A submission concerning the consultation
"Less bureaucracy for citizens:
promoting free movement of public documents and
recognition of the effects of civil status records" COM(2010) 747 final

The Commission of the Bishops' Conferences of the European Community (COMECE) brings together Bishop delegates from the Bishops' Conferences of the European Union's Member States. For thirty years now, COMECE has been accompanying the process of European integration, offering its reflections. COMECE is a partner of the EU institutions in the dialogue foreseen by Article 17(3) of the Treaty on the Functioning of the European Union. Its permanent General Secretariat, based in Brussels, analyses EU policies on a day-by-day basis, striving to bring the specific contribution of the Catholic Church into the debate.

In the light of this, the COMECE Secretariat is pleased to submit to the attention of the European Commission the following remarks on the Green paper "*Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records*" COM(2010) 747 final.

In this regard, we deem it would appropriate, if we also explore any future possibility of further contacts with your Services for the discussion of additional elements, on the basis of the specific channel of dialogue foreseen by Article 17(3) of the Treaty on the Functioning of the European Union.

General considerations

The initiative at issue has, in some regards, the potential to facilitate the life of EU citizens. Some of the formalities to which the first section of the consultation document refers (paragraphs 3.2-3.3) can indeed create perceived bureaucratic obstacles. In this area, a closer cooperation between the competent national authorities could also lead to consistent improvements.

On the other hand, some of the options mentioned in the Green paper, in particular as for the mutual recognition of the effects of civil status records (paragraph 4), call for an extremely careful approach, as they give rise to a number of legal and ethical concerns.

Some of the documents involved are closely linked with matters of high sensitivity that stand at the core of the Member States' national sovereignty, in areas in which ethical implications and national sensibilities and peculiarities come into play (e.g. marriage, civil/registered partnerships, adoption). We are concerned that some of the solutions suggested by the Green paper would devalue such national sensibilities and legal traditions (if not divest them of particular significance). The richness of Europe is also in its diversity. This diversity should be preserved and not questioned or crushed by levelling exercises at the EU level. Full respect for the diversity of national legal orders and for the different Constitutional traditions, as well as for the Member States' public policies, should guide the EU actions on this matter. It should also be remembered that Article 67(1) TFEU states that the Union shall constitute an area of freedom, security and justice with respect not only for fundamental rights, but also *for the different legal systems and traditions of the Member States*. Any imposition on the Member States, including in the area covered by the present consultation, would clearly violate this provision.

For these reasons, we would recommend excluding documents relating to the above-mentioned areas (marriage, civil/registered partnerships, adoption) from the scope of application of any proposal the Commission will issue on the basis of this consultation.

In case the Commission shall still insist on focusing on the area of family law, the text would have to obviously find its legal basis in Article 81(3) TFEU: the unanimity requested by it guarantees that the concerns of all the Member States involved as for the protection and preservation of their national family law systems would be taken into account.

Question 1 *Do you think that the abolition of administrative formalities such as legalisation and the apostille would solve the problems encountered by citizens?*

The elimination of administrative formalities in this area would certainly facilitate procedures for citizens. However, mechanisms like legalisation and apostille are also foreseen to prevent frauds and abuses and therefore one should avoid oversimplifications in tackling the matter. The Green paper suggests the elimination of these instruments but it does not seem to refer to any solid alternatives that would reduce the burden for citizens and lighten procedures while not renouncing to the (necessary) safeguards as for the above-mentioned concerns. The identification of mechanisms to facilitate the proof of the authenticity of documents and of their translations is anyway advisable.

Question 2 *Should closer cooperation between Member States' authorities be envisaged, in particular as regards civil status records, and if so, in what electronic form?*

It seems opportune to have a close cooperation between public authorities of Member States so as to find practical solutions to some of the issues arising in the area in question. As automatic recognition decidedly appears to be an exaggerated solution (see our considerations concerning Question 8) it is certainly more reasonable to move towards the establishment of systems that facilitate the cooperation among national authorities.

The recourse to electronic forms will definitely render procedures more agile, even though in this context particular attention will have to be devoted to the need for legal certainty and to the protection of privacy.

Question 3 *What do you think about the registration of a person's civil status events in a single place, in a single Member State? Which place would be the most appropriate: place of birth, Member State of nationality or Member State of residence?*

In this regard, we suggest that the events relating to civil status of a person should be recorded both in the place of birth and in the one of residence. It is desirable that all the events that are relevant for the civil status of a person

are recorded in the place of birth. This would obviously require the obligation of communicating them to the Registry of the place of birth.

Question 4 *Do you think that it would be useful to publish the list of national authorities competent to deal with civil status matters or the contact details of one information point in each Member State?*

It seems useful to foresee an information point for each Member State, rather than lists of national authorities competent on the matter of civil status, which would require constant and permanent updating.

Question 5 *What solutions do you recommend in order to avoid or at least limit the need for translation?*

The recourse to standard forms would certainly decrease the need to translate documents and therefore could constitute a solution for the problem considered in this question.

Question 6 *What kind of civil status certificates could be the subject of a European civil status certificate? Which details should be mentioned on such a certificate?*

First of all, in the eventuality that this option shall be explored, it will be essential to grant the Member States, by means of clear provisions, the possibility to refuse to recognise the Certificate. in clearly defined cases In particular, the eventual EU instrument must provide that the competent national authorities of the receiving Member State, for reasons of public interest, shall have the right to avail themselves of the public order exception to refuse the recognition of the Certificate issued by another Member State. More generally, no imposition on the national authorities should derive from the establishment of a European civil status certificate; the options made by some Member States especially in matters having ethical implications (in particular in the area of family law) must not be overturned through the instrument; and the solution should not be pursued if

the aim is that of taking a first step towards the elimination/replacement of the role of national administrations and the relevant practices.

As for the documents that should not be the object of a European Certificate, we would refer to the exclusion of the same documents mentioned in our reply concerning automatic recognition (Question 8), as well as in the introductory part containing our General considerations. In this case as well, complete consensus among all Member States is the essential and necessary basis for having a European Certificate concerning a certain civil status event.

As for the types of documents that could be covered in case this solution is adopted, we deem that it could be convenient to include in the scope of the European Certificate birth, filiation and death. As for the institution of marriage, this solution (if pursued) can be legitimately adopted only to cover the marriage that exists in every single EU Member State (the one between a man and a woman).

It would also be interesting to explore the possibility of creating an analogous and separate European Certificate for studies, concerning the main educational certificates (diplomas, degrees and doctorates).

As for the form of the European Certificate, it should always be issued in English as well as in the national language.

Question 7 *Do you think that civil status issues for citizens in cross-border situations in the EU could be effectively solved by national authorities alone? In this case, should not the EU institutions provide at least some guidance to national authorities (possibly in the form of EU recommendations) to ensure minimum consistency of approaches with a view to finding practical solutions to the problems faced by citizens?*

In general, the leading role should stay firmly in the hands of the Member States' national administrations, while the EU should focus more on facilitating the cooperation among Member States' authorities. We are convinced that civil status issues for citizens in cross-border situations in the EU can be effectively solved by national authorities alone. The EU institutions may provide them with complementary help, and support, upon the condition that no interventions that could be perceived as invasive or any undue

pressure/coercion on certain Member States will be exerted, and that ample flexibility in finding solutions aimed at tackling the issues raised by the consultation document will be granted to national administrations.

It must be said that it is also difficult to give a clearly positive or negative assessment of the more specific suggestion concerning 'EU guidance' without any concrete indications as to the contents and mechanisms of this 'guidance' being given by the Green paper. In case this solution is pursued by the European Commission, the eventual recommendations should prove broad enough, so as to provide for full respect of national specificities and traditions, and must not lead to any 'forced changes' to legislations or practices.

Finally, we do not share what is implied in the relevant section of the Green paper, that this option would be the first step preceding a harmonisation of the rules on the law applicable to civil status situations. No such further evolution should be envisaged in the present context.

Question 8 *What do you think of automatic recognition? To which civil status situations might this solution be applied? In which civil status situations might it be considered unsuitable?*

We recommend the rejection of the extreme solution of automatic recognition, as it would bring about legally and practically absurd results and unwanted/undesirable consequences, in particular as for the area of family law.

First of all, the risk of marriage/partnership tourism is also all too evident: couples who do not have access to marriage or civil/registered partnerships (this can be the case for opposite-sex and/or same-sex couples) in their own Member State, would easily get round the perceived 'obstacles' contained in the relevant national legislations by first entering into marriage or civil partnership in another Member State where such types of unions do exist and subsequently forcing their own Member State to recognise them, as well as their civil effects.

Secondly, it is hard to see how Member States could be legitimately required to *accept* what according to their legal systems might be *not acceptable* and

merely constitute an artificial construction created by other national legal orders - unless chaos is deemed to be a legitimate goal.

Automatic recognition of civil status situations for which no unitary approach exists in all EU Member States could moreover give rise to phenomena of 'reverse discrimination', as there would be the risk of having a certain Member State being forced to grant, for instance, to same-sex couples coming from another Member State rights that are not recognised to its citizens. The automatic recognition in a Member State of a marriage celebrated according to the law of another Member State could also give rise to frauds and abuses.

In general, it is important to ensure that an initiative aimed at helping EU citizens does not have the direct *or indirect* effect of creating interference with the Member States' family law systems and the relevant national competence, as well as with their options concerning the benefits deriving from civil status.
In fact, it is not simply a question of avoiding to legislate at the EU level on the definition of marriage - as it is mentioned in the Green paper at page 12 - but also of carefully preventing any indirect (but possibly heavy) impact such a solution can have on the directions taken at the national level in the area of family law. Therefore, any attempt at including documents related to same-sex 'marriages', civil/registered partnerships (concerning opposite-sex and/or same-sex couples) or *de facto* unions would force the limits of the initiative, considering that such institutions exist only in some Member States. A very significant group of Member States' legal orders do not foresee same-sex 'marriage', while civil/registered partnerships (for opposite-sex and/or same-sex couples) and provisions on *de facto* unions are also not part of the legal orders of a number of EU Member States. The sovereignty of these Member States, of which such options are a perfectly legitimate expression, cannot be diminished or affected in the name of a simplistic application of the principle of mutual recognition and just because a minority of Member States has opted for introducing within their legal orders such institutions. The skepticism expressed by the European Commission in the Green paper as to the advisability of extending the scope of the future proposal to marriage

(page paragraph 4.3, letter b, last sentence), in particular, should be widely shared. In replying to this Question, we would also like to recall and express our support for the cautious position taken by Commissioner Reding on the matter. For instance, on the 18 January 2011, at the European Parliament's Plenary session, she stated that *"Regarding the recognition of civil status, we have no intention of proposing any legislation that would interfere with Member States substantive family law or modify national definitions of marriage... Our green paper on recognition of civil status documents is designed for cross-border situations, such as the recognition of birth certificates, and is not concerned with the recognition of same-sex marriage"*.

Even in cases like civil status records concerning divorce, the fact should be taken into full account that not all Member States provide for this institution (e.g. the case of Malta) and that even when legal orders do foresee divorce, in a number of Member States the marriage in question might be considered not valid for the purposes of divorce proceedings (this includes the cases where a certain 'marriage' does not exist in the law of the host Member State or is even illegal according to it). In these cases as well, no imposition should derive for the Member States in question, which have as much right to see their sovereignty fully respected inside their territory, as the Member States that foresee divorce or the above-said kind of unions have of introducing and preserving them in their internal legal orders. This approach has rightly informed the recent Council Regulation (EU) No 1259/2010 on implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (and its Article 13, in particular).

Another problematic area to be avoided is the one related to 'sexual identity', with the different approaches existing in the Member States as for the relevant changes to public records[1].

The right to freedom of movement of EU citizens is quoted repeatedly in the consultation document - and in particular in the part concerning automatic recognition. However, this right is subject to precise limits and cannot be exercised in an 'unconditional' way: to quote the most relevant example,

[1] See the controversial Order issued on 11 January 2011 by the German Constitutional Federal Court (1 Bvr 3295/07), which stated that the provision that requires permanent infertility and a 'gender reassignment' surgical operation for the person's 'perceived gender' to be recognised under the civil status laws, is unconstitutional.

Directive 2004/38/EC, concerning precisely the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, foresees clear limitations and stringent conditions for exercising this right[2].

In general, we would conclude that all national legislations must converge completely and that a clear consensus among all the EU Member States must exist on a certain civil status record to justify the provision for automatic recognition of a certain civil status situation all over the EU. This is not the case for documents related to the area of family law. This possibility can be studied in relation to civil status records concerning life events like death or the attribution or the change of surname but not for others, like marriage and adoption (in both cases especially when concerning same-sex couples)[3].

Any eventual proposal concerning the mutual recognition of the effects of civil status records should provide:

- **For the possibility to limit the mutual recognition to civil status records that would have been issued in a similar domestic case**

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[2] See, *inter alia*, the various limitations and conditions foreseen by Recitals 5 and 6, Article 2(2), letter b, Article 3(2), letter b and Article 7 of the Directive.
The Commission has referred, in the context of the present consultation, to Case C-353/06 *Grunkin-Paul* of October 2008, in which the European Court of Justice stated that the refusal by a Member State's authority to recognise the (double) surname of a child born in another Member State - which was legally registered in the latter - constituted a violation of the EU's free movement rules. However, it should also be remembered that in the subsequent decision concerning Case C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* (22 December 2010), the ECJ ruled that the refusal by the authorities of a Member State to recognise all the elements of the surname of a national of that State, as determined in another Member State at the time of his or her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility which is not permitted in the first Member State under its constitutional law, does not unjustifiably undermine the freedom to move and reside enjoyed by citizens of the Union. The Court underlined that obstacles to the freedom of movement may be justified if they are based on objective considerations and they are proportionate to the legitimate objective of the national provisions. In this context, the Court also noted that the European Union must respect the national identities of its Member States, adding that certain public policy justifications have to be weighed in the balance with the right of free movement of persons recognised under EU law. The Court also underlined that the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another and that national authorities enjoy a margin of discretion within the limits imposed by the Treaty.

[3] Even with regard to birth certificates problems could arise, as such documents can be subject to amendments in case of a change of sex and the approaches foreseen by the legislations of some Member States could be problematic for other national legal systems. The question of certificates concerning births deriving from certain artificial methods should also be considered with great cautiousness.

- **That the receiving Member States should still be allowed to refuse recognition if they deem that this would likely prejudice the sovereignty, security, public order or other essential interests of the country**
- **Grounds for refusal of the recognition that are modulated differently according to the different categories of civil status records and not fashioned in a 'one-size-fits-all' way.**
- **For an application of the principle of mutual recognition that takes into full account the specificities, as well as the diversity, of national legal orders**

Question 9 *What do you think of recognition based on the harmonisation of conflict-of-law rules? To which civil status situations might this solution be applied?*

First of all, before further extending this solution, it would be very important to have an extended reflection/consolidation period to take stock and assess the effectiveness of the instruments of similar kind adopted in recent times at the EU level in other areas (especially as for cross-border family law).

Apart for this initial general remark, the recourse to this solution is made not advisable by the path followed by some of the most recent EU texts covering similar areas (Council Regulation (EU) No 1259/2010 on implementing enhanced cooperation in the area of the law applicable to divorce and legal separation; the October 2009 proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession; the March 2011 proposal for a Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes). In all these cases, the recourse to the public policy exception is evidently curtailed and unduly limited, with provisions that try to belittle, if not to neutralise, this fundamental criterion[4]. Unfortunately, in this context and for this purpose, the principle of non-

[4] See respectively Recitals 25 and 30 of Regulation (EU) No 1259/2010, Recitals 24 and 34 of the proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession and Recital 25 of the proposal for a Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

discrimination has been granted, for the moment, an apparent (and unjustified) position of hierarchical superiority to the others contained in the EU Charter of Fundamental Rights[5]. We take the opportunity to stress that, also with reference to the jurisprudence of the European Court of Human Rights[6] and to Article 9 of the Charter of Fundamental Rights[7], Article 21 of the Charter (Non-discrimination) cannot be interpreted in any way that would imply that marriage should be opened to same-sex couples in each EU Member State without exception. This consideration also applies to area covered by the present consultation, including the case of harmonisation of conflict-of-law rules concerning civil status records.

The concept of public policy is in fact essential for the protection of the different Constitutional and legal traditions of the Member States, especially in the delicate area of family law. It is therefore necessary to insert in the eventual proposal safeguard clauses that would allow the unconditioned application of the public policy exception, thereby protecting national legislations.

An additional element of concern is in the fact that the criteria identified to allow citizens to choose the law applicable, for instance by Article 5 of Council Regulation (EU) No 1259/2010, prove rather weak in guaranteeing a

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[5] **For instance, Recital 21 of Council Regulation (EU) No 1259/2010 states that *"Considerations of public interest should allow courts in the Member States the opportunity in exceptional circumstances to disregard the application of foreign law in a given case where it would be manifestly contrary to the public policy of the forum"* but adds that *"…the courts should not be able to apply the public-policy exception in order to disregard the law of another Member State when to do so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination"*. Recital 24 of the same Regulation also underlines that *"This Regulation respects fundamental rights and observes the principles enshrined in the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited"* and that the text *"…must be applied by the courts of the participating Member States in observance of those rights and principles"*.**

[6] **In the case *Shalk and Kopf v. Austria*, Application no. 30141/04, judgement of 24 June 2010, paragraph 108, the ECtHR stated that Contracting States are still free to restrict access to marriage to *different-sex couples* and that this does not constitute discrimination against same-sex couples.**

[7] ***"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights"*. The provision is based on Article 12 of the European Convention on Human Rights.**

solid link and a close connection between the person who chooses it and the applicable law chosen[8].

Moreover, the considerations concerning some of the issues mentioned in replying to Question 8 (e.g. 'reverse discrimination' phenomena) equally apply to the solution of harmonisation of conflict-of-law rules.

In case the option of harmonising conflict-of-law rules should still be pursued, we would urge the European Commission to insert in the relevant proposal a provision having at the least the same scope of Article 13 of Council Regulation (EU) No 1259/2010[9], so as to safeguard legal certainty, as well as the valid and full application of national laws. No provision should oblige or force the authorities of a Member State to recognise by virtue of the application of the future EU instrument, a civil status record issued by another Member State (and its effects), if the requirements foreseen by the national law of the former - in particular, but not exclusively, as for marriage and family, including adoption - are not present.

As for further considerations concerning the types of documents that should be included or excluded from the scope of the initiative, including as for the solution mentioned in Question 9, we would refer to the concerns already expressed in replying to Question 8, as well as in the introductory part containing our General considerations.

***Question 10** What do you think of the possibility of citizens choosing the applicable law? In which civil status situations might such a choice be applied?*

The option of granting to citizens the possibility to choose the law applicable to a civil status event in cross border situation is, in our view, problematic. The solution could lead to confusion, rather than to positive effects, and give

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[8] For example, letter (a) refers to the law of the State where the spouses have their habitual residence at the time of conclusion of the agreement. The criterion of letter (b) also fails to ensure the needed stability. Doubts could also be raised as for criterion (c), which refers to the nationality of either of the spouses at the time of conclusion of the agreement.

[9] *"Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation"*.

rise to contradictions with respect to the important objective of the certainty of the law and of the predictability of the applicable law.

The relevant decision of the citizen concerned would be in too many cases dictated by mere convenience and therefore this legislative option, in the absence of rigid limitations, would risk creating room for the deplorable phenomenon of EU citizens 'shopping' for the most convenient law.

The argument concerning the confusion about which law applies to each case in cross-border situations when more than one national law comes into play (often used to support provisions on the choice of the applicable law on the part of citizens) is rather flimsy and inconsistent, as international private law rules provide for the necessary guidance in every EU Member State. As for the types of documents that could be covered in case this solution is adopted, we would refer to the considerations and concerns expressed in replying to Questions 8 and 9.

COMECE Secretariat

29 April 2011