‘LOVE’ WITHOUT (B)ORDERS...?
THE DEVELOPMENT OF EU LEGAL INSTRUMENTS SHAPING ACTION AGAINST RELATIONSHIPS OF CONVENIENCE*

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Nowadays, an increasing number of relationships of convenience are being formed for the purpose of illegal entry into the European Union, and such relationships typically constitute a small but not insignificant part of sophisticated schemes carried out by organised criminal groups. The phenomenon is not new, but the recent increase in migration pressure has posed serious challenges for the European Union, its Member States, and even for most European countries outside the EU (Amberg 2016a, 406). This is particularly true of irregular migration (Jeney 2016),[2] *which contravenes existing rules, and the legal approaches to dealing with it vary greatly across the European Union (Carrera, Den Hertog & Kostakopoulou 2018). This extremely complex situation has economic, societal, social, ethnic, and religious dimensions, poses a threat to national and regional security, and, last but not least, engages representatives of several academic disciplines (Görbe 2018, 241).*

When it comes to managing relationships of convenience that can be considered migration-related from this perspective, there are numerous conflicting considerations, with political, legal, and economic arguments and distinctions intermingling (Amberg 2016b, 204). Among these, one of the most important tasks is undoubtedly the legal assessment of the phenomenon and, along with this, the development of a desirable framework for it, both now and in the future. In the present paper, within the framework of outlining the emerging European Union toolkit, we can seek the answer to our question of where it is heading – or, more precisely, where the fight against the phenomenon under examination should be heading, in which, by the end of the discussion, signs of unification are increasingly recognisable in the picture, which is essentially varies in tone from Member State to Member State.

Keywords
relationships of convenience, marriage, irregular migration, European Union, legal instruments, constructive action

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[2] The European Union has recently begun to favour the terms ‘regular’ and ‘irregular’, and we will align ourselves with this in our explanation.

Introduction

The present paper, as reflected in its title, seeks to examine the development of the European Union's legal instruments aimed at addressing relationships of convenience established for migration-related purposes. By analysing the evolution of the EU's regulatory and policy framework, the paper explores how legal responses to such phenomena have gradually taken shape, how the need for constructive action by Member States is becoming increasingly apparent. The analysis begins with a brief overview of the conceptual and legal foundations of relationships of convenience, followed by a detailed discussion of key EU instruments – in particular, the Communications and the Handbook issued by the European Commission – that have significantly influenced Member States' practices. Throughout the paper, special attention is paid to the interplay between free movement rights, migration control, and the prevention of abuse, with a view to highlighting the emerging direction of the European Union's legal policy in this field.

1. Early instruments of action

The first in a series of instruments adopted by the European Union to combat marriages of convenience was the *1997 Council Resolution* (Council of the EU 1997). Although this document is still a *soft law* instrument (Gyeney 2011, 178), it provides a definition of marriage of convenience in the context of the European Union's residence rules, defining it as a marriage between a national of a Member State or a third-country national legally residing in an EU Member State and a third-country national, solely for the purpose of circumventing the laws governing the entry and residence of the latter party and obtaining a residence permit or authority to reside in a Member State for the third-country national concerned (Council of the EU 1997, Article 1.). It is worth noting that while the original draft resolution would have given Member States extensive powers to take decisive action against marriages of convenience, it was ultimately adopted in a 'softened' form (Gyeney 2011, 178–179).

Interpreted in the context of the European Union's *residence rules*, the *Free Movement Directive* (Directive 2004/38/EC) describes marriages of convenience as relationships whose sole purpose is to obtain the right of free movement or residence.[3] At the same time, the Free Movement Directive refers to these marriages – together with other forms of relationships entered into for the same purpose – as specific manifestations of *abuse of rights or fraud* [Directive 2004/38/EC, (28) recital]. Member States are given comprehensive powers to take the *necessary measures* against these forms of abuse*,* more specifically to refuse, terminate, or withdraw any rights conferred

[3] It should be noted that defining the limits of the term 'sole' as an attribute of aim required further interpretation in judicial practice concerning the review of Hungarian cases relating to immigration law, in respect of which the Curia ruled that a literal interpretation of this term cannot lead to a conclusion in specific cases, as it is impossible for the court to prove that couples who are striving at all costs to maintain the appearance of a genuine relationship are actually living together. Curia Kfv.III.37.448/2015/4.

by the Directive (Directive 2004/38/EC, Article 35.).[4] The aim of this is not to punish the abuse itself, but to discourage those who exercise their rights in good faith and to ensure the uniform and effective enforcement of the entire regulatory system (Töttős 2015a, 215–229).

As is evident from the provisions of the Free Movement Directive described above, the general wording of the authorisation – particularly with regard to the conditions for action by Member States – necessitated the creation of *further guidelines*. The European Commission has therefore issued several *Communications* on the subject, which indicates the growing nature of the phenomenon. At the same time, the regulatory concept set out in the Directive, undoubtedly with a view to facilitating freer action by Member States, also contains some interesting features. It does not place the provisions on abuse of rights among the rules on restrictions for reasons of public policy or public security. Furthermore, it does not stipulate the applicability of the relevant safeguard provisions, nor are the provisions of the Free Movement Directive intended to protect against expulsion applicable (Bojcsev 2012a, 338).

2. European Commission Communication of 2009

2.1. The evolution of the concept of marriage of convenience

The Commission guidelines set out in the *2009 Communication* (Commission 2009) clarified the concepts of abuse and marriages of convenience in the context of EU rules on free movement. With regard to the definition of the latter, it is noteworthy that it clarified the possibility of extending the concept by *analogy* to other relationships established for the same purpose.[5] Its illustrative list included, among other things, nominal adoptions and (registered) partnerships (Commission 2009, 16).

In connection with the evolution of the definition of marriage of convenience, it should be noted that, in the case of the interpretation of the concept of *life partners* in the light of the Free Movement Directive, it was the Budapest-Capital Administrative and Labour Court that submitted a request for a preliminary ruling *in Case C-459/14 Cocaj*.[6] Under the Directive, the concept of *'family member'* includes, in particular, a spouse and a partner with whom the EU citizen is in a registered partnership established under the law of a Member State [Directive 2004/38/EC, Article 2(2)(b)]. This is

[4] However, the Free Movement Directive also stipulates that any such measures must be proportionate and in accordance with the procedural safeguards laid down in Articles 30 and 31 of the Directive. Marriage of convenience, therefore, constitutes a restriction on the right to free movement and residence (see Várnay & Papp 2015, 289).

[5] Accordingly, in the following, we use the terms *marriages of convenience* and *relationships of convenience* interchangeably, as they are typically the most relevant in terms of interconnections and the most characteristic within relationships of convenience. In terms of our subject matter, these relationships refer to those that are deemed relevant to the subject matter in question and correspond to the instruments previously described regarding migration. It is acknowledged that relationships of convenience may naturally evolve along alternative lines of interest in other areas of law and in everyday life.

[6] C-459/14 *Request for a preliminary ruling from the Budapest-Capital Administrative and Labour Court (Hungary) lodged on 3 October 2014 – Fadil Cocaj v. Immigration and Citizenship Office.* [accessed May 27, 2023]

provided that the legislation of the host Member State treats *registered partnerships as equivalent to marriage*. In Hungary, however, *registered* partnerships can only be entered into by persons of the same sex, who are excluded from the institution of marriage. Persons of different sexes may make a *declaration of partnership* before a notary public, but the legal effects of this are not the same as those of a registered partnership.[7] In the case in question, a Kosovar man who had made a declaration of partnership before a notary public with a Hungarian woman was refused permission to stay in Hungary on the grounds of family reunification. According to the Hungarian immigration authorities, the reason for the refusal was that the legal status of 'family member' under the Free Movement Directive cannot be obtained in this way. The Budapest-Capital Administrative and Labour Court, acting on the man's appeal, referred the question to the Court of Justice of the European Union (hereinafter the CJEU, the Court) as to whether the Kosovar man could be recognised as a 'family member' under the Free Movement Directive.[8]

Ultimately, since the referring court withdrew its request for a preliminary ruling,[9] no decision was made by the CJEU in this case. However, the Hungarian Government's position, based on the above considerations, is acceptable, noting, among other things, that in terms of legal effects, only registered partnerships between persons of the same sex can be considered equivalent to marriage (Kormány.hu 2015, 18). This is in line with the findings of *Curia's jurisprudence-analysing working group on immigration*, which devoted a special investigation to the issue, referring in particular to the increased significance of this form of cohabitation in Hungary. Overall, it can be said that although the relevant concept of 'family member' does not specifically mention life partners, the detailed rules on the right of residence in the Hungarian legal system allow for the granting of the right of residence, subject to certain conditions and restrictions (Curia 2013 83–85; 118).[10] It is worth noting in connection with the history of the case that, six years after it began, the Curia issued a precedent-setting decision on the same issue as raised in the case, with the same theoretical content as outlined above.[11]

It is worthy of mention, however, that the CJEU did not remain completely without options for decision-making on this issue. In the *Coman case*[12] ruled in 2018 that Member States are obliged to recognise – solely for the purpose of granting a derived right of residence to a non-EU citizen – *marriages between same-sex couples* in a Member State of the European Union, regardless of whether their own legal system opens the institution of marriage to them (Gyeney 2019, 52). Emphasising that Member States are free to decide to determine their position on the matter of same-sex marriage, and that the EU respects the national identity of its Member States, which is an integral part of their fundamental political and constitutional order (Lehóczki 2018, 143), the

[7] For details of the legal effects of cohabitation relationships on family law, see Szeibert 2022.
[8] A brief description of the application was also included in the following publication: Lehóczki, Széplaki-Nagy, Balogh, Darák & Szabó 2015, 87.
[9] The Budapest-Capital Administrative and Labour Court communicated this matter to the Court in its letter dated 2 July 2015. C-459/14 *Fadil Cocaj v Office for Immigration and Nationality* [ECLI:EU:C:2015:546].
[10] Curia Kfv.IV.37.327/2009/5.; Curia Kfv.III.37.834/2009/4.; Curia Kfv.III.37.256/2010/4.
[11] Curia Kfv.37612/2020/8.
[12] C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [ECLI:EU:C:2018:385].

CJEU ruled that, if a Member State refuses to recognise a marriage concluded by a non-EU citizen with an EU citizen of the same sex in another Member State solely for the purpose of granting that citizen a derived right of residence, may impede the exercise of that EU citizen's right to move and reside freely within the territory of the Member States. This would result in the right to free movement varying from one Member State to another, depending on the national legal provisions on same-sex marriage.

However, compliance with the judgment is not smooth in practice. In Romania, the Member State to which the judgment referred, the EU legal order was unable to enforce the right of residence of the couple,[13] who had meanwhile turned to the European Court of Human Rights on the matter and on the fourth anniversary of the landmark ruling in June 2022, Members of the European Parliament urged the European Commission, which had 'remained silent' on the issue, to take the necessary steps to remedy the infringement.[14] At the time of completion of the manuscript for the present paper, Romania has not yet implemented the verdict by granting Coman's partner a residence permit.[15]

2.2. Assessment of the indicative criteria

Returning to a more specific discussion of the *2009 Communication*, in addition to the above, it also provides a *summary of the so-called indicative criteria* for abuse, which can shed light on the abuse or lack thereof of EU law, in order to ensure an effective procedure (Commission 2009, 16–17). Due to the nature of the phenomenon, abuse is likely, for example, if the couple does not speak a common language and makes contradictory statements about each other and the circumstances of their meeting. On the other hand, if the third-country spouse could obtain a right of residence in their own right, or if the couple has been together for a long time, this suggests that the relationship is genuine (Commission 2009, 16–17).

However, the criteria must be assessed in light of the specific circumstances of each case, as illustrated by the fact that EU law does not require a third-country spouse to *live with an EU citizen* in order to obtain a right of residence.[16] Equally important was the fact that the person concerned had *previously resided legally in another Member State*, which is a prerequisite for exercising the right to family reunification. The Court ruled permissively on the enforcement of this requirement, as an immigration rule applied by a Member State against persons residing illegally in the European Union, in 2003 in the *Akrich case,*[17] and then in the *Metock case* in 2008, despite the arguments of the

[13] See Application No. 2663/21 *Relu-Adrian Coman and Others against Romania lodged on 23 December 2020, ECHR* (published on 1 March 2021). The application was accepted by the Court.
[14] The open letter to the President of the European Commission can be accessed via the following website: European Parliament (2022). Several recommendations are made to EU institutions in the matter discussed in order to ensure the free movement of rainbow families within the European Union: Tryfonidou & Wintemute 2021.
[15] The completion date in question was set for November 2023. On the issue discussed above, see Nugraha 2023.
[16] C-267/83 *Aissatou Diatta v Land Berlin* [ECLI:EU:C:1985:67], paragraphs 15 et seq.
[17] C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [ECLI:EU:C:2003:491].

intervening Member States, ruled against the requirement.[18] Both judgments had serious consequences for Member State regulations. Following the Akrich case, Denmark, the United Kingdom, the Netherlands, and Finland also adopted the requirement of prior lawful residence. Following the Metock case, which effectively removed the Akrich-style safety net from Member States (Currie 2009, 312), in Denmark, for example, the rules on family reunification have been eased, although by 2009 the number of people granted this right had increased by a third, prompting Germany to respond by raising the general requirements (such as basic German language skills) in an attempt to counteract the easing practice (Schmidt 2018, 130–132).

Overall, it can be said that, since the turn of the millennium, an increasingly *liberal approach* has emerged in the CJEU's case law. In this approach, gradually moving away from its previous moderate stance, the Court seeks to give substance to EU citizenship, taking steps towards a broader interpretation of the rights of free movement of EU citizens and their family members. However, regarding this trend, which has a clearly positive impact on the legal status of certain third-country family members in the European Union, the literature also points out that its primary aim is to increase the political legitimacy of the EU (Gyeney 2011, 180–181).

3. European Commission Communication of 2014

3.1. A cautious approach

In 2014, expanding on the legal framework outlined in its previous Communication, the Commission also sought to promote action against 'the alleged marriages of convenience' and to support the work of national authorities in its Communication on immigration control, in the context of EU law on the free movement of EU citizens (Commission 2014a). This was further supported by the accompanying Commission Staff Working Document in the form of a Handbook (Commission 2014b, hereinafter the Handbook).

The creation of the document was greatly encouraged by the fact that, at its meeting on 26–27 April 2012, the Council (Justice and Home Affairs) approved the roadmap entitled *'EU Action on Migratory Pressures – A Strategic Response'* (Council of the EU 2012). The roadmap identified marriages of convenience as a means of facilitating the illegal entry and residence of non-EU nationals in the EU. Among the six priorities identified in the strategic document setting out the directions for EU action on illegal migration is guaranteeing and protecting free movement by preventing abuses by certain third-country nationals, namely, namely entering into marriages of convenience, using false identity documents (Jeney 2016). Among the measures listed in the roadmap, which are to be taken by the Commission and/or Member States in order to obtain a more complete picture of abuses of the right to free movement by third-country nationals and of organised crime facilitating illegal immigration, was the compilation of a handbook on marriages of convenience. The handbook was also called for in the Commission's Communication of 25 November 2013 entitled '*Free movement of EU*

[18] C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [ECLI:EU:C:2008:449], paragraph 58.

citizens and their families: Five actions for change'. The referred Communication clarified the rights and obligations of EU citizens under EU law on free movement and set out five measures to help national authorities enforce these rules effectively (Commission 2013).

The final version of the Handbook was written in a spirit of caution, out of concern that Member States might overstep the mark in their zeal to combat the phenomenon (Commission 2014b, 28). This warning is evident from the structure of the document itself. The patient reader has to wait until page 32 of the 47-page document to reach the section entitled *'Operational measures within national remit'*. The preceding chapter, entitled *'Applicable legal framework',* discusses at length and attempts to embed in a practical framework the rules applicable to the range of possible measures and safeguard provisions, emphasising throughout that an examination of the marriage can only take place if there are reasonable doubts as to its genuine nature (Commission 2014b, 28). Among the measures, it is worth highlighting the expectation of sensitivity to cultural specificities on the part of the representatives of the authorities involved (Töttős 2015b, 61), the practice of a 'double-lock mechanism', which primarily calls for the examination of signs indicating the non-existence of abuse (Commission 2014b, 34–36), and the grouping of signs indicating possible abuse according to the *'life cycles'* of the marriages of convenience involved (Commission 2014b, 36–41). The latter also highlights that the process of uncovering the phenomenon – preferably at the earliest possible stage – must be based on the division of tasks between the various national authorities involved and is not solely the responsibility of the immigration authorities (Commission 2014b, 46–47).

Returning to the cautionary nature of the Handbook, it should be noted that it was not without foundation. To illustrate, one may refer to a 2013 case before a Dutch court, in which the authorities rejected the marriage between an Egyptian man and a Hungarian woman, basically referring only to their behaviour.[19] Similar statements may be found on the part of the Swiss authorities, who stated that it *was 'obvious'* which couples' marriages constituted abuse, as this could be determined *'immediately'* and from *'gut feelings'* (Lavanchy 2014, 15–16).[20]

3.2. Criticism and the need for constructive action

The Handbook has been criticised by several Member States, as they believe that it approaches the problem from a legal perspective and focuses on the limitations of action, thus failing to serve real operational interests effectively (Töttős 2016, 326). It is worth mentioning that the *need for constructive action* to the phenomenon of marriages of convenience has become so pressing during this period that it has even been included in the debate on the United Kingdom's withdrawal from the European Union, i.e., Brexit.

[19] Family Court, Eastern Brabant, 11 December 2013, quoted and tranclated by: De Hart 2017, 299.
[20] The following article also draws attention to the current dangers: Andrikopoulos 2019.

The *concerns* expressed by former British Prime Minister David Cameron[21] included reforming the right to free movement, in particular preventing the legalisation of illegal residence through marriages of convenience. The negotiations on the four areas of concern were ultimately successful. However, despite all the energy expended, *Conclusions* on Brexit adopted by the heads of state and government of the EU Member States at the European Council meeting on 18-19 February 2016 (European Council 2016) could not take further shape, as it is well known that the United Kingdom left the European Union on 31 January 2020. From the point of view of the topic under discussion, it is worth noting that one of the annexes to the Conclusions was a statement in which the European Commission undertook to prepare a proposal to supplement the Free Movement Directive. According to the proposal, EU law would have essentially applied the general presumption – thereby deviating significantly from current immigration practice – that, in the case of certain third-country spouses,[22] the primary purpose of marriage is to obtain a right of residence. As a result, it would have excluded these family members from the application of favourable mobility rules without giving them the opportunity to prove the authenticity of their marriage. The Commission also undertook to clarify certain aspects of the concept of marriage of convenience, which, however, caused some confusion, as this clarification could have been made in the context of the EU documents referred to above (Töttős 2016, 326; European Council 2016, 19–24).[23]

The driving force behind the British demand was certainly increased by the fact that the phenomenon was already more prevalent in the United Kingdom than the European Union average (Wemyss, Yuval-Davis & Cassidy 2017). This is probably why they used special tools in their fight against marriages of convenience, like the Certificate of Approval Scheme (COA), which requires the Home Office to give its approval for marriages between foreigners who are not legally settled in the UK on a permanent basis. With the implementation of this measure, the number of marriages of convenience fell below 500 after its introduction in 2005, compared to 3,578 cases in 2004. However, due to widespread criticism, it was completely repealed on 9 May 2011 (UK Home Office 2013, 12–15).

Conclusions – 'United in diversity'

At the end of our investigation, we can conclude that the need to create a legal framework for migration-related relationships of convenience has existed in the European Union for a relatively long time. Among the instruments created in this way, the Communications issued by the European Commission, which seek to clarify the general authorisation contained in the Free Movement Directive concerning the actions

[21] *'We also need to crack down on the abuse of free movement, an issue on which I have found wide support in my discussions with colleagues. This includes tougher and longer re-entry bans for fraudsters and people who collude in sham marriages...'* Gov.uk 2015. 5.

[22] This includes third-country family members who did not have legal residence in a Member State prior to marrying an EU citizen – recalling the criterion set out in the Akrich case, as described above, which was later amended – and those who marry an EU citizen only after that citizen has settled in the host Member State.

[23] Research conducted specifically in response to British demands: Griffiths 2019.

of Member States, play a prominent role. In addition to further defining the concept of marriages of convenience, the 2009 Communication also made a significant contribution to defining the framework for action by Member States in a practical manner by developing indicative criteria. In contrast, the Commission's 2014 Handbook focused on expanding the legal framework outlined in its previous Communication, taking a cautious, legally based approach.

At this point, however, it is worth mentioning that despite the criticism levelled at the 2014 Handbook, it is undeniable that it serves as a good methodological basis for the national authorities involved. According to a *comparative study* on the subject, the procedures show significant similarities in terms of investigating abuses, which can be traced back to the Handbook (Strik, De Hart & Nissen 2013, 41). Similarities can also be found in the reports prepared by the *European Migration Network* (EMN 2012)[24] examining abuses of the right to family reunification.[25] Without overlooking the fact that the similarities reflected in the assessment of marriages of convenience are naturally rooted in the social and cultural similarities between Member States (Wray, Agoston & Hutton 2014, 242), we can conclude that, alongside the increasingly decisive *demand for constructive action* on the part of Member States, there is also a marked *tendency towards unity* in the relevant procedures of individual Member States.

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