Commission des Episcopats de la Communauté Européenne
Commission of the Bishops' Conferences of the European Community
Kommission der Bischofskonferenzen der Europäischen Gemeinschaft

Contribution to the public consultation on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)

The Secretariat of the Commission of the Bishops' Conferences of the European Community (COMECE), on behalf of the Bishops delegated from the national Bishops' Conferences of the EU Member States, observes and analyses legal and political developments in the European Union. In its work, the COMECE Secretariat is especially committed to monitoring the social aspects of policy making. The COMECE Secretariat therefore welcomes the public consultation on *"the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)"* and consequently would like to contribute to the above consultation.

1. General observations

1.1. We consider the family, based on the marriage between one male and one female, as a natural society, which exists prior to the State or any other community, and possesses inherent and inalienable rights[1]. The family is also recognised by several international human rights instruments as a natural and fundamental unit of society, and it is entitled to protection by society and the State.[2] For these reasons, public authorities must respect and foster the dignity, lawful independence, privacy, integrity and stability of every family.[3]

1.2. The specific nature of the family based on marriage is recognised by most of the European Constitutions. Moreover, this nature is not a truth solely for believers: it is the

[1] *Charter of the Rights of the Family,* presented by the Holy See on October 22, 1983, Preamble. Viewed at: http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html

[2] Art. 16.3 of the Universal Declaration of Human Rights; Art. 23.1 of the International Covenant on Civil and Political Rights; Art. 44.1 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Art. 16 of the European Social Charter (revised); Preamble of the UN Convention on the Rights of the Child.

[3] Art. 6 a) of the *Charter of the Rights of the Family*, *op. cit.*

natural heritage of humanity that is written in every person's heart and characterises the culture of peoples.[4] The institutional value of marriage should be upheld by the public authorities; the situation of non-married couples must not be placed on the same level as marriage duly contracted.[5] Any interpretation of the institution of marriage that deviates from its definition as a natural and permanent union between a man and a woman, could affect the cornerstone of many European national societies and, not least, public order in most of the EU Member States. One should not forget that family and related legislation cover an area of high sensitivity that stands at the core of the Member States' national sovereignty, and where ethical implications and national sensibilities and peculiarities come into play.

1.3. Even the rights of the person, although they are expressed as rights of the individual, have a fundamental social dimension, which finds an innate and vital expression in the family. The family and society, which are mutually linked by vital and organic bonds, have a complementary function in the defense and advancement of the good of every person and of humanity.[6]

1.4. Family life is generally recognised as a human right in international public law[7], and migrant workers, as stated by Article 12.b) of the Charter of the Rights of the Family,[8] *"have the right to see their family united as soon as possible."*[9] The special protection of vulnerable persons, such as children, makes a claim for special legal treatment. [10]

[4] Declaration of the Pontifical Council for the Family regarding the Resolution of the European Parliament dated March 16, 2000, making de facto unions, including same sex unions, equal to the family, Vatican City, March 17, 2000. Viewed at:
http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20000317_declaration-homosexual-unions_en.html

[5] Art. 1.c) of the *Charter of the Rights of the Family, op. cit.*

[6] *Charter of the Rights of the Family, op. cit.,* Preamble.

[7] Art. 7 of the European Charter of Fundamental Rights of the European Union; Art. 8 of the European Convention on Human Rights.

[8] See footnote 1.

[9] Cfr. Art. 19.6 European Social Charter (revised): *"(…) The Parties undertake: (…) to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory."*

[10] Art. 10.1 of the UN Convention on the Rights of the Child*: "(…) Applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."*

2. Our answers to the questionnaire

Q1

Are these criteria (reasonable prospect for the right of permanent residence at the time of application as regulated in Article 3 and a waiting period until reunification can actually take place as regulated in Article 8) the correct approach and the best way to qualify the sponsors?

The expression *"reasonable prospect of obtaining the right of permanent residence"* (Article 3) is vague and uncertain, and does not give prospective sponsors an adequate indication of their chances of success[11]. Moreover, the legal framework and practice in the Member States on permanent residence in their territories varies from one to another. Therefore, we recommend a better wording in the text in order to clarify the situation of the sponsor.

With respect to the one-year of permanent residence of the sponsor as a minimum in order to qualify the sponsor, we consider to be a reasonable period.

As regards the waiting periods foreseen by Article 8 paragraph 2, a long delay in the reunification (up to 4 years) can certainly harm the relationship between spouses and the best interest of the child, which is a guiding principle in all actions concerning children.[12] A shorter total period is recommendable (e.g., 2 years).

Q2

Is it legitimate to have a minimum age for the spouse, which differs from the age of majority in a Member State? Are there other ways of preventing forced marriages within the context of family reunification and if yes, which?

Do you have clear evidence of the problem of forced marriages? If yes how big is this problem (statistics) and is it related to the rules on family reunification (to fix a different minimum age than the age of majority)?

[11] With respect to the right to family life (Art. 8 ECHR), the ECrHR makes clear that the quality of the law, must be such that it is formulated with sufficient precision to enable somebody, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (Andersson v. Sweden, judgment of 25 February 1992, para. 75).

[12] Art. 3.1 of the UN Convention on the Rights of the Child: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

It is legitimate to have a minimum age for the spouse, which differs from the age of majority in a Member State, if the rule can be justified as a proportionate measure to fight against forced marriages. In any other case, it could be an unjustified discrimination. In the UK, for example, the Home Affairs Committee of the British Parliament found that to require sponsors of marriage visas and their incoming spouses to be over the age of 21 *"has undoubtedly helped a number of young people to resist forced marriage."*[13] In Denmark, the *Government's Action Plan for 2003-2005 on Forced, Quasi-forced and Arranged Marriages* states that amendments were made to the immigration and marriage acts, raising the age requirement for family reunification marriage partners from 18 to 24. It was also decided that as a general rule, permission for family reunification will not be given if it is considered that there is doubt that the marriage was entered into according to the wishes of both partners. The conclusion is clear: *"The changes in the rules have already proved highly effective, and no further legislative initiatives have therefore been taken in conjunction with this action plan."*[14]

Some information reveals that forced marriages in at least some Member States are a reality to be addressed. According to the 2005 PACE report entitled *Forced marriages and child marriages: "although the issue is not addressed by empirical studies and no exact figures have been able to be collected, the phenomenon is actually one of fearful proportions".*[15]

Only quite fragmentary information of different types and relevance is available. Thus, according to the German newspaper *Der Spiegel,* 3,443 people (the vast majority of them were women) sought help at counseling and information centres in Germany in 2008 because they had already been, or were being, forced into marriage.[16] In its 2011 Eighth Report (on Forced marriage), the Home Affairs Committee of the British Parliament highlighted that *"forced marriage remains a serious concern, affecting thousands of young*

[13] http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/880/88002.htm

[14] Page 6. Viewed at: http://www.nyidanmark.dk/NR/rdonlyres/05ED3816-8159-4899-9CBB-CDD2D7BF23AE/0/forced_marriages.pdf
However, the possible negative impact of the 21/24 year old rules on several areas concerning family life are not described in these reports.

[15] Council of Europe, PACE Report on Forced marriages and child marriages (Committee on Equal Opportunities for Women and Men. Rapporteur: Mrs Rosmarie Zapfl-Helblin. 20 June 2005), point 6. Viewed at: http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc05/edoc10590.htm#P135_12000

[16] http://www.spiegel.de/international/germany/0,1518,796760,00.html

people in the UK."[17] In the 2003 report of the French Higher Council for Integration, 70,000 persons are estimated to be at risk of forced marriage, although this estimate is difficult to corroborate.[18] On the other hand, regional Police in the Spanish region of Cataluña reported recently 300 cases of forced marriages.[19]

However, there is a need to obtain further evidence in Member States in order to arrive at a correct opinion on the issue, and to prevent disproportionate legal measures and administrative practices on the family, which can harm its family life and entail an unfair discrimination.

On the other hand, especially important is the prevention of a reunification based on forced marriage in the country of origin, where Foreign Affairs Services can make the preliminary research and offer protection to the victim, if necessary.[20]

Q3

Do you see an interest in maintaining those standstill clauses which are not used by Member States, such as the one concerning children older than 15?

In our view, there is no reason to maintain these standstill clauses, and no minor should be subject to further obstacles, which might delay family reunification.

Q4

Are the rules on eligible family members adequate and broad enough to take into account the different definitions of family existing other than that of the nuclear family?

The rules in the current Directive (Article 4 points 1 and 2) are adequate for the definition of family members in both the 'nuclear' and the 'extended' family.

As family law is not a EU competence and the domestic legislations of the Member States have different views on family issues (for example, the legal definition of a "spouse"; the recognition or not of partnerships or same-sex unions as "marriages", or even polygamous

[17] http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/880/88002.htm
[18] Quoted by the PACE Report on Forced marriages and child marriages, point 6, *op. cit.*
[19] http://www.congreso.es/public_oficiales/L9/CONG/BOCG/D/D_558.PDF
[20] See, for example, the British practice as carried out by the Forced Marriage Unit (FNU), in its document entitled "Forced Marriage Case Handling Guide for MPs and Constituency Offices". Viewed at: http://www.fco.gov.uk/resources/en/pdf/3849543/fmu-guide-mps.pdf

marriage), we consider that Member States' domestic law on those aspects should be respected (see below, proposal 3.2).

Q5

Do these measures efficiently serve the purpose of integration? How can this be assessed in practice? Which integration measures are most effective in that respect?
Would you consider it useful to further define these measures at EU level?
Would you recommend pre-entry measures? If so, how can safeguards be introduced in order to ensure that they do not de facto lead to undue barriers for family reunification (such as disproportionate fees or requirements) and take into account individual abilities such as age, illiteracy, disability, educational level?

Compulsory pre-departure measures can create unjustified barriers to family reunification. Voluntary pre-departure measures offered by the Member State in the country of origin can be helpful. Moreover, we do not find unreasonable certain measures to promote integration (for example, courses of language, culture, history, political institutions, citizenship, etc.) after entry into the host country, taking into account the personal circumstances and skills of the members of the reunified family (for example, old age, disabilities, etc.). However, integration measures should not entail disproportionate fees or inaccessibility of the venues where courses take place.

Q6

In view of its application, is it necessary and justified to keep such a derogation in the Directive to provide for a three year waiting period as from the submission of the application?

As answered in Question 1, a long delay in the reunification (up to 4 years) can certainly harm the relationship between spouses and the best interest of the child, which is a guiding principle in all actions concerning children.

Q7

Should specific rules foresee the situation when the remaining validity of the sponsor's residence permit is less than one year, but to be renewed?

Specific rules in this particular case would improve the family reunification.

Q8

Should the family reunification of third country nationals who are beneficiaries of subsidiary protection be subject to the rules of the Family reunification Directive?
Should beneficiaries of subsidiary protection benefit from the more favourable rules of the Family reunification Directive which exempt refugees from meeting certain requirements (accommodation, sickness insurance, stable and regular resources)?

In our view, beneficiaries of subsidiary protection should benefit from the same favourable rules as refugees in accordance with Article 78 TFEU[21], and the requirements of the Stockholm Programme.[22]

Q9

Should Member States continue to have the possibility to limit the application of the more favourable provisions of the Directive to refugees whose family relationships predate their entry to the territory of a Member State?
Should family reunification be ensured for wider categories of family members who are dependent on the refugees, if so to which degree?
Should refugees continue to be required to provide evidence that they fulfil the requirements regarding accommodation, sickness insurance and resources if the application for family reunification is not submitted within a period of three months after granting the refugee status?

[21] Especially paragraph 2, letters d) to f).
[22] *"6.2.1 (…) The European Council accordingly invites: - the Council and the European Parliament to intensify the efforts to establish a common asylum procedure and a uniform status in accordance with Article 78 TFEU for those who are granted asylum or subsidiary protection by 2012 at the latest,"*

For the grounds set out in paragraph 4.2 of the *Green Paper*, we consider unreasonable both rules limiting: a) the application of the more favourable provisions of the Directive to refugees whose family relationships predate their entry to the territory of a Member State; and b) the benefits to applications submitted within three months of arrival.

Concerning family reunification for wider categories of family members who are dependent on the refugees, we consider reasonable the application of the current general principles of the Directive on the admissible members of a family (nuclear and extended) for that purpose.

Member States should be legally responsible for informing the refugees about the three months provision.

Q10

Do you have clear evidence of problems of fraud? How big is the problem (statistics)? Do you think rules on interviews and investigations, including DNA testing, can be instrumental to solve them? Would you consider it useful to regulate more specifically these interviews or investigations at EU level? If so, which type of rules would you consider?

There should be a general presumption of the validity of a marriage, except where there are justified reasons – not only or mainly subjective perceptions – which indicate the existence of fraud.

Rules on interviewing and investigations should be reasonable and proportionate, following the general domestic regulations on evidence law. Measures such as DNA should in any case be voluntary, and as a last resort - if no other reasonable alternatives exist to prove the family link, such as documentary or witnesses' evidences, or any other valid means as provided by national law-.[23]

[23] In the case of Kalacheva v Russia, the ECrHR (7 May 2009, paragraph 34) stated that: *"(…) today a DNA test is the only scientific method of determining accurately the paternity of the child in question; and its probative value substantially outweighs any other evidence presented by the parties to prove or disprove the fact of an intimate relationship. Furthermore, the applicant suggested that she and the defendant had concealed their relationship; hence the genetic examination could have been the only persuasive evidence of the disputed paternity."*

The difficulties in obtaining statistics on fraud in civil status is usually recognised by the States. The International Commission on Civil Status's[24] report entitled *Fraud with Respect to Civil Status* indicates that *"the studies conducted on this subject since 1992, especially the analysis of replies by ICCS member States to the questionnaires sent to them, confirmed the feeling, expressed by numerous persons working in the field, that fraud in civil status matters is steadily increasing. None of the States, however, possess a reliable and centralised statistical instrument. Only a few of them are in a position to give selective indications of the scale of fraud by reference to judicial proceedings in that area."* [25]

In our view, quantitative and qualitative data are essential to clarify the reality of fraud, in order to adopt reasonable and proportionate measures to prevent and combat it. The European Union, through funded external research or using its statistical services, could help to obtain a better picture of the scope of the problem.

Q11

Do you have clear evidence of problems of marriages of convenience? Do you have statistics of such marriages (if detected)? Are they related to the rules of the Directive? Could the provisions in the Directive for checks and inspections be more effectively implemented, and if so, how?

We are conscious that marriages of convenience are a problem in many Member States, and each legal system is entitled to adopt proportionate checks and controls to prevent and combat fraud in family reunification. As the European Court of Human Rights stated: *"a Contracting State may properly impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether the proposed marriage is one of convenience and, if necessary, to prevent it,"*[26] but, at the same time *"a general, automatic and indiscriminate restriction on a vitally important Convention right fell outside any acceptable margin of appreciation (...) a blanket prohibition, without any attempt being made to*

[24] Intergovernmental organisation of 16 States (Austria, Belgium, Croatia, France, German, Greece, Hungary, Italy, Luxembourg, Mexico, The Netherlands, Poland, Spain, Switzerland, Turkey and the UK) and 8 observers (Cyprus, Holy See, Lithuania, Moldova, Romania, Russian Federation, Slovenia and Sweden).

[25] ICCS General Secretariat, *Fraud with Respect to Civil Status in ICCS Member States,* Strasbourg, December 2000. Viewed at: http://www.ciec1.org/Etudes/Fraude/FraudeAngl.pdf

[26] O'Donoghue and Others v United Kingdom, 14 December 2010, para. 87.

investigate the genuineness of the proposed marriages, restricted the right to marry to such an extent that the very essence of the right was impaired."[27]

The Council Resolution of 4 December 1997 already sets out certain measures to be adopted on the combating of marriages of convenience, but clearly stated in its Recital number 6 that *"the objective of this resolution is not to introduce systematic checks on all marriages with third-country nationals, but whereas checks will be carried out where there are well-founded suspicions".* [28]

Q12

Should administrative fees payable in the procedure be regulated? If so, should it be in a form of safeguards or should more precise indications be given?

Administrative fees should be reasonable and proportionate, and should not present an economic obstacle, which undermines the opportunity of the sponsor to reunify his or her family members. A European regulation could be helpful for that purpose, giving some objective guidelines for its determination or a maximum related to the cost of living of the country.

Q13

Is the administrative deadline laid down by the Directive for examination of the application justified?

In principle, we consider the administrative deadline to be justified, even though deadlines should not be extended, making the process more difficult. In the case of children, as foreseen by Article 10.1 of the UN Convention on the Rights of the Child, applications *"shall be dealt with by States Parties in a positive, humane and expeditious manner."*

Visa facilitations in the countries of origin should be also considered.

[27] Idem, para. 89.
[28] Official Journal C 382, 16/12/1997, P. 0001 – 0002. Viewed at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1216(01):EN:HTML

Q14

How could the application of these horizontal clauses be facilitated and ensured in practice?

The best interest of the child is a principle that should be applied to the whole process, and not only at the stage of examination (Article 5.5). This is a mandatory rule following Article 3.1 of the UN Convention on the Rights of the Child: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".*

3. Other proposals

3.1. In order to improve its coherence and legal quality, the Directive should clearly separate the family from the other social realities. Thus, its Chapter II (Family members), in Article 4, should contain only paragraphs 1 and 2. However, systematically, it would be advisable to open a separate chapter (Chapter IIa – Non marital cohabitation members) to refer to other social realities referred to in paragraph 3 of Article 4, as non-marital cohabitation is a situation quite distinct from the family founded on marriage, to which it cannot be compared. More generally, the provision of the possibility for Member States of the Union to broaden the ambit of application of the right to 'family reunification' to cohabitants represents and entails an undue forcing of the concept of family as a union between one male and one female founded on marriage.

As a consequence of this proposal, further linguistic harmonisation of the text is required in order to apply the concept of family to married couples and their children, and the notion of non marital cohabitation members to other social realities: for example, Article 2 paragraph 3 *("…when examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the* ***non marital cohabitation*** ~~*family relationship…*~~*);* Article 15.1 *("…provided that the family* ***or non marital cohabitation member****…"),* etc.

3.2. The provisions concerning the legal status of non-marital cohabitants should be expressly limited to countries whose domestic law recognises forms of equivalence between

marriage and cohabitations that are not founded on marriage. Thus, we consider that Recital 10 of the Directive should be incorporated into an Article, to ensure due respect for the Family law of each Member State. This would avoid a situation where, directly or indirectly, legally or *de facto*, the laws of certain Member states that legally recognise non-marital unions (registered or not, homosexual or heterosexual), marriage between same sex persons (as it is the case in a minority of EU Member States) or could recognise polygamous marriages, could unduly affect other Member States, forcing them to the recognition of the relevance of a status which their legal order does not recognise.

COMECE Secretariat

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