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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

Accompanying the document

COMMUNICATION TO THE EUROPEAN PARLIAMENT AND TO 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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Section 1

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.

Millions of EU citizens are on the move every day, visiting other EU countries, doing business, working or settling there. For them, freedom of movement is taken for granted, considered synonymous with their status as EU citizens. Many of them travel abroad and settle there together with their families.

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 and families on the move who genuinely rely on EU law are fully protected by EU rules. However, just 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, in any form, undermines this for fundamental right of 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*”¹, 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

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

prepared the present 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 as a Staff Working Document the Communication "*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*"².

The purpose of this Handbook 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 that this phenomenon exists but varies significantly between Member States³. 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/EC⁴ ("*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

² Reference to be added

³ Communication "*Free movement of EU citizens and their families: Five actions to make a difference*", cited above, section 3.1.

⁴ COM(2009) 313 final.

⁵ Although this Handbook does not address marriages of convenience between two non-EU nationals in the context of Directive 2003/86/EC, given the parallels with the operational aspects of combatting potential abuses of the right to family reunification, it may, *mutatis mutandis*, be referred to for guidance, where relevant, in particular on investigation tools and techniques and on cross-border cooperation.

⁶ See Commission Communication of 3 April 2014 on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final - http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/family-reunification/docs/guidance_for_application_of_directive_on_the_right_to_family_reunification_en.pdf.

⁷ For general information on how the fight against marriages of convenience can be facilitated by cross-border see section 4.6.

⁸ Implementation EU Policy cycle for organised and serious international crime: Multi-annual Strategic Plan related to the EU crime priority "illegal immigration".

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>.

¹⁰ COM(2009)313 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF>.

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 practices 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.

Scope of this Handbook

Various types of marriages of convenience have been reported by national authorities.

In the context of the fight against abuse of EU rules on free movement, a marriage of convenience is commonly understood as a **marriage contracted for the sole purpose of conferring a right of residence under EU law** on a non-EU national who would otherwise not be able to benefit from such a right.

Only if EU citizens reside with their spouse in a Member State other than that of their nationality, or reside in the Member State of their nationality after having exercised their right to free movement notably by residing in another Member State, their marriage could, in principle, be assessed under **EU law on free movement of EU citizens**, primarily under Directive 2004/38/EC (*hereinafter referred to as the Directive*).

Marriages between two EU citizens fall outside the scope of this Handbook.

Marriages of convenience **between two non-EU spouses** residing in the EU also fall outside the scope of this Handbook, as they constitute an abuse of **EU rules on family reunification** (*Directive 2003/86/EC*)⁵.

Marriages of convenience **between non-EU nationals and EU citizens who reside in their Member State of origin and who have not exercised their right to free movement also fall outside the scope of this Handbook**. In the absence of any applicable EU law, they would have to be examined pursuant to national immigration laws.

Other types of marriages of convenience are further addressed at EU level in different contexts, notably in the framework of tackling abuses to family reunification of non-EU nationals⁶ or of fighting serious forms of abuses, linked to organised crime and trafficking in human beings.

Indeed, regardless of their form, marriages of convenience are linked in many cases to **organised crime** and to crimes such as **trafficking in human beings**, forgery or smuggling.

In particular, tackling the involvement of organised crime requires law enforcement expertise and a multidisciplinary and multiagency response going beyond the scope of this Handbook⁷.

A specific strategic objective (goal 4) related to marriages of convenience is included in the EU Policy cycle 2014-2017 for organised and serious international crime, within the framework of the priority relating to the "*Facilitation of Illegal Immigration*"⁸. The policy cycle priorities are being implemented through the joint actions of national authorities and Commission agencies, such as Europol, thus enabling more operational exchanges among Member States on the different aspects of the broader issue of marriages of convenience linked to organised crime.

As regards trafficking in human beings, Directive 2011/36/EU⁹ focusses on prevention and prosecution of criminals whilst establishing robust provisions on victims' protection. The EU Anti-Trafficking Coordinator has commissioned ISEC projects on forced marriages and guidelines for identification of victims, including for consular services and border guards.

Within this broader context, this Handbook represents a contribution to assist Member States in tackling suspected marriages of convenience **from the specific perspective of EU citizens' right to free movement.**

Protection of fundamental individual rights as a starting point

Marriage is related to the most intimate aspects of private and family life. **Measures** taken by national authorities on a **discriminatory or automatic basis** with a view to detect and prevent possible abuse are likely to constitute an **unjustified and disproportionate intrusion into the private life of all the couples concerned.**

Successful appeals on procedural grounds against the original decisions taken by national authorities in the context of fight against abuse show the importance of having a set of **effective rules and safeguards in place to protect citizens' fundamental rights.**

Any measure taken by national authorities with a view to prevent abuse **must fully respect the fundamental rules and principles of EU law.** In particular, genuine couples should not be prevented, discouraged or dissuaded from exercising their fundamental right to free movement by unjustified or disproportionate measures. This is a **pre-requisite for the fight against abuse to be effective without undermining EU law and its objectives.**

Free movement is one of the fundamental freedoms that EU citizens enjoy under EU law. Derogations to such a fundamental freedom guaranteed by the EU Treaty may only take place on a **case by case basis and if they are non-discriminatory, justified and proportionate** to the objective pursued by the national authorities.

At the same time, national authorities have to take into account a **full set of fundamental rights and safeguards.**

Fundamental rights which **lie at the core of the protection afforded by EU law to all individuals** range from the right to respect for private and family life, the prohibition of discrimination, the right to an effective

remedy and the right to defence to the principles of legality and proportionality.

The right to free movement of EU citizens and their families

EU citizens who have exercised their right to move and reside freely in an EU country other than that of their nationality **enjoy a strong protection** under primary and secondary EU law as this right forms part of the foundations of the European Union.

EU law on free movement of EU citizens promotes, simplifies and strengthens intra-EU mobility of EU citizens.

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.

Article 35 of Directive 2004/38/EC 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, provided the conditions referred to in that Article are respected.

Recital 28 of the Directive more particularly stipulates that *"[t]o guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures"*.

In 2009, the Commission issued guidelines for better transposition and application of the Directive (*hereinafter referred to as the Guidelines*)¹⁰, inter alia, to help national authorities better understand what constitutes abuse to free movement and how to prevent or tackle cases of abuse under national law while complying with EU law.

Section 2

DEFINITIONS

As indicated above, this Handbook aims at providing guidance on how to tackle marriages of convenience between non-EU nationals and EU citizens exercising their right to free movement under the Directive.

To be able to effectively prevent and tackle abuse in the form of marriages of convenience, **national authorities need to understand what a marriage of convenience is**. They need to know that there are different forms of abusive marriages.

This section will help distinguishing between **genuine marriages and marriages of convenience**.

It will also highlight that there may be **definitions of marriages of convenience in other areas of EU law** which need to be interpreted in the light of the purpose of those rules.

Section 2.1	Abuse and marriages of convenience under EU law on free movement
Abuse of law in general ...	<p>Abuse of law is a phenomenon which exists in all areas of law, be it at national or at EU level.</p> <p>Where a law confers certain advantages which are not universal, there might be people seeking to manipulate the facts or the rules or procedures provided in the law in order to obtain an abusive advantage.</p>
... and EU law in particular	<p>EU law on free movement of EU citizens is no exception. To the extent that it grants EU citizens and their families the right to easily move to another EU country and settle there, it can be misused to circumvent limitations under national immigration laws which would be applicable to non-EU nationals wanting to settle in their own capacity.</p>
What is abuse under EU law on free movement?	<p>For the purposes of Directive 2004/38/EC, the notion of abuse refers to an artificial conduct entered into solely with the purpose of obtaining the right of free movement and residence under EU law which, albeit formally observing the conditions laid down by EU rules, does not comply with the purpose of those rules¹¹.</p>
What is a marriage of convenience for the purposes of EU law on free movement?	<p>Marriages of convenience are a specific form of abuse.</p> <p>Hence, the notion of marriage of convenience for the purposes of the free movement rules and of this Handbook refers to a marriage contracted for the sole purpose of conferring a right of free movement and residence under EU law on free movement of EU citizens to a spouse who would otherwise not have such a right¹².</p>
Building blocks of abuse	<p>The constitutive elements of abuse of EU law on free movement of EU citizens can be summarized as follows.</p>

¹¹ See 2009 Commission guidelines.

¹² See Recital 28 of the Directive and 2009 Commission guidelines.

<p>Artificial conduct</p>	<p>Firstly, the conduct, through which EU law is abused, must be artificial in the sense that it is a feigned imitation, lacking naturalness, sincerity or spontaneity.</p> <p>When it comes to marriages of convenience, the abusive conduct is linked to the absence of intention of the married couple to create a family as a married couple and to lead a genuine marital life.</p> <p>The abusive character of marriages of convenience is represented by <i>mala fide</i> of the spouses¹³ prior to and at the moment they enter into the marriage.</p> <p>Marriages which started off as genuine marriages but later descended into something that is merely of form should not be considered as marriages of convenience even where a marriage that would otherwise have been terminated by divorce is maintained for the sole purpose of continuing to confer on the non-EU spouse a right of residence under EU law on free movement of EU citizens.</p>
<p>Sole purpose</p>	<p>The abusive conduct must be made with the purpose of obtaining the right of free movement and residence under EU law.</p> <p>As the notion of "<i>sole purpose</i>" is an autonomous concept of EU law, it must be interpreted according to EU law, taking into account primarily the purpose of this concept in the wider context of the fundamental freedom to move and the fight against abuse.</p> <p>Therefore, the notion of "<i>sole purpose</i>" should not be interpreted literally (<i>as being the unique or exclusive purpose</i>) but rather as meaning that the objective to obtain the right of entry and residence must be the predominant purpose of the abusive conduct.</p> <p>A conduct aimed at abusively acquiring more than one unfair advantage (<i>such as, in addition to the right of residence, a tax advantage</i>) may also be considered as abusive.</p> <p>On the other hand, a marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage (<i>for example the right to a particular surname, location-related allowances, tax advantages or entitlement to social housing for married couples</i>).</p> <p>In the national context, granting advantages to married couples is often the way in which Member States may promote marriages and family life. When an EU citizen genuinely marries a non-EU national, it should not be surprising that they want to live together somewhere, often in a country in which the other spouse had no legal right of residence before the marriage.</p>
<p>Formal respect of law</p>	<p>Abusive conduct formally observes all the conditions imposed by law.</p> <p>Marriages of convenience are contracted in formal compliance with</p>

¹³ Typically, both spouses enter into a marriage of convenience in *bad faith*. However, in marriages by deception, only non-EU spouses enter in *bad faith* (see the next section for more details).

	<p>the applicable national law of the country of marriage.</p> <p>Every marriage of convenience is, by definition, a valid marriage in that the parties to it have legally become husband and wife. A marriage of convenience has been entered into at a specific time and place, following the ceremony laid down by the applicable national marriage law and after overcoming any legal impediments to marry (<i>such as impediments related to capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy</i>). Consequently, the couple should be able to produce a formally valid marriage certificate.</p> <p>If one wants to detect a marriage of convenience, the focus must be on the intention of the relationship on which the right of residence is founded rather than on the outward reflection of the relationship.</p>
<p>Fraud</p>	<p>Abuse should be distinguished from fraud. Fraudsters seek to break the law by presenting fraudulent documentation alleging that the formal conditions have been duly met or which is issued on the basis of a false representation of a material fact concerning the conditions attached to the right of residence. For instance, the submission of a forged marriage certificate with a view to obtaining a right of entry and residence under the Directive would be a case of fraud and not of abuse, since no marriage was actually contracted¹⁴.</p>
<p>Purpose of the rules</p>	<p>The objective of EU law on free movement of EU citizens is to promote and protect the right to free movement of EU citizens and those closest to them by virtue of genuine family ties.</p> <p>EU law on free movement confers a primary and individual right to move and reside freely within the territory of the Member States to all EU citizens and their EU family members (<i>irrespective of their nationality</i>).</p> <p>As regards non EU family members, this right derives from the recognition that EU citizens may be deterred from exercising their rights if they cannot be accompanied by their family and that family life and the maintenance of the unity of the family is a fundamental value in the EU and all its Member States.</p> <p>Couples contracting marriages of convenience go through steps which are solely designed to achieve a legal status of marriage which is unsupported by the fundamental foundations of marriage.</p>
<p>Section 2.2</p>	<p>Different types of genuine marriages and marriages of convenience</p>
	<p>On the ground, it may be challenging to distinguish between different types or forms of marriages, in particular between genuine marriages and marriages of convenience. More guidance on this is provided below.</p> <p>Understanding what a marriage of convenience is by putting it into contrast to other forms of marriages can help tackling abusive marriages more effectively.</p>

¹⁴ See also 2009 Commission guidelines.

<p>What is a genuine marriage?</p>	<p>Genuine marriages are characterised by the intention of the married couple to create together a durable family unit as a married couple and to lead an authentic marital life. Marriages of convenience are characterised by the lack of such an intention.</p> <p>It is difficult to find one definition of marriage that could be applied to marital practices observed across the world. This is a crucial issue and failure to appreciate the global variety of marital practices and inability to see beyond European or even national perceptions related to marriage and family life can lead to prejudiced and ultimately incorrect conclusions that a perfectly genuine marriage is of convenience just because it does not fit the prevalent concept of marriage, family life or how relationships develop.</p> <p>The choice of a partner and the decision to marry is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision.</p> <p>In principle, marriages legally entered into anywhere in the world must be recognized for the purpose of EU law on free movement of EU citizens. However, Member States are not obliged to recognise marriages prohibited by their legislation as conflicting with fundamental interests of their society and principles of legal order. In particular, they do not have to recognise polygamous marriages contracted lawfully outside the EU which may be in conflict with their own legal order¹⁵.</p>
	<p>Some genuine marriages are sometimes incorrectly considered as marriages of convenience.</p>
<p>Arranged marriage</p>	<p>In arranged marriages, both spouses fully and freely consent to the marriage, although somebody else (<i>such as parents, a matchmaking agent, matrimonial site or a trusted third party</i>) takes a leading role in the choice of partner.</p> <p>On the outward face of it, arranged marriages may resemble marriages of convenience (<i>for example, where spouses have not met before the marriage or met only shortly</i>). However, an arranged marriage is a genuine marriage if it is a result of free will and wish of the spouses to create together a durable family unit as a married couple and to lead an authentic marital life.</p>
<p>Proxy marriage</p>	<p>A proxy marriage is a marriage in which one or both spouses are not physically present at the wedding ceremony and are usually represented by another person, 'proxy', who is authorised to stand in for him/her at the ceremony.</p> <p>Proxy marriages are not common in the EU (<i>they are even contrary to public order in some EU Member States</i>) but they could be frequently contracted in other countries.</p> <p>The reasons for marriage by proxy can be genuine (<i>for example when one spouse cannot attend the ceremony for reasons of military service or imprisonment or is unable to travel due to serious health issues</i>) but they</p>

¹⁵ See 2009 Commission guidelines.

	<p>can also be nefarious (<i>such as to quickly contract a marriage of convenience without the EU spouse having to travel to another country for the wedding ceremony</i>).</p> <p>Concerns about the genuineness of marriages by proxy have been raised in particular in one Member State, due to the difficulties of assessing the authenticity of proxy marriage certificates or to instances where EU citizens become victims of identity fraud and unwittingly (<i>as their presence is not required at the ceremony</i>) get married by proxy to non-EU nationals.</p>
Consular marriage	<p>Many countries, including some Member States, allow marriages between their own citizens or between their own citizens and nationals of other countries to be solemnised at their embassies or consulates. Consular marriages are clearly lawful and valid and should not automatically trigger suspicions.</p> <p>Some Member States, however, reported that consular marriages contracted at their embassies could be targeted by abusers seeking to have their marriage celebrated under national laws of the EU country where they would like to live while avoiding having to do that in that country, in front of a person officiating the ceremony who may be better trained to detect suspected cases of marriages of convenience. This regards situations where the law of the Member State concerned allows for consular marriages to be contracted between its own nationals and non-EU nationals.</p>
Marriages of convenience	<p>Marriages of convenience can be subdivided into several groups, depending on the mode in which they have been set up. The list below should not be considered to be exhaustive.</p>
'Standard' marriage of convenience	<p>Probably the most common <i>modus operandi</i> related to marriages of convenience is a marriage where both spouses are willing accomplices, freely consenting to enter into a relationship designed to abuse EU law.</p> <p>By no means is this the exclusive way in which a marriage of convenience can be contracted. The degree to which the EU citizens freely consent to enter into a marriage of convenience can significantly differ.</p>
Marriage by deception	<p>A marriage by deception arises when the EU spouse is deceived by the non-EU spouse to genuinely believe that the couple will lead a genuine and lasting marital life.</p> <p>Such marriage is a marriage of convenience and should be tackled accordingly, with due regard to the innocence of the EU spouse. In such marriages, the EU citizen is not a willing accomplice, but a victim guilty only of good faith.</p> <p>Such marriages typically, but not necessarily, follow a short relationship on the internet, or after the EU citizen has met the non-EU spouse in a foreign country on holidays.</p> <p>They may involve violence and threatening behaviour, particularly if the</p>

	<p>EU spouse has started to have concerns and is unwilling to participate in the immigration process.</p>
<p>Human trafficking</p>	<p>Alarming, marriages of convenience include in many cases elements of trafficking in human beings¹⁶.</p> <p>According to Article 2(1) of Directive 2011/36/EU: <i>"Member States shall take the necessary measures to ensure that the following intentional acts are punishable:</i></p> <p><i>The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".</i></p> <p>According to its Article 2(3), exploitation includes, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.</p> <p>Of relevance in this context is also Recital 17 of Directive 2011/36/EU, which provides the following:</p> <p><i>"While Directive 2004/81/EC provides for the issue of a residence permit to victims of trafficking in human beings who are third-country nationals, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States (4) regulates the exercise of the right to move and reside freely in the territory of the Member States by citizens of the Union and their families, including protection from expulsion, this Directive establishes specific protective measures for any victim of trafficking in human beings. Consequently, this Directive does not deal with the conditions of the residence of the victims of trafficking in human beings in the territory of the Member States."</i></p> <p>Besides what is typically considered as trafficking in human beings (<i>for example women brought to the host EU country and forced to marry someone</i>), organised crime groups may exploit a position of vulnerability of EU spouses (<i>such as poverty, outstanding debt, homelessness, drug addiction, unemployment or psychological vulnerability</i>) to have them contract a marriage of convenience.</p> <p>In cases where EU citizens are trafficked, they may not always realize that their vulnerability has been exploited and they protect those who have misused them (<i>for example when a heavily indebted person is</i></p>

¹⁶ See most recently the Early Warning Notification by EUROPOL of March 2014 "Marriages of convenience: A link between facilitation of illegal immigration and trafficking in human beings", noting an emerging trend.
https://www.europol.europa.eu/sites/default/files/publications/ewn_2014_8_public_fp_phoenix_fp_checkpoint_marriages_2.pdf.

	<p><i>promised financial reward</i>).</p> <p>Such marriage is a marriage of convenience and should be tackled accordingly.</p> <p>At the same time, the victims of trafficking should be protected. According to Directive 2011/36/EU, Member States must ensure that assistance and support are provided to victims before, during and after criminal proceedings in order to enable them to exercise the rights conferred upon them by the standing of victims in criminal proceedings. In particular, this support may consist of the provision of accommodation, medical treatment including psychological assistance, as well as information, and interpretation and translation services, if necessary.</p> <p>During the investigation and criminal proceedings, victims must receive appropriate protection including access to legal counselling and representation, free of charge if necessary, and access to a witness protection programme, where appropriate. Any further trauma to the victims should be avoided, for example by sparing them any contact with the accused. Moreover, they must have access to compensation for victims of violent crimes of intent.</p>
<p>Forced marriage</p>	<p>Finally, EU citizens can sometimes be coerced into marriage without their consent or against their will.</p> <p>Forced marriages often include elements of trafficking in human beings and are a gross breach of fundamental rights violating the principle of the freedom and autonomy of individuals. They are a form of violence against women and men.</p> <p>As such, forced marriages are not protected by international¹⁷ or EU law¹⁸.</p> <p>Forced marriages could also be contracted with the purpose of obtaining an EU right of residence. Such forced marriages can thus be considered as marriages of convenience falling within the scope of the Handbook.</p> <p>In forced marriages, the coerced EU spouse is a victim and should be protected and offered assistance. Some Member States have developed dedicated policies to tackle forced marriages, for instance establishing that forcing someone to marry constitutes a distinct criminal offence.</p>
<p>Bogus marriage</p>	<p>Finally, some 'marriages' are no real marriages at all, being a complete sham.</p> <p>Sometimes, marriages of convenience are labelled as bogus or sham but this is, strictly speaking, not correct. Unlike marriages of convenience, which are formally valid, bogus or sham marriages are invalid or entirely fictitious. Bogus marriages may involve forgery or the misuse of documents relating to another person.</p>

¹⁷ *Inter alia*, Article 16(2) of the Universal Declaration of Human Rights or Article 16(1)(b) of the Convention to Eliminate All Forms of Discrimination Against Women.

¹⁸ See also 2009 Commission guidelines.

	The formal validity of marriages of convenience is their ' <i>competitive advantage</i> ' over bogus marriages.
Distinguishing from marriages of convenience in other areas of law	There may be definitions of marriages of convenience in other areas of EU law. However, each definition needs to be understood in the light of the purpose of its rules.
Family reunification by non-EU nationals	Directive 2003/86/EC on the right to family reunification aims at determining the conditions for the exercise of the right to family reunification by non-EU nationals residing lawfully on the territory of the Member States. It aims at promoting the integration of non-EU nationals. Article 16(2b) defines ' <i>marriage of convenience</i> ' as a marriage contracted for the sole purpose of enabling the person concerned to enter or reside in an EU country. Directive 2003/86/EC does not apply to family members of an EU citizen (Article 3(3)). In addition, Denmark, Ireland and the UK are not bound by this directive.
EU Council Resolution	On 4 December 1997 the Council of the European Union adopted a Resolution on measures to be adopted on the combating of marriages of convenience ¹⁹ . <i>For the purposes of the resolution, a 'marriage of convenience means "a marriage concluded between an EU citizen or a non-EU national legally resident in an EU country and a non-EU national, with the sole aim of circumventing the rules on entry and residence of non-EU nationals and obtaining for the non-EU national a residence permit or authority to reside in an EU country.</i> This resolution concerns therefore not only marriages falling within the scope of EU free movement rules but also marriages between non-EU nationals and EU citizens who have not exercised their right to free movement as well as marriages between non-EU nationals. Although, given its broad remit, the definition it provides goes beyond the scope of this Handbook, this Resolution contains elements on hints of abuse which are of relevance as regards operational measures to tackle marriages of convenience in general; these have consequently been reflected into section 4 of the present Handbook.
Section 3	APPLICABLE LEGAL FRAMEWORK
	Investigation of marriages of convenience and decision-making on the basis of the evidence collected by national authorities may be challenging for all the parties involved.

	<p>An incorrect decision restricting free movement rights on grounds of abuse may have an important negative impact on the rights and well-being of EU citizens and their families who have genuinely made use of their right to free movement. Such a decision may damage the well-being of their children, violate their fundamental rights to marry and to respect for private and family life or lead to the wrongful imposition of sanctions. An incorrect or disproportionate decision restricting rights may also lead to claims for damages or compensation against national authorities, as well as incur high costs in legal proceedings both for individuals and for the national authorities.</p> <p>This section aims at helping national authorities to identify all the factors and rules that must be taken into account when wanting to take any measure to prevent or tackle abuse, in particular the EU rules on free movement and fundamental rights (<i>notably the right to respect to family life and the best interests of the child</i>).</p> <p>This section also aims to draw the attention of national authorities to the fact that any formal decision taken by national authorities in relation to marriages of convenience has to comply with a number of procedural safeguards such as that it must be in writing, list all the elements considered and advise on when and where to appeal against the decision.</p>
Safeguards and rights apply at all stages	<p>Fundamental freedoms and rights and safeguards must be respected by national authorities at all stages, i.e. when taking any measure or decision relating to an alleged case of abuse, starting from deciding whether it would be justified to launch an investigation and ending with the final decision to deny a right under EU law on free movement of EU citizens.</p>
Section 3.1	Relevant rules and principles
	<p>Identifying and understanding the relevant rules and considerations is an essential step towards effectively preventing and tackling marriages of convenience under EU law on free movement of EU citizens.</p>
Section 3.1.1	EU law on free movement of EU citizens
Free movement is the general rule but it is not unlimited	<p>The right of EU citizens and their families to move and reside freely is the general rule, the point of departure.</p> <p>However, the right of free movement is not an unlimited right. In fact, Article 21 of the Treaty on the Functioning of the European Union which enshrines this right explicitly provides that the right is subject to the limitations and conditions laid down in the EU Treaties and by the measures adopted to give them effect.</p> <p>Directive 2004/38/EC lays down the conditions under which that right may be exercised and the limitations which may be imposed on that right for the attainment of legitimate objectives recognised by the EU legislator, such as to prevent crime or to ensure that EU citizens who are not economically active in the host EU country do not become an unreasonable burden on the public finances.</p>

	<p>The right to move and reside freely can thus be restricted when the individual EU citizen concerned does not, or no longer meets the conditions EU law attaches to free movement of EU citizens.</p> <p>It can also be restricted when personal conduct of an EU citizen represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society related to public policy, public security or public health.</p> <p>Finally, it can be restricted in the event of abuse.</p> <p>Any restriction of the fundamental right to free movement must, however, be justified and proportionate in each individual case of alleged abuse.</p>
<p>Narrow interpretation</p>	<p>The Court of Justice has confirmed in its established case law²⁰ that, given the fundamental status of freedom of movement which is derived directly from the EU Treaties, the provisions of EU law granting that freedom must be given a broad interpretation, whereas derogations from that principle must be interpreted strictly.</p> <p>Against this background, it must be stressed that free movement of EU citizens and their families must not be unduly restricted by unjustified or disproportionate national measures aimed at tackling abuse or protecting national immigration policies²¹. Measures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights.</p> <p>Thus, national authorities may not take measures based on a general presumption of abuse which would automatically result in comprehensive checks of all EU citizens married to non-EU nationals wishing to move to their territory.</p> <p>At the same time, nobody can be allowed to take abusive advantage of the right to move and reside freely within the EU.</p> <p>EU law on free movement of EU citizens provides for a number of material and procedural safeguards which aim at granting EU citizens adequate protection in dealings with both administrative authorities and the courts concerning any incorrect or disproportionate decision restricting their right to move and reside freely within the EU.</p>
<p>Specific provisions of EU law on free movement of EU citizens</p>	<p>Article 35 of the Directive allows Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.</p> <p>At the same time however, it explicitly stipulates that <i>"any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31 [of the Directive]."</i></p>

²⁰ Recently, case C-348/99 *I. v Oberbürgermeisterin der Stadt Remscheid*.

²¹ Case C-127/08 *Metock and others*.

<p>Material safeguards derived from proportionality principle</p>	<p>The requirement that all measures taken to refuse, terminate or withdraw any right conferred by the Directive on grounds of abuse should respect the principle of proportionality is a specific expression of this general principle of EU law established in Article 5(4) of the Treaty on European Union and settled case law of the Court of Justice.</p> <p>The powers conferred on EU Member States do not allow them to make arbitrary use of these powers. EU law on free movement of EU citizens confers on EU citizens and their family members rights which are enforceable by them in the courts and which the courts must protect²².</p> <p>The principle of proportionality requires an individual assessment of every case and prohibits considerations of general prevention.</p> <p>The requirement of individual assessment necessitates that national authorities must base their decisions in individual cases exclusively on the personal conduct of the individuals concerned and cannot rely on justifications that are isolated from the particulars of the cases.</p> <p>The application of the principle of proportionality on the ground requires:</p> <ul style="list-style-type: none"> ○ firstly, to identify a legitimate objective pursued; ○ secondly, that the measure needs to be suitable to achieve the objective; and ○ thirdly, that the measure must be necessary to achieve this objective.
<p>Decision must be pursuing a legitimate objective</p>	<p>Firstly, the measure to be taken by the national public body which may interfere with the EU right to free movement must be pursuing a legitimate objective compatible with EU law.</p> <p>Typically, in the context of marriages of convenience, the national considerations underlying the legitimate objective of the fight against abuse are related to the protection of interests of the host society, such as:</p> <ul style="list-style-type: none"> ○ public order and prevention of disorder or crime; ○ controlling immigration; or ○ the protection of the rights and freedoms of others.
<p>...appropriate to achieve the objective</p>	<p>Secondly, the measure must be suitable and appropriate to achieve the objective in order to pass the test of proportionality.</p>
<p>... necessary to achieve the desired objective ...</p>	<p>Thirdly, to pass the test of proportionality, the measure must be necessary to achieve the desired objective.</p> <p>The test of proportionality fails where less restrictive measures may still allow attaining the objective pursued because the measure is then considered to go beyond what is necessary in order to attain the objective. For example, this consideration should be taken into account when deciding on the type of sanction for an established offence.</p>

<p>Legislative and individual measures covered</p>	<p>The principle of proportionality applies not only in relation to individual measures taken on the basis of national rules, but also to the national rules as such²³.</p>
<p>Consequences of incorrect application of proportionality test</p>	<p>The incorrect or insufficient application of the proportionality test may result in the original decision being overturned by the courts which are tasked by EU law on free movement of EU citizens (<i>Article 31(3) of the Directive</i>) to assess the proportionality of the restrictive decisions challenged by concerned EU citizens and their families.</p> <p>If found disproportionate, the challenged decision must be overturned by the courts.</p>
<p>Considerations to be taken into account</p>	<p>The need to ensure that any measure refusing, terminating or withdrawing a right under the Directive on grounds of abuse respects the material safeguard of proportionality, as expressed in Article 35, is further reflected in the procedural safeguards applicable to such measures, provided for in Articles 30 and 31 of the Directive – also referred to in Article 35.</p> <p>According to Article 31(3) of the Directive, the redress procedures must ensure that such measures are not disproportionate, particularly in view of the requirements laid down in Article 28.</p> <p>Article 28(1) of the Directive obliges national authorities carrying out the test of proportionality to take account all relevant factors and explicitly instructs them to consider:</p> <ul style="list-style-type: none"> ○ how long the person concerned has resided on its territory; ○ his/her age; ○ state of health; ○ family and economic situation; ○ social and cultural integration into the host EU country; and ○ the extent of his/her links with the country of origin. <p>This list is not exhaustive: all other relevant factors and considerations must be identified and taken into account.</p>
<p>Non-discrimination on the grounds of nationality</p>	<p>The case law²⁴ of the Court of Justice on restrictions on the right to move and reside freely on grounds of public policy confirms that this right of EU citizens may be restricted only for conduct sanctioned by the law of the host EU country or with regard to which other genuine and effective repressive measures intended to combat such conduct were taken in relation to their own nationals.</p> <p>This principle of non-discrimination should be extended to restrictions of the right to move and reside freely on other grounds, such as to measures taken to prevent marriages of convenience.</p>

²³ Case 36/75 *Rutili*.

²⁴ Cases 115/81 *Adoui and Cornuaille* and C-268/99 *Jany*.

	<p>Consequently, EU Member States may restrict the right of EU citizens to move and reside freely on the grounds of marriages of convenience only where such conduct is also sanctioned and genuinely tackled in relation to own nationals.</p>
Section 3.1.2	Wider context of European and international law
	<p>Besides EU law on free movement of EU citizens, there are other important instruments of European and international law that need to be taken into account when marriages of convenience are detected, investigated and sanctioned. It needs to be stressed that these instruments apply together with the rules and principles of EU law, as explained above.</p> <p>Of particular relevance for the purposes of this Handbook is the right to marry, 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 (<i>hereinafter referred to as the Charter</i>), which is binding on EU institutions as well as EU Member States when implementing EU law.</p> <p>In accordance with Article 52(3) of the Charter, the meaning and scope of rights corresponding to rights guaranteed by the European Convention on Human Rights (<i>hereinafter referred to as the Convention</i>) should be the same as those laid down by this Convention.</p> <p>Guidance on the interpretation of the rights enshrined in the Charter therefore takes into account the corresponding provisions of the Convention.</p>
Section 3.1.2.1	Right to marry
EU law	<p>Article 9 of the Charter stipulates that 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.</p> <p>According to the Explanations Relating to the Charter (<i>Official Journal 2007/C 303/02</i>), this right is similar to that afforded by the Convention, but its scope may be wider when national legislation so provides.</p>
European law	<p>Article 12 of the Convention provides for the right to marry and to found a family, according to the national laws governing the exercise of this right.</p> <p>In contrast to some other fundamental rights protected by the Convention (<i>such as the right to respect for family life, freedom of thought, conscience and religion, freedom of expression or freedom of assembly and association</i>), Article 12 of the Convention does not contain any</p>

	<p>provision that would specifically permit interference with or limitation of the right to marry²⁵.</p> <p>However, this does not mean that the right to marry, as protected by Article 12 of the Convention, is an absolute right. This Article confers upon national authorities certain discretion on how to govern the exercise of the right to marry at national level. The leeway granted to national authorities is, however, limited.</p>
<p>Case law of the Court of Human Rights</p>	<p>The case law of the European Court of Human Rights has taken a restrictive approach towards limitations of the right to marry in national laws.</p> <p>The Court of Human Rights has nevertheless recognised that national laws may lay down rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy. National laws may also impose formal rules concerning matters as publicity and the solemnisation of marriage.</p> <p>However, any limitations introduced in national laws must not restrict or reduce the right to marry in such a way or to such an extent that the very essence of this right is impaired and must not deprive individual persons (<i>or a category of persons</i>) of full capacity to marry or substantially interfere with their exercise of the right²⁶.</p>
<p>Measures to tackle marriages of convenience</p>	<p>The Convention, as confirmed by the case law of the European Court of Human Rights, authorises national authorities, in the context of immigration laws and for justified reasons, to introduce in national laws substantive rules the purpose of which is to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage²⁷.</p> <p>National authorities will not necessarily be acting in violation of Article 12 of the Convention if they subject marriages involving foreign nationals to scrutiny in order to establish whether or not they are marriages of convenience. Should national authorities find that the proposed marriage is one of convenience, they can prevent the marriage from being celebrated.</p> <p>For marriages of convenience already concluded abroad, national authorities can refuse to recognise their effects for family reunification. This is because the right to marry protects the right to enter into a genuine marriage, and does not imply a right to secure an abusive advantage.</p> <p>Under the Convention, national laws may also allow for the delaying of a proposed marriage between an EU citizen and a non-EU national for</p>

²⁵ In relation to the right to respect for family life, Article 8(2) of the Convention authorises interference which is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

²⁶ See, for example, 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).

²⁷ Judgment *O'Donoghue and Others v. the United Kingdom* (case 34848/07).

	<p>a reasonable period so as to establish whether the marriage is one of convenience²⁸.</p> <p>Similarly, in case of an intended marriage between an EU citizen and a non-EU national, the future spouses may be required to notify their intention to marry to the authorities and, if necessary, submit general information (<i>such as name, place and date of birth, current address and telephone number(s), and nationality</i>), their immigration history and residence status of the non-EU future spouse, including the obligation to reply to questions about whether or not this person has been expelled in the past²⁹.</p>
International law	<p>Article 16 of the Universal Declaration of Human Rights guarantees the right to marry and to found a family, which is the natural and fundamental group unit of society and is entitled to protection by society and the state.</p> <p>Article 23 of the International Covenant on Civil and Political Rights also recognises the right to marry.</p>
Section 3.1.2.2	Right to family life
EU law	<p>Article 7 of the Charter provides that everyone has the right to respect for his or her family life.</p> <p>According to the Explanations Relating to the Charter, this right corresponds to the right guaranteed by Article 8 of the Convention. As explained above, the meaning and scope of this right are the same as those of the corresponding article of the Convention.</p> <p>Consequently, the limitations which may be imposed on this right are the same as those allowed by Article 8 of the Convention.</p>
European law	<p>Article 8 of the Convention confirms that everyone has the right to respect for family life.</p> <p>Public authorities may interfere with this right only if that is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.</p>
Case law of the Court of Human Rights	<p>Case law of the European Court of Human Rights confirms that States are entitled to control the entry of non-nationals into their territory and their residence there.</p> <p>The Convention does not guarantee the right of an alien to enter or to reside in a particular country.</p> <p>However, if a decision restricting the right to enter and reside will interfere with the right to respect for family life, it must be necessary in</p>

²⁸ See, for example, case *Sanders v France*, cited above.

²⁹ See, for example, case *Klip and Krüger v the Netherlands*, cited above.

	<p>a democratic society and proportionate to the legitimate aim pursued.</p> <p>The relevant factors in this test in relation to marriages of convenience between EU citizens and non-EU nationals can be outlined as follows³⁰:</p> <ul style="list-style-type: none"> ○ the nature and seriousness of the offence committed by the non-EU spouse; ○ the length of non-EU spouse's stay in the country from which he or she is to be expelled; ○ the time elapsed since the offence was committed and the non-EU spouse's conduct during that period; ○ the nationalities of the various persons concerned; ○ non-EU spouse's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; ○ whether the EU spouse knew about the offence at the time when he or she entered into a family relationship; ○ the seriousness of the difficulties which the EU spouse is likely to encounter in the country to which the appellant is to be expelled; ○ whether there are children of the marriage, and if so, their age; ○ the best interests and well-being of the children, in particular the seriousness of the difficulties which any children are likely to encounter in the country to which the non-EU spouse is to be expelled; and ○ the solidity of social, cultural and family ties with the host country and with the country of destination.
<p>Relationship between EU law and Article 8 of the Convention</p>	<p>When seeking to restrict the rights of parties in a marriage of convenience, national authorities must comply with two tests: under EU law on free movement of EU citizens and under Article 8 of the Convention.</p> <p>Those two tests are distinct and non-interchangeable but share a number of similar features, notably that both require that the restrictive decision is justified and proportionate.</p> <p>The fact that such restrictions may be found compatible with Article 8 of the Convention does not mean that they can automatically be considered as compatible also with EU law on free movement of EU citizens.</p>
<p>International law</p>	<p>Article 16 of the Universal Declaration of Human Rights guarantees the right to marry and to found a family, which is the natural and fundamental group unit of society and is entitled to protection by society and the state. Article 12 of the Declaration also ensures that no one shall be subjected to arbitrary interference with his family.</p> <p>Article 23 of the International Covenant on Civil and Political Rights also recognises the right to marry. Article 17 of the Covenant protects everyone against arbitrary or unlawful interference with their family.</p>

³⁰ Judgment *Üner v The Netherlands* (case 46410/99).

Section 3.1.2.3	Children's rights
	<p>Having a child from the marriage is a strong "<i>counter-indication</i>" of abuse. Still, there may be some marriages of convenience involving children, mostly from previous relationships of the spouses.</p> <p>Where children are thus involved, their rights must be properly identified and taken into account when tackling marriages of convenience.</p>
EU law	<p>Article 24 of the Charter provides that children have the right to such protection and care as is necessary for their well-being and reiterates that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.</p> <p>Moreover, children have the right to maintain on a regular basis a personal relationship and direct contact with both their parents, unless that is contrary to their interests.</p> <p>According to the Explanations Relating to the Charter, this right is based on the UN Convention on the Rights of the Child, particularly Articles 3, 9, 12 and 13 thereof.</p>
European law	<p>Article 8 of the Convention, which protects the right to respect for family life, applies also to children of spouses who have entered into a marriage of convenience.</p>
UN Convention on the Rights of the Child	<p>The main instrument of international law is the United Nations Convention on the Rights of the Child of 20 November 1989 which all EU Member States have ratified.</p> <p>The UN Convention defines the child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.</p> <p>The most relevant provision of the UN Convention for the purposes of this Handbook is Article 3(1) which stipulates that "<i>[i]n 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.</i>"</p> <p>More practical advice on the application of this provision can be found in UNHCR Guidelines on Determining the Best Interests of the Child³¹ of May 2008.</p> <p>To correctly protect the best interests of the child requires first to identify these interests (<i>typically, to be able to continue to reside in the host EU country with both parents, notably where the child is well integrated in the host EU country or is in education there</i>) and then to assess whether the strength of any other consideration, or the</p>

³¹ <http://www.unhcr.org/4566b16b2.html>.

	<p>cumulative effect of other considerations, outweighed the consideration of the best interests of the children.</p> <p>The best interests of the children are thus the starting point. The protection of the rights of the child does not mean that the final decision must inevitably be in conformity with the identified best interests. What is determined as the best interests should ordinarily prescribe the outcome of the case. Considerations of substantial strength will be needed to permit a different conclusion.</p> <p>In particular, national authorities must also pay due respect to the right of children not to be separated from their parents against their will (<i>Article 9 of the UN Convention</i>) and ensure that children who are capable of forming their own views can express those views freely and that their views are given due weight in accordance with the age and maturity of the child (<i>Article 12 of the UN Convention</i>).</p>
<p>Practical application</p>	<p>In the event of a marriage of convenience, removal of one or both spouses from the host EU country is a possible sanction, provided such as measure is justified and proportionate to the objective pursued, as explained above.</p> <p>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 protection of children is even more relevant where the child's welfare is jeopardised by conduct which is not of their making, but of the parents' making.</p> <p>In principle, children and their parents enjoy together a single family life and whether or not the removal of a parent would interfere disproportionately with their family life has to be looked at by reference to the family unit as a whole and the impact of removal upon each family member. The right to respect for the family life of one family member inescapably encompasses the right to respect for the family life of other family members with whom that family life is enjoyed.</p> <p>Needless to say, affected children must be allowed to freely express their views on the decisions affecting their parents and indirectly also them. Such views must be taken into consideration in accordance with their age and maturity, as requested not only by Article 12 of the Convention, but also by Article 24(1) of the Charter.</p>
<p>Consequences of nationality of the child</p>	<p>The application of the above provisions related to the fundamental rights of children also depends on the nationality of the children – if they are nationals of the host EU country, they benefit from additional protection under domestic and international laws prohibiting expulsion of own nationals³² or in exceptional cases from case law of the Court of Justice on Union citizenship³³ where removal of a non-EU parent who entered into a marriage of convenience would force the child to leave the host EU country or the EU as a whole.</p>

³² Article 3 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

³³ Cases C-34/09 *Ruiz Zambrano*, C-256/11 *Dereci* and joined Cases C-356/11 and C-357/11 *O. and S.*

Section 3.1.2.4	Other relevant fundamental rights
Prohibition of inhuman or degrading treatment	<p>When tackling abuse, national authorities must not subject the investigated persons to degrading treatment. Measures taken by national authorities, notably when investigating potential abuse, must respect the integrity of the persons concerned. The investigation methods must not be such so as to humiliate or debase the subjects.</p> <p>A failure to comply with the above could violate Article 4 of the Charter <i>(as well as Article 3 of the Convention)</i>.</p>
Prohibition of discrimination	<p>Similarly, in their measures tackling abuse, national authorities must not 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.</p> <p>Such discrimination would violate Article 21 of the Charter <i>(and possibly Article 14 of the Convention as well)</i>. National authorities should use objective criteria when deciding who should be subject to investigation and ensure that measures to tackle abuse are not carried out in a discriminate manner.</p>
Section 3.2	Evidential burden and burden of proof
Evidence	<p>In the case of suspected marriages of convenience, as in the case of other suspected offences, the measures taken to investigate the case at stake and to collect evidence must comply with some essential procedural safeguards imposed by law, as explained below.</p> <p>These safeguards apply to all measures taken by national authorities in the framework of the fight against abuse.</p> <p>There is no EU-wide common approach to the evidence required to prove that a marriage is one of convenience. The evidential requirements vary across EU Member States. Member States' authorities must take a case-by-case approach and review all various elements that might constitute evidence to support or oppose the conclusion that a marriage of convenience has been contracted.</p> <p>Collected evidence must be considered in its entirety and its assessment must be based on a combination of all information collected during the course of investigation.</p> <p>Only in this way can due attention be paid to all the circumstances of the individual investigated marriage.</p> <p>The investigated marriage must be reviewed in a neutral, unbiased way so evidence both in favour and against the original suspicion is sought, collected and duly taken into account.</p> <p>A failure to carry out the investigation in an unbiased manner and to collect the evidence in the same way may cause the final decision to fail to comply with the procedural requirements under national and EU</p>

	law.
Burden of proof	The burden of proof in relation to the right to enter a Member State and to reside there under EU law on free movement of EU citizens is twofold .
Burden of proof is on the non-EU spouse when lodging an application	<p>Firstly, it is up to the non-EU spouses to prove that they are beneficiaries of EU law on free movement of EU citizens.</p> <p>Under the Directive, when applying for an entry visa or a residence card, they must provide the necessary documents which are required according to the Directive.</p> <p>This is done by presenting supporting documents proving:</p> <ul style="list-style-type: none"> ○ the identity of the applicant (<i>for example by presenting a valid passport</i>); ○ that the applicant is a spouse of the EU citizen from whom the rights are claimed to be derived (<i>for example by presenting a valid marriage certificate</i>); and ○ that the applicant accompanies the EU citizen who will exercise the free movement right or joins the EU citizen who is already exercising that right (<i>e.g. a proof that the EU citizen already resides in the host EU country or a confirmation that the EU citizen will travel there</i>). <p>Where the applicant fails to provide sufficient evidence proving the above, the competent national may conclude that the applicant has no right of entry or residence under EU law on free movement of EU citizens and may refuse to issue the requested entry visa or residence card.</p>
Standard of evidence	<p>However, it is an established principle of EU law on free movement of EU citizens that applicants have the right of choice of the documentary evidence by which they wish to prove that they are beneficiaries of EU law on free movement of EU citizens (<i>i.e. of the family link</i>).</p> <p>National authorities may only suggest to the applicants which specific documents (<i>e.g. a marriage certificate as the means of proving the existence of marriage</i>) are the best to be used, but may not refuse other appropriate means of proof (<i>such a means of proof could be, for instance, the birth certificate of a common child stating that its parents are married</i>).</p>
Exhaustive list of supporting documents	The above list of supporting documents is exhaustive ³⁴ and does not foresee that EU citizens and their non-EU spouses must also present proof that their marriage is not of convenience. As a consequence of the above, regardless of whether or not there is any suspicion that their marriage is not genuine, non-EU spouses are formally required to present only proof of a marriage which is valid and currently

³⁴ See, for example, Article 10(2) of the Directive or Recital 14 which stipulates that "[t]he supporting documents required by the competent authorities for the issuing of [...] a residence card should be **comprehensively specified** in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members." (emphasis added).

	<p>existing.</p> <p>Couples who have contracted a marriage of convenience will typically be able to fulfil this requirement as their marriage is formally valid.</p>
<p>Burden of proof is on the national authorities to prove abuse</p>	<p>Married couples cannot be obliged or required, as a rule, to present evidence that their marriage is not abusive.</p> <p>EU citizens and their family members enjoy the benefit of assumption, meaning that they do not need to provide evidence that their marriage is genuine. To require this would go beyond the requirement to present proof that their marriage is valid.</p> <p>This reflects the principle of law that the person who lays charges has to prove the charges (<i>'semper necessitas probandi incumbit ei qui agit'</i>).</p> <p>The burden of proof clearly rests on the national authorities who suspect that a non-EU national has entered into a marriage of convenience with an EU citizen for the sole purpose of being granted an EU right to free movement to prove that the marriage is of convenience.</p>
<p>Burden of proof and the couple</p>	<p>However, if the national authorities have well-founded suspicions as to the genuineness of a particular marriage, which are supported by evidence (<i>such as conflicting information provided by the spouses</i>), they can invite the couple to produce further relevant documents or evidence.</p> <p>Spouses have the obligation to co-operate with the authorities. This obligation should be communicated to the spouses.</p> <p>Should the couple provide additional evidence that dispels the concerns the national authorities, the case can be closed and the marriage considered as genuine.</p> <p>Should the couple fail to provide evidence that would dispel the suspicions which can reasonably be expected to be available to genuine couples or even should the couple decide not to provide any evidence at all, this cannot form the sole or decisive reason to conclude that the marriage is of convenience.</p> <p>It can however be taken into account by the authorities together with all other relevant circumstances in their assessment as regards the genuine or not nature of the marriage.</p>
<p>Evidential standard</p>	<p>An investigation into a marriage can only take place where there are reasonable doubts about its genuineness.</p> <p>Whilst, however, such reasonable doubts are sufficient as grounds for launching an investigation, once an 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 concerned, in compliance with the relevant evidential standard.</p> <p>The evidential standard may differ in accordance to the legal nature of</p>

	the objective the national authorities pursue when tackling abuse in any abusive marriage ³⁵ .
Section 3.3	Procedural safeguards must be respected when adopting any decision which may restrict the right to free movement
	Once the national authorities: <ul style="list-style-type: none"> ○ have sufficient evidence to conclude that the investigated relationship is a marriage of convenience; ○ have ensured that the assessment complies with all the material safeguards provided for in national, EU and international law; and ○ and that it is proportionate they can formally adopt a decision restricting EU rights to free movement and residence on the grounds that the investigated relationship is a marriage of convenience.
	The decision itself must furthermore comply with several procedural safeguards stemming from EU law in order to be lawfully made.
EU law on free movement of EU citizens	Those safeguards are based on Article 35 of the Directive itself, which, as already highlighted above, allows EU Member States to adopt the necessary measures to refuse, terminate or withdraw any EU free movement right in the case of marriages of convenience, provided that <i>"any such measure [is] subject to the procedural safeguards provided for in Articles 30 and 31 [of the Directive]."</i> <p>As confirmed by case law of the Court of Justice, any non-EU national married to an EU citizen claiming to be beneficiary of the Directive benefits from the minimum procedural guarantees that the Directive provides.</p> In this respect, it is irrelevant for the application of the procedural safeguards set out in the Directive whether or not the non-EU family member is lawfully resident in the host Member State ³⁶ .
The Charter	The specific safeguards of the Directive must be also placed in the context of other relevant protected fundamental rights, such as the right to an effective remedy and to a fair trial (Article 47 of the Charter) or the right of defence (Article 48 of the Charter). <p>In addition to the below procedural rights, enshrined and fleshed out by the Directive, national authorities must respect other important fundamental rights and principles of general nature, such as the right</p>

³⁵ For example, when the national authorities want to address abusive conduct of a particular couple in the context of criminal proceedings, the relevant national criminal evidential standard applies. A different evidential standard may apply when the same conduct is pursued under immigration law, administrative law or civil status law.

³⁶ Otherwise, those safeguards would be deprived of their essential effectiveness: see case C-50/06 *Commission v. Netherlands* (paragraphs 35-37) and case C-459/99 *MRAX* (paragraphs 101-103).

	to good administration.
Section 3.3.1	Safeguards related to any decision which may restrict the right to free movement
Article 30 of the Directive	<p>Article 30 of the Directive requires that any decision taken by national authorities which restricts the right to free movement must comply with a set of safeguards protecting the right to an effective remedy, which is a general principle of EU law reflected in Article 47 of the Charter.</p> <p>This means ensuring that:</p> <ul style="list-style-type: none"> ○ the persons concerned understand the situation they have found themselves in and therefore may take effective steps to ensure their defence³⁷; and ○ national courts may properly review their case. <p>Any action taken by national authorities must be properly justified and explained so that it can be settled by the action of a court.</p>
The decision must be in writing and be notified	The decision must be in writing . This safeguard is necessary to make it possible for courts, if called upon by appellants, to carry out a proper judicial review of the decision. The decision must also be notified to its addressees.
Comprehensible	<p>The decision must be made in a way that its addressees are able to comprehend its content and all implications for them which must be explicitly spelt out.</p> <p>The decision does not have to be translated into the language of its addressees³⁸; particularly where it is a lesser known language, but it does require national authorities to do what they can to make sure that its addressees understand what the decision is about and what it means for them.</p>
Fully justified	<p>The decision must inform its addressees, precisely and in full, of the grounds on which it is based³⁹.</p> <p>This safeguard aims at enabling the persons concerned to prepare their defence properly. It should be recalled that, in addition to the requirement of the Directive, national authorities must ensure that the decision also provides justification under Article 8 of the Convention; otherwise it may be overturned upon appeal.</p>
Advise on where and by when to appeal ...	The decision must specify the court or administrative authority with which its addressees may lodge an appeal . The decision must specify the time limit for the appeal .

³⁷ Case 36/75 *Rutili*.

³⁸ This was clarified in the Commission's proposal for the Directive (*COM(2001)257 final*).

³⁹ The Directive foresees a possibility not to inform of the grounds where this is contrary to the interests of State security but this does not seem to be particularly relevant to marriages of convenience.

<p>and allow for reasonable time before its execution</p>	<p>Where applicable, the decision must specify the time allowed for its addressees to leave the territory of the host EU country.</p> <p>Save in duly substantiated cases of urgency, the time allowed to leave the territory may not be less than one month from the date of notification.</p> <p>The concept of urgency must be understood in the context of the fundamental right to an effective remedy.</p> <p>With little time between the expulsion decision being taken and its actual enforcement, the persons affected may effectively have no chance to avail themselves of the safeguards and guarantees of EU law on free movement of EU citizens and other applicable fundamental rights instruments.</p> <p>As confirmed by case law⁴⁰ of the Court of Justice, the expulsion decision may not be executed before the persons concerned are able to avail themselves of the redress remedy.</p> <p>Where the removal is deemed urgent by national authorities and the persons affected are to be removed before the deadline of one month, national authorities must duly substantiate the decision.</p>
<p>Section 3.3.2</p>	<p>Safeguards related to the review of any decision restricting the right to free movement</p>
<p>Article 31 of the Directive</p>	<p>Article 31 of the Directive governs the situation where the decision which restricts the right to free movement, already rendered by national authorities, is being appealed by its addressees. It specifies the rights of the persons concerned and clarifies the requirements that must be met by the redress procedure.</p>
<p>Right to complete judicial protection</p>	<p>The persons whose EU free movement rights have been refused, terminated or withdrawn on the grounds of marriages of convenience are entitled to judicial redress procedures in the host Member State to appeal against the decision taken against them or to seek its judicial review.</p> <p>This aims at ensuring the necessary and appropriate judicial protection of EU citizens and their families whose fundamental freedoms may have been unduly restricted.</p>
<p>Administrative redress procedures</p>	<p>Complete judicial protection does not exclude the possibility for Member States of providing also for a redress procedure before an administrative authority.</p> <p>Where EU Member States have established administrative redress procedures, the persons affected must also have access to these redress procedures to be able to seek review of the decision taken against them.</p>
<p>Suspension of enforcement</p>	<p>Where the decision taken on the grounds of marriages of convenience comprises an expulsion decision, the persons affected must also be</p>

⁴⁰ Case 48/75 *Royer*.

	<p>provided with the possibility, together with their application for appeal against or judicial review of the expulsion decision, to apply for an interim order to suspend enforcement of that expulsion decision.</p> <p>In that case, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:</p> <ul style="list-style-type: none"> ○ where the expulsion decision is based on a previous judicial decision; or ○ where the persons affected have had previous access to judicial review; or ○ where the expulsion decision is based on imperative grounds of public security under Article 28(3) of the Directive. <p>This safeguard requires EU Member States to empower their courts to accede to requests for suspension of the expulsion order in cases meeting the above conditions.</p> <p>As the suspensory effect lasts only until the decision on the interim order has been taken (<i>and not the decision on the expulsion decision as such</i>), EU Member States should organise the procedure efficiently and rapidly to prevent any undue delays during which the person concerned cannot be removed.</p>
<p>Judicial redress not only focusing on legality of the contested measure but its proportionality as well</p>	<p>The redress procedures – <i>both judicial and administrative</i> – must allow for an examination not only of the legality of the decision but also of the facts and circumstances on which the proposed measure is based.</p> <p>The redress procedures must also ensure that the contested decision is not disproportionate, particularly in view of the requirements laid down in Article 28 of the Directive, as explained in Section 3.1.1.</p> <p>This provision makes it clear that the national court’s task is not only limited to assessing the legality of the contested decision (<i>which is likely to be of limited importance in cases of abuse</i>), but also the facts which form the basis for it.</p>
<p>Access to redress procedures from abroad</p>	<p>Where the persons concerned apply for redress while absent from the host EU Member State, they may be excluded from the host EU country pending the redress procedure.</p> <p>However, they may not be prevented from submitting their defence in person, except when their appearance may cause serious threat to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.</p> <p>This provision aims at guaranteeing the right of the persons affected to obtain a fair hearing and to present their defence in full.</p>
<p>Section 4</p>	<p>OPERATIONAL MEASURES WITHIN NATIONAL REMIT</p>

	<p>This section reflects practices distilled from national practices across the Member States and is not intended as a blueprint for all investigational patterns and processes. Rather, it should serve as a toolbox of solutions allowing Member States to set up tailored operational schemes fitting their specific needs and available resources.</p>
Section 4.1	Reasons and motivations behind marriages of convenience
EU citizens - financial gain	<p>To be able to tackle abuse, national authorities must understand the motivation driving involved parties to abuse EU law (<i>EU citizen, non-EU spouse and, if applicable, also facilitators</i>).</p> <p>The main reason why EU citizens engage in assisting non-EU nationals to abuse EU law on free movement of EU citizens seems to be financial gain. EU citizens who find themselves in a vulnerable position (<i>poverty, outstanding debt, homelessness or drug addiction</i>) are more likely to be convinced to contract a marriage of convenience in order to improve their situation. In many such cases, there are elements of human trafficking.</p>
Non-EU spouses – acquiring and protecting an EU right to enter and reside	<p>By definition, the main motivation for non-EU nationals to enter into a marriage of convenience is to obtain the right of entry and residence under EU law on free movement of EU citizens. For some non-EU nationals, a marriage of convenience with an EU citizen offers a route towards a right of residence which may be more stable and protected than other channels of migration, regular or irregular.</p> <p>Marriages of convenience may be also motivated by the desire to extend the stay for those whose right to remain in the host EU country has recently expired, or is close to expiry, and who may have exhausted all other means of extending their stay. The same motivations can very well apply to non-EU nationals who are threatened with removal from the host EU country.</p>
Facilitators – financial gain	<p>Where there are facilitators involved in a marriage of convenience, their main motivation is financial gain. The substantial amounts of money non-EU nationals are willing to pay get into the European Union makes marriages of convenience attractive to organised crime which benefits from the difference between the amounts they charge non-EU nationals and those they pay to EU spouses.</p>
Section 4.2	Hints that could trigger an investigation
Section 4.2.1	Nature of hints and safeguards protecting genuine couples
Differences in behaviour	<p>In case of doubts about the nature of the marriage of a given couple and with a view to deciding whether to trigger an investigation a number of hints could constitute one of the elements guiding the authorities. Abusive couples can be distinguished from genuine couples by observing their conduct and identifying meaningful hints of abuse that reveal the real intentions of the abusers.</p>

	<p>The notion of "<i>hints of abuse</i>" employed for the purposes of this Handbook must be understood as meaning that hints of abuse observed by national authorities never automatically and inevitably confirm the abusive nature of the marriage under consideration. There must always be a wider and neutral appreciation of all elements, for and against suspected abuse (<i>see the double-lock mechanism described below</i>). Hints of abuse may only trigger an open-ended investigation, with no pre-determined outcome.</p>
Section 4.2.1.1	<i>Nature of hints of abuse</i>
Nature of hints of abuse	An effective hint of abuse relates to a conduct which abusive couples are reasonably expected to exhibit <u>significantly more often than genuine couples</u> .
How should hints be constructed?	Effective hints of abuse must thus be directly linked to the difference in conduct . An effective hint of abuse is expected to be triggered significantly more often by abusive couples ⁴¹ . This means that there are no "safe" hints of abuse that can be triggered only by abusive couples as any single hint of abuse will be triggered by some genuine couples. Actually, it is very likely that any genuine couple will inevitably trigger one or several hints of abuse .
Inherent limitations of hints of abuse	The hints of abuse must therefore only be seen and understood in their entirety in order to be relevant for triggering an investigation. While a typical genuine couple may trigger several hints of abuse, typical abusers will trigger substantially more hints of abuse .
Section 4.2.1.2	<i>Hints of non-existence of abuse</i>
Minimising false positive cases	<p>When the national authorities tackle abuse on the ground, it cannot be excluded that they will be confronted with atypical but genuine couples that will score a comparable number of hints of abuse as some abusive couples.</p> <p>The approach described below is aimed at minimising the danger of considering a genuine couple as abusers.</p>
Free movement first	<p>Firstly, by 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.</p> <p>Taken together with the burden of proof, this translates into the "presumption of innocence" where EU citizens and their families are considered to have the right to move and reside freely <i>unless</i> proven guilty of abuse.</p>
Double-lock safeguard	Secondly, the danger of false identification of a genuine couple as abusive on the basis of " <i>hints of abuse</i> ", can be reduced by a prior verification of "hints that there is no abuse" (Section 4.3) which –

⁴¹ For instance, the spouses not having a joint bank account or having a large age difference could not be considered as effective hints of abuse; this can be the case also in many genuine marriages. On the other hand, the spouses not knowing crucial personal information about each other may be considered as an effective hint of abuse.

	<p><i>unlike hints of abuse</i> – reflect the conduct much more likely to be exhibited by genuine couples than abusive couples, such as being in a long-standing relationship or in a important long-term legal or financial commitment.</p>
<p>Safeguards of the check of hints that there is no abuse</p>	<p>Some genuine couples can also trigger hints of abuse. This, in itself, is no proof of their "guilt", just a signal that an investigation could be launched to look into the case in more detail.</p> <p>When compared to typical abusers, typical genuine couples can reasonably be expected to trigger substantially less hints that there is abuse.</p>
<p>Look first for hints that could support conclusion that the couple is genuine ...</p>	<p>The double-lock mechanism consists of looking first into "<i>the hints that there is no abuse</i>". Only if the examination of "<i>the hints that there is no abuse</i>" has not confirmed the genuine nature of the investigated marriage, the authorities would be continuing with verification of "<i>the hints of abuse</i>".</p> <p>In practical terms, national authorities investigating abuse should not, in principle, focus primarily on hints of abuse to support their initial gut feeling that there is something suspicious about the marriage at stake. On the contrary, national authorities should first consider hints that there is no abuse that would support the conclusion that the couple is genuine and enjoys the right to move and reside freely. Only where the couple is not prima facie clear of the (initial) suspicion on the basis of the "<i>hints that there is no abuse</i>" should the hints of abuse be considered.</p> <p>Such an approach is helpful to avoid going through a whole investigation process in cases of genuine but atypical couples and to minimise the risk of false positive identifications (<i>where, for instance, the spouses do not have a common household or one of the spouses has an adverse immigration history</i>).</p> <p>This approach can thus bring cost-effective investigations forward and contribute to minimising the risk of decisions being overturned by national courts on the ground of violation of basic procedural safeguards.</p>
<p>Circumstantial nature of evidence of abuse</p>	<p>The evidence linked to the hints which is collected by the national authorities involved in tackling abuse will predominantly be circumstantial evidence.</p> <p>By its very nature, one piece of circumstantial evidence is not likely to be enough to derive any logical conclusions from it. Circumstantial evidence gathered must form a whole which, taken together, becomes corroborating evidence which strongly supports one particular inference (<i>the suspected marriage is abusive</i>) over another (<i>the suspected marriage is genuine</i>). Where the corroborating evidence is strong enough to meet the respective burden of proof, it can then be further used for prosecution.</p> <p>Although hints of abuse or no abuse identified might carry different weight, their overall assessment must be neutral and unbiased. As a consequence, all pieces of evidence must be assessed together, as a</p>

	whole – none should be simply ignored because it does not "fit" a pre-determined conclusion.
Section 4.3	Hints that there is no abuse
Genuine marriage as a help	Compared to abusive couples, genuine couples are much more likely to present certain behaviour traits , such as sharing parental responsibility. The double-lock safeguard , described in Section 4.2.1.2, requires that national authorities primarily focus on elements pointing to these traits.
	Hints of possible abuse at this stage reflect the differences which can be reasonably expected in the conduct of genuine and abusive couples. <u>In comparison with abusive couples, genuine couples:</u> <ul style="list-style-type: none"> ① are more likely to consist of a non-EU spouse who would have no particular problem obtaining a right of residence in his/her own capacity; ① are more likely to consist of a non-EU spouse who has lawfully resided with the EU citizen in another EU country before seeking EU rights in the host EU country; ① are more likely to be in a close relationship for a long time; ① are more likely to share parental responsibility together for one or more children and to be equally involved in the exercise of this responsibility; ① are more likely to have a common domicile or household; ① while the spouses do not live together, are more likely to maintain regular and frequent contact; ① are more likely to have entered a serious long-term legal or financial commitment together (<i>e.g. a mortgage to buy a home</i>); or ① are more likely to have their marriage lasting for a long time.
Section 4.4	Hints of abuse
Life-cycle approach	The best way to structure hints of abuse is to divide them into several groups corresponding to inherent stages of " <i>the life cycle</i> " of marriages of convenience. Some hints may be relevant in more than one stage but – <i>to avoid repetition</i> – they are placed in the most relevant part.
	Before the future spouses meet for the first time
	During this stage, the non-EU national would like to establish an EU right to enter or reside in the EU country of choice while the EU citizen is looking for financial gain. In this stage, the future spouses' decision to abuse EU law on free movement of EU citizens by means of a marriage of convenience is formed.
	Hints of possible abuse at this stage reflect the differences which can be

	<p>reasonably expected in the conduct of genuine and abusive couples.</p> <p><u>In comparison with bona fide non-EU nationals, abusers:</u></p> <ul style="list-style-type: none"> ① are more likely to have been unsuccessful in previous entry or residence applications through other migration channels; ① are more likely to have previously migrated irregularly to an EU country; ① are more likely to be currently residing irregularly in an EU country; ① are more likely to be currently faced with imminent expiry of their legal residence in an EU country; ① are more likely to have a history of previous marriages of convenience or other forms of abuse or fraud; or ① are more likely to have family members with a history of previous marriages of convenience or other forms of abuse or fraud. <p><u>In comparison with bona fide EU citizens, abusers:</u></p> <ul style="list-style-type: none"> ① are more likely to be in a bad financial situation (<i>for example, heavily indebted</i>); or ① are more likely to have previously concluded short marriages with non-EU nationals.
	Pre-marriage phase
	<p>In this stage, putative abusers and future spouses are already in touch and they prepare for the wedding that will give their feigned relationship a gloss of formal validity.</p>
	<p>Hints of possible abuse at this stage reflect the differences which can be reasonably expected in the conduct of genuine and abusive couples.</p> <p><u>In comparison with genuine couples, abusers:</u></p> <ul style="list-style-type: none"> ① are more likely to never have met <i>in person</i> before the marriage; ① are more likely to have got together through the services of a disreputable marriage agency with suspected connections to organised crime or through an informal network within non-EU national communities which is known to be acting as facilitator; or ① are more likely not to speak a common language understood by both, and there is no evidence that they are making some efforts to establish a common basis for communication.
	The wedding
	<p>During this stage, future spouses are preparing to get married and celebrate the wedding. Every marriage of convenience goes through this stage, since it is, <i>by definition</i>, validly concluded.</p>

Hints of possible abuse at this stage reflect the differences which can be reasonably expected in the conduct of genuine and abusive couples.

In comparison with genuine couples, abusers:

- ① are more likely to use a marriage venue which is known to be prone to abuse or has possible connections to organised crime;
- ① are more likely – where relevant - to have their wedding organised by a third party who does not seem to fit this purpose (*e.g. not a friend/relative or a specialised agency*) or who has suspected connections to organised crime;
- ① are more likely to celebrate their wedding ceremony together with other couples with whom they do not seem to have anything in common, possibly with the same witness(es);
- ① are more likely to have previously initiated procedures to wed another EU spouse;
- ① are more likely to have the EU citizen flown to the country only a short time before the marriage without any plausible reason or leave the country shortly after the marriage has been conducted without any plausible reason;
- ① are more likely to have their travel arrangements organised by a third party with possible connections to organised crime; or
- ① are more likely to hand over an "unexplained" sum of money or gifts in order for the marriage to be contracted (*with the exception of money or gifts given in the form of a dowry in cultures where this is common practice*) that could be considered as "payment for abuse" to the EU spouse and facilitators.

Where national law foresees **banns of marriage** or **secular pre-marriage registration and publication** requirements, abusers:

- ① are more likely to have discrepancies in the documents provided (*such as variations of name, date of birth, nationality of spouses*) which raise concerns of forgery;
- ① are more likely to provide a false local address;
- ① are more likely to have one of the future spouses registered in several municipalities as about to wed a different person; or
- ① are more likely to have the same third party involved in several marriages, acting as an intermediary or interpreter, with possible connections to organised crime.

Applying for an entry visa or residence document

During this stage, the couple is already formally married and the **spouses rely** on their marriage of convenience to claim a right to enter or reside in the host EU country under EU law on free movement of EU citizens for the non-EU spouse.

As provided in Article 5(2) of the Directive, Member States may, where

the EU citizen exercises the right to move and reside freely in its territory, require the family member who is a non-EU national to have an entry visa.

The general framework of EU common visa policy is laid down in Regulation (EC) No 810/2009 establishing a Community Code on Visas (*Visa Code*). The Handbook for the processing of visa applications and the modification of issued visas⁴² was adopted under the Visa Code on 19 March 2010 to provide for more details as how to process visa applications under the Directive. The Handbook is not legally binding but it sets a benchmark against which the Commission examines whether the facilities of the Directive have been duly observed.

In any event, entry visas and residence documents must be issued within the modalities and deadlines imposed by EU law on free movement of EU citizens (*entry visas as soon as possible and on the basis of an accelerated procedure, registration certificates immediately and residence cards within six months*). On-going investigations of abuse cannot justify the failure to issue the documents within the deadline. It should also be noted that, visa applications of non-EU family members of EU citizens should be processed irrespectively of whether these family members are residing legally in the country of jurisdiction of the Member State's consulate to which the application is addressed.

Hints of possible abuse at this stage reflect the differences which can be reasonably expected in the conduct of genuine and abusive couples.

In comparison with genuine couples, abusers:

- ① are more likely to give conflicting, inconsistent or false information about:
 - each other on crucial personal matters (*name, date of birth and age, nationality, address, closest family members, possible previous marriages and cohabitation, education, profession or job/unemployment*); however, account must be taken of the individual circumstances in each case, for instance of the fact that the spouses may not have lived together for sufficient time so they may not be very familiar with each other's everyday habits or their marriage was arranged and they have not got to know each other well before the marriage;
 - the circumstances of their first meeting which can be verified;
 - the wedding ceremony and celebration (*list of wedding guests, names of witnesses ...*);
 - common plans for their future, for the establishment of genuine marital life and how they (plan to) assume some of the responsibilities resulting from the marriage (*such as those of financial nature*);
- ① are more likely to involve EU citizens who are more vulnerable (*for instance because they are heavily indebted*);

- ① are more likely to have the EU citizen previously involved in a marriage of convenience;
- ① are more likely to present the passport of the non-EU spouse which has recently been issued to hide an adverse immigration history;
- ① are more likely to indicate an erroneous, false or uncertain address in the application for a residence document; or
- ① are more likely to have the non-EU spouse live together with a third person (*but not the EU spouse*) or to reside together with a third person.

Residence in the host Member State

During this stage, the spouses have been issued with entry or residence documents under EU law on free movement of EU citizens but some doubts may linger – or occur for the first time if no previous checks were feasible - as to whether their relationship is genuine (*for example, where national authorities had some concerns while deciding whether to issue the requested immigration document but were unable to collect sufficient evidence at that stage*). In this phase, **the couple remains to be formally married** and **has already** obtained by abuse an EU right of residence for the non-EU spouse.

However, **any rights acquired through abuse may be withdrawn even after having been initially granted**. To protect their unlawful right of residence, both spouses must continue to behave as it could be reasonably expected from genuine couples.

This deception should last **for a considerably long period of time**, before the non-EU spouses meet the deadlines imposed by law to acquire an independent right of residence. This can be only after several years (*under EU law on free movement of EU citizens, a right of permanent residence is acquired after five years of residence*).

It may be particularly difficult for EU citizens to maintain this level of deception which may make it easier for the national authorities use extra tools to defeat the abusers (*see Section 4.5.1 for more details*).

As a general comment, it should be stressed that EU law on free movement of EU citizens, as confirmed by case law⁴³ of the Court of Justice, does not require couples to live together to benefit from their rights.

Hints of possible abuse at this stage reflect the differences which can be reasonably expected in the conduct of genuine and abusive couples.

In comparison with genuine couples, abusers:

- ① 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 ...*);

⁴³ Case 267/83 *Diatta v Land Berlin*.

- ① are more likely to have one of the spouses living with someone else;
- ① are more likely to show a lack of contribution to the responsibilities and practical obligations arising from the marriage;
- ① are more likely to make no plans for their financial stability; or
- ① are more likely not to wish to effectively share parental responsibility for one or more children.

End of the marriage

During this stage, **the spouses consider that they no longer need to maintain an illusion of a genuine relationship** as they feel that the right of residence of the non-EU spouse is well established and no longer at risk of being terminated. In this phase, the abusers take steps to formally terminate their marriage which no longer serves its original purpose.

Hints of possible abuse at this stage reflect the differences which can be reasonably expected in the conduct of genuine and abusive couples.

In comparison with genuine couples, abusers are more likely to divorce **shortly** after:

- ① the non-EU spouse has acquired an (independent) right of residence; or
- ① the non-EU spouse has acquired nationality of the host EU country.

EU law does not prevent Member States from withdrawing an independent right of residence or even nationality acquired by naturalisation when that nationality was **obtained by deception** (including through abuse of EU law on free movement of EU citizens or fraud), on condition that the decision to withdraw observes the principle of proportionality⁴⁴.

Section 4.5

Investigating marriages of convenience

Marriages of convenience are a complex phenomenon which can be tackled with the use of various investigation and law enforcement techniques and tools.

This Section addresses in general terms investigation techniques and tools which are particularly relevant to marriages of convenience between mobile EU citizens and non-EU spouses; however these can also be relevant for other types of marriages of convenience.

In all cases, reinforced cross-border cooperation and sharing of best practices in this area between competent national authorities, in particular within the framework of the EU policy cycle for organised and serious international crime, can significantly contribute to effectively

⁴⁴ Case C-135/08 *Rottmann*.

	tackling this form of abuse (<i>see Introduction and Section 4.6</i>).
Investigation techniques	<p>The main investigation techniques used by national authorities to investigate marriages of convenience are:</p> <ul style="list-style-type: none"> ○ simultaneous interviews or questionnaires; ○ document and background checks (<i>information about the spouses and their conduct</i>); ○ inspections by law enforcement, immigration or other competent authorities (<i>in registered residences, places of employment, schools, with municipal authorities ...</i>) and community-based checks to check whether the couple is living together and jointly administer their household. <p>A range of techniques for investigation can be applied, frequently in combination and depending on individual circumstances.</p> <p>When undertaking investigative work, it is crucial to respect the rights of persons to a private life. Investigations and actions taken by national authorities must be fully in accordance with the applicable procedures and safeguards contained therein.</p>
Regular internal checks whether investigation is still justified	<p>When national authorities investigating marriages of convenience consider that there are sufficient reasons to believe that the marriage at stake could be a marriage of convenience and should be investigated, at all times and at all stages they must internally review the evidence available (<i>both for and against the suspicion of abuse</i>) to assess whether their suspicion is still supported by facts, notably facts that emerged more recently. Where the body of evidence no longer can reasonably support the suspicion of abuse, the investigation must be abandoned.</p>
Long-haul process	<p>By nature, marriages of convenience are difficult to detect and consequently to prosecute. This difficulty may be even higher where the national authorities seek to conclude the case during the initial stages of a marriage of convenience (<i>for example even before the marriage is celebrated</i>).</p> <p>Often, it will only be possible to successfully conclude an individual case of abuse after having observed the couple and their marital conduct for an adequate period of time and collecting required evidence.</p>
Alternative focus on the conditions of residence	<p>The right to move and reside freely is not unconditional. National authorities may terminate the right of residence of beneficiaries of free movement who no longer meet the conditions that EU law on free movement of EU citizens attaches to the right of residence.</p> <p>Under EU law on free movement of EU citizens, non-EU spouses retain their right of residence only as long as they meet the conditions of EU law on free movement of EU citizens⁴⁵.</p>

⁴⁵ Article 14(2) of Directive 2004/38/EC, read in conjunction with Articles 7(2), 12 and 13.

	<p>In practice, this means that:</p> <ul style="list-style-type: none"> ○ non-EU spouses must remain married to an EU citizen; ○ that the EU citizen must continue to be present in the host EU country; and ○ that the EU citizen must continue to meet the conditions of residence (<i>in principle be in (self-) employment or have sufficient financial resources not to become a burden on the social assistance scheme</i>). <p>Those who no longer meet any of the above conditions can be removed from the host EU country.</p> <p>Only after five years of residence meeting the above conditions non-EU spouses can acquire an autonomous right of permanent residence. This in principle requires the EU spouse to remain in the host EU country for at least five consecutive years. In addition, non-EU spouses resident in the host EU country can retain an independent right to reside there in the event of divorce under Article 13(2) of the Directive, notably where the marriage lasted at least for three years (<i>including one year of residence in the host EU country</i>) prior to initiation of the divorce proceedings.</p> <p>Not all EU citizens willing to enter into a marriage of convenience for financial gain will be prepared to stay in the host country for many years, to meet the conditions EU law on free movement of EU citizens attaches to the right of residence and to keep an outward image of a couple leading a genuine marital life with the person they have little in common with and thus sacrifice other plans they might have for the personal or family development during that period.</p> <p>This approach deals with objectively verifiable facts (<i>for example, whether the EU spouse is present and continues to work</i>) which can be easily identified from an administrative perspective. As the residence is not terminated on the proven grounds of a marriage of convenience, the sanctions can only be limited to administrative sanctions, such as termination of the right of residence and removal.</p>
	Investigation techniques
<p>Interviews with (future) spouses</p>	<p>As any other investigation technique, interviews of suspected spouses should only be launched where national authorities – <i>on the basis of the information available and using the double-lock safeguard mechanism</i> – consider that their serious doubts about the genuineness of the marriage have not been sufficiently dispelled.</p> <p>Interviews are, according to experts, the most effective technique to verify whether the spouses give non-conflicting, consistent and correct information about the other spouse, their past relationship and future plans. To maximise the added value, interviews could be held separately and if possible in parallel or consecutively. National laws usually provide for the obligation of the spouses to take part in the interview in person.</p>
<p>Start with a</p>	<p>To allow for effective deployment of limited resources, national</p>

<p>questionnaire</p>	<p>authorities may first ask the spouses to separately fill in a questionnaire before an interview is carried out to assess whether an interview should take place.</p> <p>The questionnaires may serve as a sort of first filter of cases where after the application of the double-lock safeguard national authorities continue to have reasonable concerns about the genuine nature of the marriage at stake but the concerns are not strong enough to launch a full investigation.</p> <p>The questionnaires may also include a section where the person concerned signs a solemn declaration about the veracity of the information provided in the questionnaire, thus possibly extending the options to sanction proven abusers under national law regarding solemn declarations.</p>
<p>Tips for a good interview</p>	<p>It should be made explicitly clear to the interviewed spouses that the questions are taken to dispel concerns national authorities have as to whether the marriage is genuine or not.</p> <p>The interviewers should warn the interviewed spouses about the legal consequences of their failure to be truthful and about the sanctions national law imposes on persons abusing EU law on free movement of EU citizens. The interviewed spouses could be advised before the questioning to alert the interviewers if they do not understand any questions.</p> <p>Contradictions, inconsistencies, lack of detail and implausible statements which are relevant for the decision-making should be identified and explicitly put to the interviewed spouses.</p> <p>It should be borne in mind that these shortcomings are not necessarily signs of mischief but could stem, for example, from:</p> <ul style="list-style-type: none"> ○ misunderstanding of the question or information sought (<i>in some cases the interviewed person may not want to admit that he or she does not understand the question</i>); ○ limited knowledge or understanding of the situation; ○ personal perspective or incorrect understanding of relevant events; or ○ the fact that recollection of some events could be limited or distorted. <p>It is important to avoid as far as is possible any communication or comprehension problems (<i>also in view of possible litigation</i>). The most common practice to this effect is to give a printout of the statements written down in the record of the interview to the interviewed spouse, who is asked for oral or written confirmation that the record is accurate or has an opportunity to correct any detail considered as not properly recorded; if the person cannot read or write, the statements recorded are read back to him/her.</p> <p>The final stage of the interview should give an opportunity to the interviewed spouse to amend or add anything they wish and also to provide some basic information about the follow-up (<i>the decision is to be</i></p>

	<i>made shortly and if negative, there is a possibility of appeal).</i>
Document and background checks	Document and background checks can be used to prepare for the interview to identify areas where the information available to national authorities seems to indicate inconsistencies, contradictions, lack of detail or implausible statements.
Police and community checks	While the spouses are residing in the host EU country, checks carried out by competent authorities and community-based checks have proven effective to uncover abuse of EU law on free movement of EU citizens and collect evidence needed to conclude the investigation. These checks are intended to verify the information provided by the spouses to support their claim for the EU right of residence and to assess whether the spouses are leading a genuine marital life.
Section 4.6	Cross-border co-operation in tackling marriages of convenience
Cross-border element	<p>Marriages of convenience falling within the scope of this Handbook contain by definition cross-border elements as they concern non-EU nationals seeking to settle in one EU country on the basis of their abusive marriage to a citizen of another EU country.</p> <p>Effective detection, investigation and prosecution of marriages of convenience can be facilitated through cross-border co-operation. Two EU agencies are well placed to help the national authorities concerned.</p> <p>Cross-border co-operation, described below, is also relevant for other constellations of marriages of convenience, which do not involve mobile EU citizens.</p>
Europol	<p>Europol is an EU law enforcement agency which assists EU Member States to fight serious international crime, such as trafficking in human beings and other modern-day threats.</p> <p>Organised crime is a multi-billion euro business, quick to adapt to new opportunities and resilient in the face of traditional law enforcement measures. Europol uses its unique information capabilities and the expertise of 700 staff to identify and track the most dangerous criminal and terrorist networks in Europe. Law enforcement authorities in the EU rely on this intelligence work and the services of Europol's operational coordination centre, centre for strategic intelligence on organised crime and secure information network, to carry out almost 12.000 cross-border investigations each year.</p> <p>In relation to marriages of convenience, Europol can offer assistance where there is involvement of organised crime in trafficking in human beings. It can provide the national authorities with operational and</p>

	<p>strategic analytical support and information on emerging trends.</p> <p>In December 2012, Europol issued Intelligence Notification No.551 on Marriages of Convenience as a means to enter and remain in the EU⁴⁶. In March 2014, it issued an early warning notification (2014/8) on <i>"Marriages of convenience: A link between facilitation of illegal immigration and trafficking in human beings"</i>⁴⁷.</p>
Eurojust	<p>Eurojust is an EU agency dealing with judicial co-operation in criminal matters. Eurojust supports the competent national authorities to render their investigations and prosecutions more effective when dealing with cross-border crime.</p> <p>Eurojust's competence covers the same types of crime and offences for which Europol has competence. For other types of offences, Eurojust may assist in investigations and prosecutions at the request of an EU country.</p> <p>Eurojust can assist the national authorities to investigate or prosecute specific acts, to coordinate with one another, to set up a Joint Investigation Team (JIT) or may supply logistical support, e.g. assistance in translation, interpretation and the organisation of coordination meetings.</p> <p>Eurojust's Action plan against trafficking in human beings covers the period 2012-2016. It lists the main priorities and actions planned by Eurojust in view of increasing the number of prosecutions of cases related to trafficking in human beings and of enhancing judicial cooperation in this area.</p>
Joint investigation	<p>Europol and Eurojust can help EU Member States set up Joint Investigation Teams. JITs are suitable and useful tools for effective investigations and prosecutions of cases related to trafficking in human beings and can offer solutions for addressing the lack of national financial resources needed to proceed with the investigations. The EU agencies also participate in a supportive role and can provide necessary funding to the national authorities involved to cover the costs of joint investigations.</p> <p>Cross-border co-operation may help to overcome significant differences between the national legal systems, for example to seek the best venue for prosecution to resolve a conflict of jurisdiction where two or more EU Member States can have grounds for prosecution. JITs can also include temporary exchange of liaison officers to assist in debriefing of own nationals involved in the abuse.</p>
European Commission	<p>In September 2008 the European Commission created a group of experts from EU Member States to identify difficulties and clarify</p>

⁴⁶ See also EU Serious and Organised Crime Threat Assessment 2013 (SOCTA), Chapter 1.9, <https://www.europol.europa.eu/sites/default/files/publications/socta2013.pdf> and SOCTA 2011, Chapter 3.2, <https://www.europol.europa.eu/sites/default/files/publications/octa2011.pdf>.

⁴⁷ https://www.europol.europa.eu/sites/default/files/publications/ewn_2014_8_public_fp_phoenix_fp_checkpoint_marriages_2.pdf.

	<p>issues of interpretation of EU law on free movement of EU citizens.</p> <p>The experts meet regularly in Brussels and part of its work is to discuss the issue of abuse. In the group, the participants exchange information on abuse and fraud, new emerging trends and patterns and best practice. Sharing of information at an EU level will continue to help identify patterns and trends of abuse as well as to explore joint action to combat the fraudulent exercise of EU law on free movement of EU citizens. Member States have also designated operational contact points to facilitate cross-border exchange of information and co-operation between authorities investigating individual cases of abuse or fraud.</p>
<p>Section 4.7</p>	<p>Roles of different national authorities</p>
	<p>At national level, many national authorities come in contact with couples who may or may not be married of convenience.</p> <p>Their active involvement and awareness may play the crucial role in detecting and tackling abusive marriages of convenience.</p> <p>Main public players involved in detection or investigation of marriages of convenience are:</p> <ul style="list-style-type: none"> ○ embassies and consulates; ○ border guards; ○ Police and law enforcement agencies; ○ national immigration authorities issuing residence documents; ○ other national authorities responsible for other benefits that may be targeted by abusers (<i>e.g. welfare authorities</i>); ○ registrars and other officials; ○ public prosecutors; ○ national courts and ○ intelligence agencies <p>Given the complexity of the issue and the practical difficulties related to the whole process of decision-taking, EU countries must, if they aspire to tackle marriages of convenience in an effective and dissuasive manner, provide, at national level, for robust and holistic policies addressing marriages of convenience and specifying the roles of different national players and their tasks.</p> <p>Based on a careful cost-benefit analysis in light of the actual occurrence of the phenomenon, the establishment of a dedicated body with an official mandate to help to set up the national policies, to assist in their implementation and to co-ordinate involved stakeholders may be helpful. This co-ordinating body must also play an active role in evaluating the implementation of national policies and instruments adopted to be applied on the ground.</p> <p>National guidelines are essential to determine a uniform application of law to enhance legal certainty, as well as creating a single central point</p>

of contact in each of the involved services for advice and assistance to all stakeholders.

Better and **comprehensive co-operation between key stakeholders**, involving creation of the ability to carry out analysis of data in various national databases, will greatly improve the capacity to tackle marriages of convenience.

As some of the **stakeholders are not public authorities** (*such as non-governmental organisations helping victims of abuse or trafficking in human beings*), a partnership could be considered where possible and relevant. Working closely with these stakeholders would provide a forum to seek their opinions of marriages of convenience, to discuss solutions and to enable them to go back and engage with their own organisations and members.