for developing ECJ jurisprudence and EU law. If the EU eventually accedes to the ECHR¹¹⁵, this influence might increase.

Overall, the emergence of EU legislation against incitement to religious hatred is to be welcome taking into account the increasing inter-faith character of European society. In my view, the solution to freedom of expression vs. religion conflicts must come from a balance between both rights in the concrete case. Extreme positions and generalisations can lead to excessive and unnecessary restrictions. In this framework, it seems that the main challenge for Europe is ‘to manage its greatest asset –rights and freedoms- in the new framework of cultural and religious diversity’¹¹⁶.

¹¹⁵ Art. 6.2 TEU.

¹¹⁶ Combalía, Z., op. cit., p. 12.