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Comments on the European Commission´s Green Paper on the right of family reunification of third-country nationals living in the European Union (Directive 2003/86/EC) COM (2011) 735final

Introduction

Our organisations represent Churches throughout Europe – Anglican, Orthodox, Protestant and Roman Catholic – as well as Christian agencies particularly concerned with migrants, refugees, and asylum seekers. As Christian organisations we are deeply committed to the inviolable dignity of the human person created in the image of God, the freedom of every human being, as well as to the common good, global solidarity and the promotion of a society that welcomes strangers.

Churches are attaching highest importance to marriage and the family, the social conditions enabling family life and the international, European and national legal frameworks connected to the possibility of founding a family and living as a family, as the family is "the natural and fundamental group unit of society" (Art. 16.3 UDHR) . Our organisations actively contributed to the negotiations on Directive 2003/86/EC. Our members have been continuously involved in monitoring the transposition of the directive into national law and are confronted with the consequences of the directive in their day-to-day work - be it in officiating weddings and other ceremonies involving third country nationals, be it in providing legal advice to those seeking family reunification or addressing the social impact of separation of the members of a family. We therefore welcome the opportunity to share our observations and concerns related to the current directive, its transposition and implementation and to highlight some aspects for much-needed improvement of member states´ legislation and practice.

As to the means to achieve such improvement, both options (clarification and correct application of the existing directive or new legislation) proposed by the Commission could in principle generate many of the needed results. Given that eight years have elapsed since the adoption of the directive without a satisfactory degree of harmonisation of practice, we would however encourage the Commission to opt for a plan of action which would in the very near

future lead to more factual harmonisation of the right to family reunification and correct implementation of existing legislation by member states.

Focussing on the primary objective of the directive: a "necessary way of making family life possible" (Consideration 4)

While the green paper raises a number of detailed questions as to the substance of specific provisions of the family reunification directive, it is in our view of central importance to recall the primary objective of the directive and national legislation flowing from it: **to facilitate and enable family life**. We are therefore grateful to the European Commission for its intention to root any future action on family reunification in the clear context of the human right to family life as guaranteed by international as well as European human rights instruments. In this respect we would in particular refer to Art. 8 of the European Convention of Human Rights, and Art. 7 of the European Charter of Fundamental Rights **(**right to respect for private and family life). Moreover, the right to family reunification has been expressly established in two significant human rights treaties: the 1989 UN Convention on the Rights of the Child (CRC) and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Removing any unjustified barrier to family life

In addressing some of the detailed questions raised by the European Commission, we would argue for policies which strike a balance between family life as one of the most fundamental and central human rights and favourable factor for integration on the one and possible policy considerations of migration management on the other hand. We would in this context recall that considerations on migration management, which have been highlighted by several member states - as legitimate as they may be - are often primarily an expression of short term considerations often in response to a populist discourse on the perceived extent and patterns of migration in the context of family reunification.

….involving all family members, as early as possible

(**Question 4**) Experiences show that a full emotional attachment and full integration in a new country largely depend, among other things, on a person's possibility to live with his/her family. In contrast, living in one country with all or some of the other family members living apart prolongs a sentiment of "neither here nor there". Along these lines, we would argue for a family reunification which takes place as early and with as complete a family as possible. This will be in the interests of family life, but also of host societies.

It would therefore be essential that the scope of family members able to benefit from family reunification would give space as a minimum for including dependant family members regardless of their age. In our view this should include provisions which include de facto family members (e.g. children who have been living and growing up with a family without necessarily having been formally adopted)[1]. As a minimum, children up to the age of 21 should have a right to family reunification, as is the case for family members of EU citizens exercising their right of free movement.

(**Question 2**) Any age requirement for the spouse to join which goes beyond the age of majority (as currently foreseen in article 4 (5)) can be both discriminatory and unjustified. While there is a valid concern around forced marriages, there is no evidence that the age limit would be the right instrument to address this problem. While higher age limits lead to waiting times which are putting caring relationships under strain, they also contribute to a perception that third country nationals would generally and more naturally enter forced or arranged

[1] To protect children and for example, to avoid trafficking, there should be a kind of legal responsibility, similar to adoption, tutorship or guardianship

marriages.[2] As there is no evidence for this assumption, we would encourage the European Commission to contract a study which can shed light into this field. Until further evidence provides different insights, we recommend deletion of such age requirement. As support and a guaranteed legal status for spouses who were forced to marry appear to be an effective instrument to counter forced marriage, we wish to recommend strengthening these.

(**Question 1**) In the same context we are concerned that the provisions regarding waiting time as well as procedural delays before a reunification can take place are excessively used by member states and have proven to present major challenges to family life. In practice, the cumulating of a certain time of residence before migrants launch an application together with national law counting minimum residence (referred to in article 8) only as of the moment of the application as well as a wide interpretation of the time span permitted for the examination of an application (article 5 (4)) can lead to waiting times which go far beyond the maximum of two years envisaged by the directive, which for many families already represents a major obstacle to family life. A clarification to the effect that a maximum period of 2 years[3] includes all waiting/procedure time would be very welcome and needed.

Emancipation, participation and integration: through strengthening migrating family members

(**Question 2**) If combatting forced marriages and the emancipation of migrating family members in general are at the heart of policy concern, measures strengthening the position of the migrating members of the family - e.g. affordable access to language learning, targeted programmes in academic and vocational training, independent residence status in case of violence in the family, support to shelters - would be a far better option for empowering the migrants than limiting the essential human rights of persons seeking to live as a family. We would in this context welcome a review or more generous transposition of articles 15 (1) and (3) allowing for an autonomous residence permit at an earlier point than 5 years after the initial permit was granted, particularly in cases of widowhood, divorce and other particularly difficult circumstances. Member organisations report about cases of migrants (mainly female) remaining in dysfunctional, even abusive, marriages only for the fear of losing their residence status – clearly a consequence of restrictive policies in this domain.

The valid concern that the newly arrived should be able to fully participate in host societies can in our view best be addressed by providing post-arrival integration measures which are accessible, which can be combined with family obligations and which are affordable. The experiences in member states, which have underlined the importance of integration, but in which integration courses are dramatically overbooked or not affordable, in which integration instructors are poorly paid or qualified and courses inaccessible outside the urban centres, shows that a lot can still be done in this domain.

We do note with concern in this context that those members states, which have used the provisions of article 7 (2) and have imposed pre-departure integration measures have in practice not necessarily accompanied such provisions by measures which would allow family members wanting to enter the EU for the purpose of family reunification to fulfil these conditions. Too often the necessary courses are neither accessible nor affordable and integration requirements as a precondition have thus become mechanisms of preventing family reunification. We would in this context welcome a dialogue between Commission and members states on the proportionality and admissibility of such measures.

[2] ICMPD, Civic Stratification, Gender and Family Migration Policies in Europe by Albert Kraler May 2010
[3] In cases covered by Art. 8 2nd indent: 3 years.

In the spirit of encouraging emancipation, it would in our view be highly recommendable if migrating family members would as early as possible have access to labour market, education and training, even if this goes beyond the rights of the sponsor of the application[4]. The 2008 report on the implementation of the directive shows an alarming reluctance of member states to grant access in these areas and in member states´ legislation and finds a significant number of potential violations of the directive. In any debate on integration, labour market participation and education are highlighted as the most important pathway to integration and emancipation of migrants - it is therefore not understandable why family members migrating in the context of family reunification are denied the chance to stand on their own feet as soon as possible and to contribute to host societies. We would therefore encourage a robust monitoring of member states' legislation by the Commission in this domain.

Material conditions: equality as guiding principle

A matter which has not only given reason for concern, but also received considerable attention, not least due to an ECJ ruling[5], is the impact of material conditions which sponsors of family reunification need to fulfil to be eligible to request reunification with their family. While these provisions have initially (in the negotiations of the 2003 directive) been introduced to protect those joining their families and were originally intended for a wider family concept beyond the core family, they have in the implementation in several member states become a central obstacle preventing families from living together. We would argue that the general guiding principle should be equal treatment with EU citizens and that regarding the provisions of article 7 (1) an assessment of the individual aspects of each case would be needed.

The Commission´s report on the application of the directive noted that in the area of accommodation conditions, practices of counties like Austria or Belgium are questionable and the reference to "normal" conditions of accommodations not helpful. In our view the adequateness of accommodation should be viewed according to health and safety standards as well as on equal terms with housing deemed appropriate/habitable for the use by nationals.

Along this line we would also argue that families should not be required to dispose of resources which are beyond the standard minimum income/minimum subsistence levels of families of nationals. As the Chakroun judgement of the ECJ/CJEU has shown, in cases where the sponsor is in receipt of social assistance, a very careful and individual assessment should be made as to the precise nature and source of the income from social assistance: the Commission should robustly monitor national legislation and ensure that laws declaring sponsors receiving any kind of social assistance as per se ineligible for family reunification are abolished, as they are in breach of jurisprudence of the ECJ/CJEU.

In the context of material conditions of family reunification we urgently would advise that the Commission would through guidance or legislation ensure that member states apply a principle of proportionality in imposing fees for granting family reunification, so that the purpose of the directive is not undermined by exorbitant fees.

[4] In our view, the limitation for sponsors in accessing employment, education should also be reviewed in order to allow for self-sufficiency and autonomy of the whole family.

[5] Case C-578/08 (the so-called "Chakroun" case)

Level playing field for persons under international protection

(**Question 8**) In light of recent approximation of rights of refugees and persons benefiting from international protection (qualification directive, long-term residence directive), it would in our view only be logic to delete article 3 (2) c. Given the particular vulnerability of refugees and subsequent potential difficulties in fulfilling certain material conditions, provisions of chapter V of the directive needs to be maintained and extended to all beneficiaries of international protection.

Alleged abuse of the directive: from anecdotes and rumours to fact-based policies

(**Question 11**): Throughout the negotiations of the directive, the aspect has been raised that family reunification is used for false purposes and will give rise to (large-scale) abuse. Similar discussions can be observed in current policy debates, even though very little evidence has been provided in the matter. We therefore welcome the call of the Commission for hard facts to inform the debate.

We note with concern that in a number of areas, discussions on possible fraud, despite little evidence, have led to a situation where any application for family reunification is not *a priori* assumed to be legitimate, but on the contrary first suspected to be fraudulent. There is an unfortunate shifting of the burden of proof: Third country nationals have to prove that their family relations are not fraudulent, rather than the authorities needing to prove the fraud. This has had very serious consequences for the ability to form or reunite families. In a number of member states it has led to procedures which are highly intrusive and costly e.g. in those countries where DNA testing has de facto become a standard procedure for the family reunification with children from particular regions of the globe.

We would in the context of intrusive procedures welcome a discussion among member states, and a robust monitoring by the Commission, on **how** the possibly fraudulent nature of a marriage is examined by member states. In our experience, measures to prevent marriages of convenience are sometimes being applied in a fairly ad hoc, even arbitrary, manner and there is some evidence that in the context of such measures (withholding of fiancé visas, refusal to permit marriages) the family foundation of many loving couples has been hampered or was even made impossible. Determining the allegedly fraudulent or forced nature of a marriage is an extremely complex and delicate undertaking. In our view the opinion, intentions and consent of those entering into a marriage should be the decisive factors for assessing the validity of a marriage and not any assumptions made by outsiders.

In summary, we believe that a more generous practice in facilitating family reunification is in the spirit of the 2003 directive. **We would encourage the adoption and enforcement of binding guidance on the respective provisions as a minimum option**. In the case that responses of member states and the European Parliament to the green book allow to hope for a speedy legislative process, amending the directive might be the preferred option. Even without new legislation, strong guidance on a **more coherent application of existing legislation** would be able to address a number of important issues. A more coherent national legislation and practice on family reunification across the EU, which acknowledges and protects **the right to family reunification**, which allows for a family reunification as early and as fully as possible and which tries to achieve empowerment by making rights a reality rather than denying rights to migrants and their families will certainly improve family life in the EU, social coherence in the EU and the credibility of the EU as an area of human rights.