



Council of the  
European Union

Brussels, 30 September 2014  
(OR. en)

13699/14

FREMP 163  
JUSTCIV 235  
ASIM 83  
SOC 657  
JAI 727  
DROIPEN 113

#### COVER NOTE

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From: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 26 September 2014

To: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European  
Union

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No. Cion doc.: COM(2014) 604 final

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Subject: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT AND THE COUNCIL Helping national authorities fight  
abuses of the right to free movement: Handbook on addressing the issue  
of alleged marriages of convenience between EU citizens and non-EU  
nationals in the context of EU law on free movement of EU citizens

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Delegations will find attached document COM(2014) 604 final.

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Encl.: COM(2014) 604 final



EUROPEAN  
COMMISSION

Brussels, 26.9.2014  
COM(2014) 604 final

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT AND THE COUNCIL**

**Helping national authorities fight abuses of the right to free movement:  
Handbook on addressing the issue of alleged marriages of convenience between EU  
citizens and non-EU nationals in the context of EU law on free movement of EU citizens**

{SWD(2014) 284 final}

## I. Introduction

**The right to move and reside freely within the European Union is one of the four fundamental freedoms enshrined in EU law and a cornerstone of European integration.** The promotion and strengthening of this right is a core objective of the European Union.

The importance of **ensuring the protection of family life in order to eliminate obstacles to the exercise of the fundamental freedom of movement** is recognised by the European Union and its Member States. If EU citizens were not allowed to lead a normal family life in the host EU country, their fundamental freedom would be seriously undermined.

EU citizens on the move who genuinely rely on EU law are fully protected by EU rules. However, as in any area of law, there will be cases where individuals may seek to abuse freedom of movement, in an effort to bypass national immigration rules. Abuse of the right to free movement undermines this fundamental right for EU citizens. Effectively tackling such abuse is therefore essential to upholding this right.

At its meeting of 26 – 27 April 2012, the Justice and Home Affairs Council approved the Roadmap on “*EU action on migratory pressures - A Strategic Response*”, which refers to marriages of convenience as a means of facilitating illegal entry and residence of non-EU nationals in the EU. The Roadmap lists several actions to be undertaken by the Commission and/or the Member States with a view to improving the understanding of abuse of free movement rights by non-EU nationals and organised crime aiming to facilitate illegal immigration. One of these actions is the preparation of **"a handbook on marriages of convenience, including indicative criteria to assist in the identification of sham marriages"**.

In the Communication of 25 November 2013 *"Free movement of EU citizens and their families: Five actions to make a difference"*<sup>1</sup>, the Commission clarified EU citizens' rights and obligations under EU rules on free movement and set out five actions to help national authorities effectively apply those rules on the ground. The Communication recalled that **EU law contains a series of robust safeguards** allowing Member States to fight abuse. One of the concrete actions **to help authorities implement these safeguards to their full potential** was the preparation, together with Member States, of **a handbook on addressing marriages of convenience**.

In response to the request by Member States mentioned above and in close cooperation with them, the Commission services have therefore prepared a Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens. The Handbook accompanies this Communication as a Staff Working Document. Its purpose is to help national authorities effectively tackle individual cases of abuse in the form of marriages of convenience while not compromising the fundamental goal of safeguarding and facilitating free movement of EU citizens and their family members using EU law in a *bona fide* way.

Data submitted by Member States on recently identified marriages of convenience between non-EU nationals and EU citizens exercising their right to free movement within the EU show

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<sup>1</sup> COM(2013) 837 final - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0837&rid=1>.

that this phenomenon exists but varies significantly between Member States<sup>2</sup>. Despite the limited number of cases, the implication of organised criminal networks, as acknowledged in recent Europol reports, is worrying.

The legal framework at EU and international level that national authorities should comply with when fighting abuse comprises EU rules on free movement of EU citizens and their family members, rights and safeguards enshrined in the Charter of Fundamental Rights of the European Union, and other relevant instruments of international law such as the European Convention on Human rights.

Further to the guidance to Member States on how to tackle abuse in the form of marriages of convenience provided in the Commission's Communication of 2 July 2009 on Guidance for better transposition an application of Directive 2004/38/EC<sup>3</sup> ("*2009 Commission Guidelines*"), the Handbook expounds this legal framework. It spells out what the application of these rules means in practice, offering national authorities operational guidance to assist them in effectively detecting and investigating suspected cases of marriages of convenience. Taking into account the indications and information provided in the Handbook should ensure that the practises of the competent national authorities are based on the same factual and legal criteria within the Union, and contribute to compliance with EU law.

**The Handbook is neither legally binding nor exhaustive. It is without prejudice to existing EU law and its future development. It is also without prejudice to the authoritative interpretation of EU law which may be given by the Court of Justice.**

This Communication summarises the main content of the Handbook, which is presented in four sections: "Introduction", "Definitions", "Applicable legal framework" and "Operational measures within national remit".

## **II. Main content of the Handbook**

### **1. Section on "Introduction"**

This section makes clear that only a marriage of convenience between an EU national and a non EU-national, where the former has exercised free movement by residing in another Member State, is covered by the Handbook. Thus, marriages between two EU citizens fall outside the scope of the Handbook. It also makes clear that any measure taken by national authorities with a view to prevent abuse must fully respect the fundamental rules and principles of EU law and that the right of free movement is the primary rule from which there may only be exceptional derogations in individual cases when justified by proven abuse.

### **2. Section on "Definitions"**

The guidance provided by the Handbook is focused on marriages of convenience within the meaning of Directive 2004/38/EC<sup>4</sup> ("*the Directive*") as marriages contracted for the sole purpose of enjoying the right of free movement and residence under the Directive that

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<sup>2</sup> Communication "Free movement of EU citizens and their families: Five actions to make a difference", cited above, section 3.1.

<sup>3</sup> COM(2009) 313 final.

<sup>4</sup> Recital 28 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, p. 77.

someone would not have otherwise. Article 35 of the Directive allows Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. Commission Guidelines in 2009 provided clarifications on the notions of abuse and marriages of convenience for the purposes of the EU rules on free movement.

The Handbook presents in detail the meaning of the constitutive elements of these notions and provides further indications on how to distinguish between genuine marriages and marriages of convenience: it describes the main traits of different forms of i) genuine marriages which are sometimes incorrectly considered as marriages of convenience (*e.g. arranged, proxy or consular marriages*) and ii) non-genuine marriages (*e.g. marriages of convenience, by deception, forced or bogus marriages*) and refers to the EU rules which apply in case the marriages of convenience include elements of trafficking in human beings<sup>5</sup>.

### **3. Section on "Applicable legal framework"**

The Handbook contains an overall presentation of the rules that national authorities must take into account when taking measures to prevent or tackle abuse, in particular the EU rules on free movement and fundamental rights, and illustrates what these rules mean in practice.

#### *3.1 EU rules and principles on free movement of EU citizens*

As regards Article 35 of the Directive, which provides that measures adopted to refuse, terminate or withdraw rights conferred by the Directive in the case of marriages of convenience "*shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31 of the Directive*", the Handbook details how the general EU principle of proportionality is to be applied in the context of the decisions at issue. It also underlines that the need to ensure that any such measure respects the material safeguard of proportionality, as expressed in Article 35 of the Directive, is further reflected in the procedural safeguards applicable to such measures, provided for in Articles 30 and 31 of the Directive.

#### *3.2 Wider context of European and international law*

The Handbook recalls the fundamental rights enshrined in instruments of European and international law that need to be taken into account when marriages of convenience are detected, investigated and sanctioned. Of particular relevance is the right to marry, the right to respect for private and family life and the right of the child as well as the prohibition of discrimination, the right to an effective remedy and the right to defence, as provided for in the Charter of Fundamental Rights of the European Union ("*the Charter*").

As the meaning and scope of rights enshrined in the Charter which correspond to rights guaranteed by the European Convention on Human Rights ("*the Convention*") should be the same as those laid down by this Convention<sup>6</sup>, the Handbook summarises the main elements of the corresponding provisions of the Convention and the related case law of the European Court of Human Rights ("*ECtHR*") so as to provide guidance on their interpretation.

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<sup>5</sup> Directive 2011/36/EU of the European Parliament and of the Council, of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>.

<sup>6</sup> Article 52(3) of the Charter; see also the Explanations Relating to the Charter (OJ 2007/C 303/02) on the meaning and scope of specific provisions of the Charter compared to the corresponding ones of the Convention.

As regards *the right to marry and to found a family*, enshrined in Article 9 of the Charter and Article 12 of the Convention, the Handbook notes that the latter Article confers upon national authorities certain discretion on how to govern the exercise of the right to marry at national level, but the leeway it grants them is limited, and presents relevant ECtHR case law<sup>7</sup>.

As regards *the right to respect for family life*, enshrined in Article 7 of the Charter and in Article 8 of the Convention, the Handbook refers to ECtHR case law<sup>8</sup> which sets out the factors to be taken into account in relation to marriages of convenience with a view to assessing whether a decision restricting the right to enter and reside may be considered necessary in a democratic society and proportionate to the legitimate aim pursued, so that it does not interfere with the right to family life.

In cases where marriages of convenience involve children (in most cases from previous relationships of the spouses), the Handbook points to the need to properly take into account the *rights of the children*, in line with Article 24 of the Charter and Article 8 of the Convention, which also applies. As Article 24 of the Charter is based on the UN Convention on the Rights of the Child, particularly its Articles 3, 9, 12 and 13, the Handbook points to the more practical advice on their application provided in the UNHCR Guidelines on Determining the Best Interests of the Child of May 2008<sup>9</sup>. It specifies in particular that, in the event of a marriage of convenience, where one or both of the spouses have parental responsibility for a child, the child's welfare must be given sufficient weight in deciding whether the person(s) with parental responsibility should be removed.

The Handbook also recalls that, if the children involved are nationals of the host EU country, they benefit from additional protection under domestic and international laws prohibiting expulsion of own nationals or, in exceptional cases, deriving from case law of the Court of Justice on Union citizenship, if the removal of a non-EU parent who entered into a marriage of convenience would force the child to leave the host EU country<sup>10</sup> or the EU as a whole<sup>11</sup>.

Finally, the Handbook underlines that, when taking measures to tackle potential abuse, *national authorities must not subject the persons concerned to degrading treatment nor discriminate* on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, nationality, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, as such measures would violate, respectively, Article 4 of the Charter (*and Article 3 of the Convention*) and Article 21 of the Charter (*and possibly Article 14 of the Convention as well*).

### 3.3 *Evidential burden and burden of proof*

The Handbook underlines that all measures taken by national authorities to investigate suspected marriages of convenience and to collect evidence must comply with essential procedural safeguards imposed by national and EU law. An investigation into a marriage can only take place where there are reasonable doubts about its genuineness. Whilst, however, such reasonable doubts are sufficient as grounds for launching an investigation, once an

<sup>7</sup> E.g. decisions of the European Commission of Human Rights in case *Sanders v France* (application 31401/96) and in case *Klip and Krüger v the Netherlands* (application 33257/96).

<sup>8</sup> Judgment *Üner v The Netherlands* (case 46410/99).

<sup>9</sup> <http://www.unhcr.org/4566b16b2.html>.

<sup>10</sup> Article 3 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>11</sup> See in particular Cases C-34/09, *Ruiz Zambrano*, C-256/11, *Dereci*, and joined Cases C-356/11 and C-357/11, *O. and S.*

investigation has taken place and has led to the conclusion that the marriage is of convenience, rights under free movement rules can be refused only where this is duly established by the national authorities, in compliance with the relevant evidential standard<sup>12</sup>.

As regards the burden of proof, the Handbook explains, further to the indications provided in the 2009 Commission Guidelines, how it functions in practice. It specifies in particular that, as the burden of proof rests on the national authorities, married couples cannot be obliged, as a rule, to present evidence that their marriage is not abusive. However, if the national authorities have well-founded suspicions as to the genuineness of a particular marriage, which are supported by evidence (*such as conflicting information provided by the spouses*), they can invite the couple to produce further relevant documents or evidence.

Spouses have the obligation to co-operate with the authorities, and this should be communicated to them. Should they fail to provide evidence dispelling the suspicions which can reasonably be expected to be available to genuine couples or even should they decide not to provide any evidence at all, this cannot form the sole or decisive reason to conclude that the marriage is of convenience. It can however be taken into account by the authorities together with all other relevant circumstances in their assessment of the nature of the marriage.

### 3.4 *Procedural safeguards*

The Handbook presents in detail the procedural safeguards that national authorities must respect, in accordance with Article 35 of the Directive, when adopting any decision which may restrict the right to free movement based on the existence of a marriage of convenience, namely those provided for in Articles 30 and 31 of the Directive, which regulate in particular issues related to the notification of such decisions and their review. It further recalls that the safeguards of the Directive must be also placed in the context of other relevant fundamental rights, such as the right to an effective remedy and to a fair trial, and the right of defence (*respectively, Articles 47 and 48 of the Charter*).

## 4. Section on "Operational measures within national remit"

In this section, the Handbook reflects operational practices distilled from practices across the Member States so as to assist national authorities in effectively detecting and investigating suspected marriages of convenience. It provides a toolbox of solutions which would allow Member States to set up tailored operational schemes fitting their specific needs and available resources, without being intended as a blueprint for all investigational patterns and processes.

### 4.1 *Hints of possible abuse that could trigger an investigation*

As regards possible triggers for investigations, the Handbook expounds on the 2009 Commission guidelines – as well as the Council Resolution on measures to be adopted on the combating of marriages of convenience of 4 December 1997<sup>13</sup> - as regards the use of indicative criteria, “hints of abuse”, related to a conduct which abusive couples are reasonably expected to exhibit significantly more often than genuine couples. The notion of “hints of abuse” used for the purposes of the Handbook must be understood as meaning that such hints observed by national authorities never automatically and inevitably confirm the abusive

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<sup>12</sup> A different evidential standard may apply depending on whether the abusive conduct is pursued under criminal law, immigration law, administrative law or civil status law.

<sup>13</sup> [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1216\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1216(01):EN:HTML).

nature of the marriage under consideration. There must always be a wider and neutral appreciation of all elements, both in favour and against the original suspicion of abuse.

In fact, when the national authorities tackle abuse on the ground, they may be confronted with atypical but genuine couples that appear at first to exhibit a number of features of a marriage of convenience. For this reason, the Handbook outlines a "**double-lock mechanism**" to be applied so as to minimise the danger of false positive identifications (*where, for instance, the spouses do not have a common household or one of the spouses has an adverse immigration history*).

This "double-lock mechanism" implies, firstly, **a rigorous application of the principle that free movement is the primary rule which can be restricted only in individual cases where it is justified on the grounds of abuse**. Secondly, the double-lock mechanism implies that national authorities investigating abuse should not, in principle, focus primarily on hints of abuse to support their initial suspicions about the marriage at stake. On the contrary, they **should first consider "hints that there is no abuse"** (*such as being in a long-standing relationship or in a serious long-term legal or financial commitment or sharing parental responsibility*) that would support the conclusion that the couple is genuine and enjoys the right to move and reside freely. Only if the examination of "the hints that there is no abuse" has not confirmed the genuine nature of the investigated marriage, would the authorities proceed to verify the existence of "the hints of abuse".

Hints of possible abuse, referring to certain behaviour traits that abusive couples are much more likely to present than genuine ones are divided in several groups, corresponding to inherent stages of "the life cycle" of marriages of convenience. Examples of such hints are presented below by way of illustration:

When the future spouses have not yet met: in comparison with *bona fide non-EU nationals*, abusers are more likely: to have previously migrated irregularly to or be currently residing irregularly in an EU country; to have a history of previous marriages of convenience or other forms of abuse or fraud; in comparison with *bona fide EU citizens*, abusers are more likely to be in a bad financial situation (*for example, heavily indebted*).

During the pre-marriage phase: in comparison with genuine couples, abusers are more likely: to never have met in person before the marriage; not to speak a common language understood by both (*and there is no evidence that they are making efforts to establish a common basis for communication*).

When the future spouses are preparing to celebrate the wedding: in comparison with genuine couples, abusers are more likely: to use a marriage venue which is known to be prone to abuse or has possible connections to organised crime; to hand over a sum of money or gifts in order for the marriage to be *contracted* (*except if given in the form of a dowry in cultures where this is common practice*); to have discrepancies in the documents submitted, which raise concerns of forgery or provide a false address.

When, after the marriage, the non-EU spouse applies for entry visa or a residence document: in comparison with genuine couples, abusers are more likely: to give conflicting or false information about each other on crucial personal matters (*name, date of birth and age, nationality, closest family members, possible previous marriages, education, profession*); to indicate a false address; to have the non-EU spouse live together with someone else.



When the couple has been issued with entry or residence documents and resides in the host Member State: in comparison with genuine couples, abusers are more likely: not to maintain their matrimonial cohabitation or continue living separately after their marriage without any plausible reason (*for example work, children from previous relationships living abroad*); to have one of the spouses living with someone else.

When the spouses take steps to formally terminate their marriage: in comparison with genuine couples, abusers are more likely to divorce shortly after the non-EU spouse has acquired an independent right of residence or the nationality of the host EU country.

#### 4.2 *Investigating marriages of convenience*

The Handbook presents the main tools used by national authorities to investigate marriages of convenience, namely simultaneous interviews or questionnaires, document and background checks, inspections by law enforcement, immigration or other competent authorities and community-based checks to check whether the couple is living together and jointly administer their household. In this context, it recalls the importance of respecting the rights of persons to a private life and the applicable safeguards and sets out common practices developed by national authorities to maximise the effectiveness of such tools.

#### 4.3 *Cross-border co-operation in tackling marriages of convenience*

The Handbook indicates how effective detection, investigation and prosecution of marriages of convenience can be facilitated through cross-border co-operation. It details in particular the assistance that can be provided to national authorities by Europol, where there is involvement of organised crime in trafficking in human beings, and by Eurojust, notably as regards the investigation or prosecution of specific acts, and coordination between national authorities. It also presents how Europol and Eurojust can help Member States set up Joint Investigation Teams, and the situations in which such teams can prove suitable and useful tools.

#### 4.4 *Roles of different national authorities*

In this final section, the Handbook maps the various authorities at national level which may be involved in tackling marriages of convenience and highlights in particular the need for holistic policies addressing such marriages and specifying the roles of different national actors. Depending on their individual needs, Member States should also consider how to best coordinate the work of all the key stakeholders, for instance by creating a central co-ordinating body or points of contact in each of the involved services.