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# The reform of the Common European Asylum System : fifteen recommendations from a sexual orientation and gender identity perspective

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**Sexual Orientation and Gender Identity Claims of Asylum:  
A European human rights challenge – SOGICA**

# **The reform of the Common European Asylum System: Fifteen recommendations from a Sexual Orientation and Gender Identity Perspective**

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May 2018



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## Executive Summary

### **The current reform of the Common European Asylum System (CEAS) and claims for asylum on the basis of sexual orientation or gender identity**

- Since the 1990s, the European Union (EU) has slowly developed an increasingly sophisticated body of asylum law and policy, known as the Common European Asylum System (CEAS).
- This framework – both in the shape of legislative instruments and case law – has inevitably also affected those asylum seekers who claim asylum on the basis of sexual orientation and/or gender identity (SOGI). This has been vividly demonstrated by particular norms in EU asylum instruments and judgments of the Court of Justice of EU (CJEU).
- The current CEAS can be said to have several shortcomings in relation to SOGI claims, including in relation to: country of origin information; the notion of ‘safe country of origin’; the burden of proof and the principle of benefit of the doubt; the concept of a ‘particular social group’; and the definition of persecution.
- A new set of proposals for reform of the CEAS was put forward in 2016 by the European Commission, and these also affect SOGI asylum claims in precise and acute ways.
- This policy brief scrutinises these proposals of reform, and assesses the extent to which these proposals and different institutional positions address, ignore or aggravate the issues that currently affect asylum seekers who identify as LGBTI (lesbian, gay, bisexual, trans and intersex).
- The policy brief makes fifteen recommendations for European policymakers in regards to the reform of the CEAS, in order to ensure that the needs of LGBTI asylum seekers and refugees are effectively addressed and their rights are respected.
- Academics from the University of Sussex working on the Sexual Orientation and Gender Identity Claims of Asylum (SOGICA) project, funded by the European Research Council, are calling for policymakers to implement these recommendations in order to render the CEAS fairer for SOGI asylum seekers.
- For further information about any of the recommendations proposed in this policy brief, or about the Sexual Orientation and Gender Identity Claims of Asylum (SOGICA) project, please contact: Professor Nuno Ferreira, [N.Ferreira@sussex.ac.uk](mailto:N.Ferreira@sussex.ac.uk).

**May 2018**

## Key recommendations

Academics from the University of Sussex working on the Sexual Orientation and Gender Identity Claims of Asylum (SOGICA) project are making fifteen recommendations for policymakers regarding the proposed reform of the Common European Asylum System (CEAS). This is to ensure that the needs of asylum seekers who identify as LGBTI (lesbian, gay, bisexual, trans and intersex) are adequately addressed and their rights are respected.

### Recommendation regarding terminology across all CEAS instruments:

#### Recommendation 1:

Add to a Recital in each CEAS proposed instrument a clear reference to gender identity as including sex characteristics and gender expression.

### Recommendations regarding the Proposed Reception Conditions Directive:

#### Recommendation 2:

Add SOGI asylum seekers to the category of 'applicant[s] with specific reception needs', under Article 2(1)(13) of the Proposed Reception Conditions Directive.

#### Recommendation 3:

Amend Article 5 of the Proposed Reception Conditions Directive as to make it compulsory to provide to all asylum seekers the information, in a terminology and language that the applicants reasonably understand, that persecution on grounds of sexual orientation or gender identity, amongst other grounds, constitutes a legitimate ground to claim international protection in EU territory.

#### Recommendation 4:

Add SOGI asylum seekers to those who require special guarantees and protection from hate crimes in the context of the reception of asylum seekers (Articles 2 and 17(4) Proposed Reception Conditions Directive).

#### Recommendation 5:

Amend Article 17(3) of the Proposed Reception Conditions Directive as to include 'undergoing hormonal treatment'.

## **Recommendations regarding the Proposed Procedures Regulation:**

### Recommendation 6:

Add to Article 27 of the Proposed Procedures Regulation the need to collect information on asylum seekers' SOGI, in particular SOGI as the basis for seeking asylum.

### Recommendation 7:

Article 12 of the Proposed Procedures Regulation should be amended to recognise that the ethnic, national, cultural or religious background of both interviewers and interpreters may present a potential hindrance in an individual's asylum interview or hearing. Guidance is needed on how to protect claimants without unlawfully discriminating against interviewers or interpreters on grounds of race or ethnic origin and religion or belief.

## **Recommendations regarding the Proposed Qualification Regulation:**

### Recommendation 8:

Article 4 of the Proposed Qualification Regulation should be amended as to introduce the sharing of the burden of proof between asylum seekers and public authorities.

### Recommendation 9:

Reflect the guidance provided in *A, B and C*, regarding 'late disclosure',<sup>1</sup> in Article 4(5) of the Proposed Qualification Regulation.

### Recommendation 10:

Recital No. 28 of the Proposed Qualification Regulation should be amended as to rephrase 'gender, including gender identity and sexual orientation' as 'gender, gender identity and sexual orientation'.

### Recommendation 11:

The Council of the EU should accept Amendment 85 by the European Parliament regarding the Proposed Qualification Regulation, to render the PSG tests alternative, instead of cumulative, by replacing 'and' with 'or'.

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<sup>1</sup> Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, ECLI:EU:C:2014:2406, para. 69-71.

Recommendation 12:

The Council of the EU should accept Amendment 75 by the European Parliament regarding the Proposed Qualification Regulation, to maintain the optionality of the 'internal protection' and add that internal protection can only be found to be viable if 'the State or agents of the State are not the actors of persecution or serious harm'.

Recommendation 13:

The Council of the EU should accept Amendment 68 by the European Parliament regarding the Proposed Qualification Regulation, to maintain the optionality of the Article 5(3) exception and exclude from its scope those cases of individuals who were previously unable to express their sexuality and now wish to do so.

Recommendation 14:

Amend Article 25 of the Proposed Qualification Regulation (as well as the Proposed recast of the Dublin Regulation) as to guarantee equal treatment of couples and families independently of gender, gender expression and sex characteristics of any of their members.

**Recommendations regarding the Proposal for an EU common list of 'safe countries of origin':**

Recommendation 15:

Reject Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU (COM(2015) 452 final).



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## Further background information

Throughout the last three decades, and in parallel with the Council of Europe (CoE), the European Union (EU) has played an increasingly significant role in moulding asylum law and policy across the continent. The EU now has a full-fledged asylum policy. Building on the competences granted to the EU institutions by the 1997 Treaty of Amsterdam, in 1999 the European Council meeting at Tampere decided on a range of initiatives in the field of justice and home affairs, including a five-year programme to develop a common EU asylum and migration policy, in particular a **Common European Asylum System (CEAS)**.<sup>2</sup>

This led to a set of Directives and Regulations in the 2000s that regulated several key aspects of the asylum system, which in the meantime underwent a recast process that led to the current set of EU instruments:<sup>3</sup> the Reception Conditions Directive,<sup>4</sup> the Procedures Directive,<sup>5</sup> and the Qualification Directive,<sup>6</sup> the Temporary Protection Directive remaining unaffected and a new instrument being introduced to deal with the return of illegally-staying third country nationals (the Returns Directive).<sup>7</sup>

This recast process introduced substantial changes, but failed to introduce an equal level of protection across the EU (De Baere, 2013; Ippolito and Velluti, 2011; Velluti, 2014; Zalar, 2013). This may be seen in a positive light, to the extent that it allows Member States to adopt standards more favourable to asylum seekers. Yet, it may also be seen as negative from the perspective of avoidance of 'forum shopping' (the idea that asylum seekers choose where to claim asylum on the basis of the probabilities of receiving a positive decision, as well as obtaining more generous benefits and living conditions), even if there is no evidence that such 'forum shopping' occurs to any significant extent (European Stability Initiative, 2015).

The recast process was followed by the 2015 events across the Mediterranean region, which translated into the arrival of thousands of individuals from conflict-torn areas in Syria and other countries further afield.<sup>8</sup> In answer to these events, in 2015 the European Commission launched the '**European Agenda on Migration**' (European Commission, 2015), and in 2016 the European Commission put forward a series of

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<sup>2</sup> Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, para. 13-14.

<sup>3</sup> The UK, Ireland and Denmark are not bound by these instruments due to the current opt-out (in the case of Denmark) and optional opt-in (in the case of the UK and Ireland) arrangements currently in place for these Member States.

<sup>4</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116.

<sup>5</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95.

<sup>6</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–26.

<sup>7</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107.

<sup>8</sup> See, for example, *Unravelling the Mediterranean Migration Crisis*, <<http://www.medmig.info/>>, accessed 24 May 2018.



legislative drafts pertaining to all elements of the CEAS, which are currently being negotiated by the EU law-making institutions, specifically the European Parliament and the Council of the EU. Whilst the proposal for reform of the Reception Conditions Directive also consists of a Directive,<sup>9</sup> the proposals for reform of the Qualification and Procedures Directives take the shape of Regulations,<sup>10</sup> which translates into much less flexibility for EU Member States in implementing EU standards and very limited scope to set higher standards.<sup>11</sup> This harmonisation effort entails a serious risk of lowering the current standards (Peers, 2017).

These reform proposals have been subjected to wide ranging commentary and criticism, for example by ECRE (AIDA, 2017). These proposals also affect SOGI asylum claims in relation to a range of aspects, and this effect has not gone unnoticed, as the European Parliament Intergroup on LGBTI Rights held a meeting in March 2017 on protecting the rights of LGBTI (lesbian, gay, bisexual, trans and intersex) asylum seekers and refugees in the context of the CEAS reform (European Parliament Intergroup on LGBTI Rights, 2017). This reform constitutes a good opportunity to introduce more appropriate norms addressing SOGI asylum claimants' rights and needs.

This policy brief considers how the current CEAS reform proposals (hereinafter the 'Proposed' instruments) impact on a range of selected, disputed aspects of EU SOGI asylum law and puts forward fifteen recommendations. This policy brief builds on other related analyses put forward by governmental organisations (UNHCR, 2018), NGOs (ILGA Europe, 2016) and academics (Peers, 2017).

## Terminology across CEAS instruments

Whilst many norms in the current CEAS instruments should encompass not only sexual orientation and gender identity, but also sex characteristics and gender expression (ILGA Europe, 2016), it would make it linguistically cumbersome to list all these characteristics in each relevant norm. It is thus suggested that – more simply, but equally effective – a Recital in each CEAS proposed instrument should make it clear that gender identity includes sex characteristics and gender expression.

**Recommendation 1:**

**Add to a Recital in each CEAS proposed instrument a clear reference to gender identity as including sex characteristics and gender expression.**

<sup>9</sup> Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (COM(2016) 0465).

<sup>10</sup> Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (COM(2016) 0466); Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016) 0467).

<sup>11</sup> Nonetheless, EU Member States will still be able to introduce or retain a humanitarian protection status, in addition to the EU refugee and subsidiary protection statuses (Article 3(2) Proposed Qualification Regulation).

## Vulnerability

The way an asylum seeker is treated throughout the asylum process depends to a great extent on whether they fall within the notion of 'vulnerable person'. Article 21 of the Reception Conditions Directive does not offer an abstract definition of 'vulnerability', but clarifies that it includes individuals 'such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation'.<sup>12</sup>

Although SOGI asylum seekers are not expressly mentioned in this provision, they fall within its remit at least when they have been victims of human trafficking, have serious illnesses or mental disorders, or have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. Recital No. 29 of the Procedures Directive, instead, considers SOGI explicitly amongst the asylum claimants' characteristics that may warrant special procedural guarantees and adequate support, including sufficient time to ensure effective access to procedures and present the elements needed to substantiate one's international protection application.

As it is very often the case that SOGI asylum seekers have been victims of serious forms of psychological, physical or sexual violence related to their SO and/or GI, and as their SOGI puts them very often in vulnerable positions in terms of asylum reception and procedure, they should classify as 'vulnerable' on many instances. Moreover, while it is vital to ensure terms like 'vulnerable' are not used in a way that conceals individual agency and resilience, in the current context, if such terms are used to describe people's situations, then the terminology and who it includes – including LGBTI asylum seekers – needs to be made consistent across all EU CEAS instruments, which is not the case at the moment.

Article 2(1)(13) of the Proposed Reception Conditions Directive replaces the term 'vulnerability' with 'special reception needs', without clearly changing its substance. The European Parliament proposes to talk about 'specific' rather than 'special' reception needs, again without clearly changing the notion's substance (European Parliament, 2017a). Crucially, however, the European Parliament also proposes to add LGBTI asylum seekers to the category of 'applicant[s] with specific reception needs', in a move perhaps inspired by the decision of the Strasbourg Court in *O.M. v. Hungary* (European Parliament, 2017a, Amendment 34).<sup>13</sup> If approved, this norm could have far-reaching positive consequences for SOGI asylum seekers and could ensure greater harmony between the rules on reception and procedures at a domestic level (ECRE, 2017).

**Recommendation 2:**

**Add SOGI asylum seekers to the category of 'applicant[s] with specific reception needs', under Article 2(1)(13) of the Proposed Reception Conditions Directive.**

<sup>12</sup> This definition is repeated in Article 20(3) of the Qualification Directive.

<sup>13</sup> *O.M. v. Hungary*, Application no. 9912/15, 5 July 2016.

## The right to information

EU law does not require that asylum seekers be given information upon their arrival or presentation of their asylum claim indicating that persecution on grounds of sexual orientation or gender identity constitutes a legitimate ground to claim international protection in EU territory. Without that information, many SOGI asylum seekers may either seek to lodge an asylum claim based on other aspects of their experience of persecution or not lodge an asylum claim at all, thus jeopardising their chances of obtaining international protection.

This lack of information may also lead to late or no identification of special procedural needs, which EU Member States are under the obligation to identify (ECRE, 2017, p. 21), and hinders monitoring of decision making on SOGI claims. This is something that could be addressed through an amended version of Article 5 of the Proposed Reception Conditions Directive.

**Recommendation 3:**

**Amend Article 5 of the Proposed Reception Conditions Directive as to make it compulsory to provide to all asylum seekers the information, in a terminology and language that the applicants reasonably understand, that persecution on grounds of sexual orientation or gender identity, amongst other grounds, constitutes a legitimate ground to claim international protection in EU territory.**

## Housing

One of the first priorities in the reception of asylum seekers is housing, which is regulated by Article 18 of the Reception Conditions Directive. Such 'premises and accommodation centres' should cater for specific needs, namely those related to gender, age and vulnerability of asylum seekers, and national authorities should prevent assault and gender-based violence, including sexual assault and harassment. The inclusion of 'vulnerability' amongst these considerations undoubtedly brings within the scope of protection of this norm many SOGI asylum seekers, and the Strasbourg Court decision in the *O.M. v Hungary* case reinforces the need to bear in mind the special needs of SOGI asylum seekers in the context not only of housing but detention as well.

The European Parliament's Committee on Women's Rights and Gender Equality has also stressed 'the need for LGBTI-sensitive reception facilities across all Member States' and highlighted that 'violence against LGBTI individuals is common in reception facilities' (European Parliament, 2016, point 12). In a separate report, the same Committee has importantly stated that 'timely support for refugee victims of violence based on gender or (perceived) sexual orientation or gender identity should be provided at all stages of the migration process, including immediate relocation in case their safety cannot be guaranteed, quality mental health support and immediate gender identity recognition for the duration of asylum procedures as a violence-prevention measure' (Committee on Women's Rights and Gender Equality, 2017, para. 42).

Although SOGI-specific housing arrangements are increasingly offered in countries with a significant number of SOGI asylum seekers,<sup>14</sup> the EU regulatory framework does not establish any such requisite. Even if no requirement is introduced to generally offer SOGI-specific housing arrangements, it is reasonable to expect from the CEAS reform process some acknowledgment of the special reception needs of SOGI claimants, for example, by expressly including SOGI claimants amongst those who require special guarantees and protection from hate crimes in the context of the Proposed Reception Conditions Directive (ILGA Europe, 2016, pp. 7–8).

**Recommendation 4:**

**Add SOGI asylum seekers to those who require special guarantees and protection from hate crimes in the context of the reception of asylum seekers (Articles 2 and 17(4) Proposed Reception Conditions Directive).**

## Healthcare

Another priority for SOGI asylum seekers is often their health. Article 19 of the Reception Conditions Directive guarantees that asylum seekers receive ‘the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorder’, including when those individuals have ‘special reception needs’.

This may prove of particular importance to trans asylum seekers in the process of transitioning from one sex to the other. If they are already undergoing hormonal treatment, it is imperative for medical reasons that the treatment not be interrupted; yet, practice across Europe varies greatly in this respect (TGEU, 2016). To make matters worse, the EU legal framework does not include a clear obligation to this effect; this can be secured by amending Article 17(3) of the Proposed Reception Conditions Directive (ILGA Europe, 2016, pp. 7–8).

**Recommendation 5:**

**Amend Article 17(3) of the Proposed Reception Conditions Directive as to include ‘undergoing hormonal treatment’.**

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<sup>14</sup> See, for example, in Berlin, the [Official Shelter for LGBTI Refugees](#) coordinated by Schwulenberatung.

## Statistics

Nothing in the current EU framework requires domestic authorities to record asylum seekers' SOGI, which makes it impossible to produce reliable statistics. Such statistics are essential to allow for a better understanding of why people seek asylum, which has an impact, for example, on the scope of the Country of Information (COI) reports and specific reception needs. This could be addressed by including these elements in Article 27 of the Proposed Procedures Regulation.

**Recommendation 6:**

**Add to Article 27 of the Proposed Procedures Regulation the need to collect information on asylum seekers' SOGI, in particular SOGI as the basis for seeking asylum.**

## Interviewing and interpreting

Another matter highlighted in asylum literature relates to the characteristics of interviewers and interpreters, especially their training to deal with certain types of claims and how their gender and ethnicity may affect the outcome of the asylum claim (UNHCR, 2012, para. 60). The Procedures Directive reflects the concerns expressed in this literature and – crucially for SOGI asylum seekers – states that interviewers should be 'competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability' (Article 15(3)(a)).

It is, however, known that in many European countries the training received by asylum decision-makers and interpreters is dramatically insufficient and inappropriate, in particular when dealing with SOGI asylum claims (Gavrielides, 2017). For this reason, the European Parliament has asserted that, '[t]ogether with relevant agencies, the Commission and Member States should ensure that asylum professionals, including interviewers and interpreters, receive adequate training – including existing training – to handle issues relating specifically to LGBTI persons' (European Parliament, 2014).

The Procedures Directive also requires authorities, wherever possible, to arrange for interviewers and interpreters to be of the same sex as the applicant if the applicant so requests, 'unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner' (Article 15(3)(b) and (c)). It is submitted that 'sex' should be interpreted as 'gender' in this context, to protect trans asylum seekers' rights.

Ethnic, national, cultural or religious background have not, however, been mentioned as characteristics the asylum applicant can refer to when expressing a preference about the interviewer and, above all, the interpreter, even if it is known that asylum applicants – in particular SOGI applicants – may find it extremely challenging to describe their experiences of SOGI-related persecution in front of someone of a particular (often their own) ethnicity or religion. Ethnic, national, cultural and religious background should thus be offered some consideration within the context of this norm of the Proposed Procedures Directive. This would also better reflect the intersectional nature of asylum seekers' experiences of the asylum procedure. As adding such consideration could effectively entail racial and religious discrimination, this should only occur within the strict derogation limits allowed by the current EU discrimination directives, particularly through the notion of 'genuine occupational requirement'.<sup>15</sup>

More generally, all rules in Article 15 of the Procedures Directive (Article 12 of the Proposed Procedures Regulation) applying to interviewers should also apply to interpreters (ILGA Europe, 2016, p. 10), in the light of the potentially crucial role of interpreters in the evolution and outcome of the adjudication proceedings.

**Recommendation 7:**

**Article 12 of the Proposed Procedures Regulation should be amended to recognise that the ethnic, national, cultural or religious background of both interviewers and interpreters may present a potential hindrance in an individual's asylum interview or hearing. Guidance is needed on how to protect claimants without unlawfully discriminating against interviewers or interpreters on grounds of race or ethnic origin and religion or belief.**

## Burden of proof

Providing evidence is of utter importance in asylum claims, as the Qualification Directive indicates. As a general principle in this field, Article 4 of the Qualification Directive establishes that 'Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.'

The evidence gathering burden *may*, then, lie much more on the applicant than on the authorities. This may have a significant bearing on the outcome of asylum claims, with adversarial systems (where the decision-maker lets the parties produce the relevant evidence) liable to render asylum claims more difficult than inquisitorial (where the decision-maker takes the initiative of collecting evidence) or mixed (where both the parties and the decision-maker share the burden of collecting evidence) systems.

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<sup>15</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26 (in particular Article 4), and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22 (in particular, Article 4).

Although the CEAS does not clearly espouse an inquisitorial, adversarial or mixed system, EU Member States have much leeway to impose heavy evidence gathering burdens on asylum seekers. This can be particularly damaging for SOGI asylum claims, as one's SOGI and evidence related to SOGI persecution are often extremely difficult to document, especially in discriminatory, oppressive and criminalising environments.

Worryingly, Article 4 of the Proposed Qualification Regulation places the burden of proof *compulsorily* on applicants (even if according to Article 8(3) the burden of demonstrating the availability of internal protection rests on national authorities). This effectively introduces an EU quasi-adversarial system and renders international protection claims more difficult for applicants who so far could have relied on more beneficial evidentiary rules at domestic level, thus translating into a negative amendment for SOGI claims. The UNHCR has thus rightly argued that the proposed wording for Article 4 should be abandoned and the burden of proof should be shared (UNHCR, 2018, pp. 9–10).

**Recommendation 8:**

**Article 4 of the Proposed Qualification Regulation should be amended as to introduce the sharing of the burden of proof between asylum seekers and public authorities.**

## 'Late disclosure'

One aspect of SOGI asylum seekers' experiences that reportedly often has a negative impact on the success of their claims is the 'late disclosure' of one's sexuality (although the problem may also represent itself in relation to gender identity). Article 40 of the Procedures Directive establishes that when an asylum seeker makes further representations during or after the examination of an asylum application, Member States are free to examine those further representations, but are also entitled to only examine them if the applicant was not at fault for not presenting the relevant new elements in question earlier on in the current or previous procedure (if there has been one). Article 5 of the Qualification Directive also states that 'Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection'.

Although this may be understandable from the perspective of procedural effectiveness, the reality is that SOGI asylum seekers often do not know that their SOGI can be of relevance for the purposes of obtaining international protection, and even if they do, many do not know how to structure their narratives and include all elements that may possess relevance to a European decision-maker. Most importantly, many SOGI asylum seekers will not feel comfortable – or may even feel utterly mortified for religious, cultural or personal reasons – at the thought of discussing their SOGI with a complete stranger, in what is often a hostile environment.<sup>16</sup> Usefully, the CJEU has asserted in *A, B and C* that delays in disclosing one's sexuality should not automatically be held against asylum claimants to harm their credibility.<sup>17</sup>

<sup>16</sup> *M.K.N. v. Sweden*, Application no. 72413/10, 27 June 2013.

<sup>17</sup> Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2

Hopefully this will prove valuable in guiding domestic authorities in not placing excessive importance on late disclosures, which seems to have already bore some fruits.<sup>18</sup> Yet, it would have been useful if such guidance had been included in one of the CEAS 2016 reform proposals. ILGA Europe, for example, suggests adding such guidance to Recital No. 29 of the Proposed Qualification Regulation (ILGA Europe, 2016, pp. 5–6), and the UNHCR suggest reflecting this in a revised version of Article 4(5) of the Proposed Qualification Regulation (UNHCR, 2018, pp. 9–10). The latter alternative would offer greater legal strength and prominence to this element.

**Recommendation 9:**

**Reflect the guidance provided in A, B and C regarding ‘late disclosure’ in Article 4(5) of the Proposed Qualification Regulation.**

## The notion of ‘particular social group’

Although nothing prevents LGBTI individuals from claiming asylum on any of the grounds prescribed in the Refugee Convention – and whilst recognising that any of those grounds may be entirely appropriate under certain circumstances – the reality is that LGBTI individuals tend to rely almost exclusively on the ‘particular social group’ (PSG) ground. Sexual orientation was mentioned expressly in Article 10(1)(d) of the 2004 Qualification Directive as one of the characteristics that may give rise to a PSG. Importantly, the 2011 recast Qualification Directive added gender identity to this norm, and the Proposed Qualification Regulation retains both sexual orientation and gender identity as characteristics that may give rise to a PSG (Article 10(1)(d)). Although intersex and trans (broadly defined) individuals could also constitute a PSG, these characteristics are not expressly mentioned in this norm.

The Proposed Qualification Regulation does not include any suggestion in this respect, which is a missed opportunity (ILGA Europe, 2016, p. 4). Some inspiration could be drawn from the Canadian Immigration and Refugee Guidelines on Sexual Orientation and Gender Identity and Expression (IRB, 2017), which fails to include sex characteristics but at least includes gender expressions (Dustin and Ferreira, 2017).

Oddly enough, Recital No. 30 of the Qualification Directive refers to ‘gender, including gender identity and sexual orientation’ in the context of ‘particular social group’, as if sexual orientation were an aspect of gender. Despite the undeniable links between sexual orientation, on the one hand, and gender norms and roles, on the other (Wilets, 1996), it is unfortunate to conflate both in such terminological and conceptual inaccuracy and enshrine that result in legal norms. For the sake of greater terminological and conceptual accuracy, ‘including’ should have been eliminated: ‘gender, gender identity and sexual orientation’ would have been preferable, but Recital No. 28 of the Proposed Qualification Regulation simply replicates the current wording.

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December 2014, ECLI:EU:C:2014:2406, para. 69-71.

<sup>18</sup> See, for example, decision of the Italian Supreme Court: Corte di cassazione, ordinanza n. 4522/15, 5 March 2015.



The EU legal definition of PSG can be found in Article 10(1)(d) of the Qualification Directive:

'(...) a group shall be considered to form a particular social group where *in particular*:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.' (emphasis added)<sup>19</sup>

The first test this norm refers to has been termed the 'fundamental characteristic test' and the second one has been termed the 'social recognition test'.

Whilst the UNHCR advocated an alternative application of these tests for the purposes of determining whether a PSG can be identified, in *X, Y and Z* the CJEU held that both tests had to be used,<sup>20</sup> thus imposing a cumulative application of these tests against the understanding of the UNHCR. This was mostly justified on the basis of a literal reading of the norm, as the word 'and' is used to connect both tests. Yet, this interpretation disregards that the tests are introduced with the words 'in particular', thus suggesting that a PSG can be found in circumstances beyond these two tests.

Furthermore, the Qualification Directive (as well as all EU asylum law) should be interpreted in a way that is compatible and consistent with the Refugee Convention, as recalled insistently throughout the preambles to the CEAS instruments. The CJEU's interpretation of the notion of PSG is thus unduly restrictive and has accordingly been widely criticised (ICJ, 2014). The European Parliament appropriately proposed an amendment that renders the tests alternative, instead of cumulative, by replacing 'and' with 'or' (European Parliament, 2017b, Amendment 85).

**Recommendation 10:**

**Recital No. 28 of the Proposed Qualification Regulation should be amended as to rephrase 'gender, including gender identity and sexual orientation' as 'gender, gender identity and sexual orientation'.**

**Recommendation 11:**

**The Council of the EU should accept Amendment 85 by the European Parliament regarding the Proposed Qualification Regulation, to render the PSG tests alternative, instead of cumulative, by replacing 'and' with 'or'.**

<sup>19</sup> The same norm goes on to add that '[s]exual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States.' This exclusion apparently aims to avoid offering legal protection to certain sexual behaviours, namely paedophilia, as if such conduct could be considered a 'sexual orientation' (when in reality it is more appropriately defined as a sexual pathology). For its potentially offensive effect, it has been argued that such allusion should be removed from EU law (ILGA Europe, 2016, p. 4).

<sup>20</sup> Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, 7 November 2013, ECLI:EU:C:2013:720.

## 'Internal relocation alternative'

Even if a SOGI asylum seeker proves persecution and membership of a PSG, asylum authorities often use what is usually referred to as the 'internal relocation alternative' to justify not granting international protection. Internal relocation refers to the possibility of an asylum seeker being able to return to the country of origin and relocate within it to escape the persecution complained of (a possibility often linked by decision-makers to some guise of 'discretion' or 'concealment' regarding one's SOGI).

This is a highly contentious tool in the context of SOGI asylum, in the light of how widespread discrimination and violence against sexual and gender minorities can be in the countries of origin of most SOGI asylum seekers. Furthermore, the extensive use of social media and internet also renders the possibility to relocate within one's country of origin increasingly unrealistic, unless a good degree of 'concealment' of one's SOGI is expected.

The current Qualification Directive deals with this notion under Article 8, as 'internal protection', and states that asylum authorities *can* carry out such an assessment bearing in mind both 'the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant'.

The Proposed Qualification Regulation would render this assessment compulsory (Article 8(1)), whilst the European Parliament would retain its optional character and add that internal protection can only be found to be viable if 'the State or agents of the State are not the actors of persecution or serious harm' (European Parliament, 2017b, Amendment 75).

**Recommendation 12:**

**The Council of the EU should accept Amendment 75 by the European Parliament regarding the Proposed Qualification Regulation, to maintain the optionality of the 'internal protection' and add that internal protection can only be found to be viable if 'the State or agents of the State are not the actors of persecution or serious harm'.**

## *Sur place* international protection claims

The possibility of *sur place* international protection claims – i.e. claims that relate to fear of persecution that arises from events which have taken place since the applicant left the country of origin – is also relevant for SOGI claimants. It may well happen that a SOGI claimant only requires international protection owing to relatives, community members or members of the police finding out about the applicant's SOGI after they left the country. This can be the case, e.g., of an international student exploring their sexuality whilst abroad, posting on social media about their participation in queer events or a new same-sex partner, and then being unable to return to the country of origin owing to family threats or unsafe community environment.

Article 5 of the Qualification Directive recognises *sur place* claims, and explicitly states that such claims may 'be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.' This suits SOGI claimants, as their SOGI-related 'activities' in the host country are most likely the result of a SOGI the applicant was already aware of to some extent in their country of origin, but may have more freely explored or expressed in the host country.

Article 5(3), however, establishes that 'Member States *may* determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.' (emphasis added) This may affect SOGI claimants, as decision-makers may perceive the participation in 'queer activities' (such as taking part in LGBTI events, speaking to the press or posting on social media on LGBTI-related issues, and being a member of LGBTI group) as an attempt of the applicant to attract attention and 'create' the necessary conditions for a finding of fear of persecution. Ironically, not engaging in such 'queer activities' is also what may damage the applicant's credibility in the eyes of the decision-maker, so applicants may fail to obtain international protection independently of whether they engage in such activities or not.

Whilst so far the Article 5(3) exception is facultative and only affects refugee status (not subsidiary protection), the Proposed Qualification Regulation aims to amend this norm to render it practically mandatory and apply it to subsidiary protection as well. The European Parliament, instead, would keep the exception facultative and exclude from its scope those cases, as described above, of individuals who were previously unable to express their sexuality and now wish to do so (European Parliament, 2017b, Amendment 68). In this Amendment, to 'sexuality' we would add 'gender identity'.

**Recommendation 13:**

**The Council of the EU should accept Amendment 68 by the European Parliament regarding the Proposed Qualification Regulation, to maintain the optionality of the Article 5(3) exception and exclude from its scope those cases of individuals who were previously unable to express their sexuality or gender identity, and now wish to do so.**

## Family reunification

In case of a positive decision on some form of international protection, social integration is left largely to Member States' discretion. Yet, EU legislation on the family reunification rights of third country nationals (Family Reunification Directive) allows refugees to be joined by family members.<sup>21</sup>

<sup>21</sup> Articles 9 ff of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03/10/2003 P. 0012 – 0018.

'Family members' categorically include spouses and (unmarried and 'under age') children, but only include unmarried partners 'in a duly attested stable long-term relationship' and registered partners upon Member States' discretion (Articles 4 and 10). These norms, if transposed in a minimalistic way by Member States, leave SOGI asylum seekers in a less advantageous position than heterosexual/cis-gender asylum seekers.

Indeed, SOGI claimants will generally have much greater difficulty in proving subsisting family or intimate relations, for example, that they lived together with an intimate partner in the country of origin, owing the secretive nature of those relationships in persecutory environments. This remains the case despite Article 11(2) of the Family Reunification Directive stating that domestic authorities should take into account non-official or documentary evidence of the family relationship and should not reject an application based solely on the fact that documentary evidence is lacking. Article 23 of the Qualification Directive complements the Family Reunification Directive by ensuring that Member States promote the family unity of beneficiaries of international protection.

Although under the Proposed Qualification Regulation Member States retain the prerogative of discriminating against unmarried couples in the light of their domestic law (Article 2(9)(a)), it offers a slightly broader notion of 'family member', namely by including relationships formed outside the country of origin of the applicant(s) but before the arrival to the host country (Recital No. 16), and extends the right to family reunification to those who are granted subsidiary protection (Article 25).<sup>22</sup>

This proposal is welcome, but it remains to be seen how evidentiary standards will be applied when SOGI applicants will make use of these substantive norms. There have thus been calls for clearer inclusion of same-sex couples and their relatives within the notion of 'family members' in the Proposed Qualification Regulation, as well as in the Proposed recast of the Dublin Regulation (European Parliament, 2017b, Amendment 16; ILGA Europe, 2016, pp. 4–5; UNHCR 2018, pp. 31–32). One should go even further and call for equal treatment of couples and families independently of gender identity, gender expression and sex characteristics of any of their members.

**Recommendation 14:**

**Amend Articles 2(9)(a) and 25 of the Proposed Qualification Regulation (as well as the Proposed recast of the Dublin Regulation) as to guarantee equal treatment of couples and families independently of sexuality, gender identity, gender expression and sex characteristics of any of their members.**

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<sup>22</sup> Whilst the Family Reunification Directive applies chiefly to refugees and their family members residing outside the EU, the Qualification Directive / Proposed Qualification Regulation applies more broadly to any beneficiary of international protection and to their family members already in the EU territory. In situations where both instruments potentially apply, the Family Reunification Directive takes precedence as *lex specialis* (Recital No. 38 of the Proposed Qualification Regulation; Peers, 2017).

## 'Safe countries'

SOGI asylum seekers are often from countries that may be in Member States' lists of 'safe countries', which not only entitles domestic authorities to adopt an accelerated procedure, but may even lead to holding that an asylum claim is inadmissible if the applicant is a national of a 'safe country of origin', or can apply to asylum in a 'first country of asylum' or a 'safe third country' (Articles 33(2)(b) and (c), 35-38 of the Procedures Directive).

Yet, these SOGI asylum seekers may well be victims of persecution warranting international protection, as the information gathered in relation to the country of origin, 'first country of asylum' and 'third country' often omits elements regarding SOGI minorities. Scholars and civil society alike have exposed the shortcomings of the 'safe country' notion (Costello, 2016; ECRE, 2016).

So far, there is no list of 'safe countries' at a European level – only at the level of some EU Member States. In a worrying move, the EU institutions are currently considering a Proposed 'Safe Countries of Origin' Regulation, which adopts a list of 'safe countries of origin' to be valid across all Member States part of CEAS.<sup>23</sup> This proposal includes as 'safe countries' Albania, Bosnia and Herzegovina, former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey.

Some commentators are of the opinion that an EU list of 'safe countries of origin' would help the EU cope with 'unusual migration flows' by accelerating and simplifying the asylum claims of individuals affected (d'Oultremont, 2015). Yet, some of the countries the EU Commission's proposal includes as 'safe' – most notably Turkey – are renowned for reports of homophobic and transphobic policies and violence (ILGA et al., 2017).

The European Parliament has thus rightly pointed out that SOGI minorities can be subjected to abuse in countries held to be 'safe' for the purposes of asylum determination, so their claims for asylum may be entirely legitimate (European Parliament, 2016, point 12). Fast-track procedures and lists of 'safe countries' should thus not unduly affect SOGI asylum claims in a detrimental way. More generally, any EU list of 'safe countries' would need to be consistent with the principle of non-refoulement and the rights of vulnerable groups (European Parliament, 2016 point 18).

Seemingly taking into account these concerns, Preamble 46 of the Proposed Procedures Regulation acknowledges that '[t]he fact that a third country is on the EU common list of safe countries of origin cannot establish an absolute guarantee of safety for nationals of that country and therefore does not dispense with the need to conduct an appropriate individual examination of the application for international protection.' Moreover, Article 47 of the Proposed Procedures Regulation states that a country can only be considered 'safe' for a particular applicant if, amongst other requirements, 'he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances'.

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<sup>23</sup> Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU (COM(2015) 452 final).



This is welcome, however, in practice, the most effective and law-compliant way forward is to simply do without any such list of 'safe countries' and with the notion of 'safe country' itself – both at a European and domestic level – as the notion is unsatisfactory and risks leading to the violation of the principle of non-refoulement.

**Recommendation 15:**

**Reject Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU (COM(2015) 452 final).**

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## Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA

SOGICA is a four-year (2016-2020) research project funded by the European Research Council (ERC) that explores the social and legal experiences of asylum seekers across Europe claiming internal protection on the basis of their sexual orientation or gender identity (SOGI). It is led by Professor Nuno Ferreira and a team of researchers at the School of Law, University of Sussex who are Dr Carmelo Danisi, Dr Moira Dustin and Dr Nina Held.

SOGI related human rights violations are the basis of an increasing number of asylum claims, amounting to thousands across Europe each year. These asylum claims are often treated in an insensitive way, i.e. based on inappropriate legal, cultural and social notions. These claims are also of a striking complexity and significance for the purposes of assessing the efficiency and fairness of an asylum adjudication system.

Focusing on Germany, Italy and the UK as case studies, and analysing how SOGI related claims are addressed at European level – covering the European Union (EU) and Council of Europe (CoE) – the project seeks to determine how European asylum systems can treat more fairly asylum claims based on the claimant's SOGI. As a result, SOGICA will generate the first ever theoretically and empirically-grounded comparative and comprehensive picture of the status and experiences of this specific group of asylum-seekers. This approach will provide the necessary evidence base to improve current law, policy and decision-making. The aim is to contribute to the development of a more just and humane asylum process for individuals seeking refuge in Europe on the basis of SOGI.

Over the life of the project, we intend, among other things, to: interview and collaborate with SOGI asylum-seekers and refugees, stakeholders and civil society representatives; create an online database of relevant legislation, policy, case-law, and any other resources that can be used by asylum seekers, practitioners and researchers; contribute to and organise workshops and training in the field; support European SOGI, refugee and migrant organisations.

- Follow us on Twitter (@SOGICA1) and Facebook (@SOGICAProject)
- Check the SOGICA website [www.sogica.org](http://www.sogica.org) and join the SOGICA mailing list for updates
- Let us know if you or anyone you know would like to be interviewed

It is time to create a fairer asylum system in Europe!



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