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Reforming the Common European Asylum System: Enough Rainbow for Queer Asylum Seekers?

Summary

Abstract

A partire dagli anni ’90, l’Unione europea (UE) ha lentamente sviluppato un sistema di asilo sempre più sofisticato conosciuto come Sistema Europeo Comune di Asilo (CEAS). Questo quadro – inteso come insieme di strumenti legislativi e sviluppi giurisprudenziali – ha inevitabilmente avuto implicazioni per coloro che fondano la loro domanda di protezione internazionale sulla base dell’orientamento sessuale e/o dell’identità di genere (SOGI). Ciò trova conferma nel contenuto di alcune disposizioni relative agli strumenti legislativi del CEAS e dalle sentenze rilevanti della Corte di giustizia dell’Unione europea (CGUE). L’attuale assetto del CEAS solleva una serie di problematiche rispetto alle richieste di asilo SOGI. Una serie di proposte per riformare il CEAS sono state avanzate nel 2016. Anche da queste proposte possono derivarsi alcune implicazioni significative per i richiedenti asilo SOGI. Questo contributo intende esplorare questo tentativo di riforma, tenendo conto delle varie posizioni espresse dalla Commissione, dal Parlamento e dal Consiglio. In tal modo, si tenterà di verificare fino a che punto tali proposte e le differenti posizioni istituzionali fanno fronte alle, o ignorano o aggravano le, problematiche che incontrano i richiedenti asilo SOGI.

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. A new set of proposals for reform of the CEAS was put

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forward in 2016, and these also affect SOGI asylum claims in precise and acute ways. This contribution scrutinises these proposals of reform, including the different positions of the Commission, Parliament and Council, where relevant. In particular, this contribution will assess the extent to which these proposals and different institutional positions address, ignore or aggravate the issues that currently affect SOGI asylum seekers.

1. Introduction

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 well-developed asylum policy. The development of an EU asylum policy can be traced back to the early 1990s. All EU Member States then (as now) were bound by the 1951 Refugee Convention[1]. But there was no relevant action in this field at an EU level. The 1990 Dublin Convention was entered into by 12 EU Member States to assist them in determining the EU Member State responsible for examining asylum claims[2]. 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)[3]. 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[4]: the Reception Conditions Directive[5], the Procedures Directive[6], and the Qualification Directive[7], 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)[8]. This recast process introduced substantial changes, but failed to introduce an equal level of protection across the EU[9].

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[10]. In answer to these events, in 2015 the European Commission launched the 'European Agenda on Migration'[11], which, in relation to the CEAS, prioritised: a) 'a new systematic monitoring pro-

1 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

2 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, OJ C 254, 19 August 1997, pp. 1-12.

3 Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, para. 13-14.

4 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.

5 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 June 2013, pp. 96-116.

6 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 June 2013, pp. 60-95.

7 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 December 2011, pp. 9-26.

8 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 December 2008, pp. 98-107.

9 G. De Baere, *The Court of Justice of the EU as a European and International Asylum Court*, *Leuven Centre for Global Governance Studies*, Working Paper 118, 2013; F. Ippolito, S. Velluti, *Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness*, in *Refugee Survey Quarterly*, 2011, 3, pp. 24-62; S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts*, Heidelberg/New York/Dordrecht/London, Springer, 2014; B., *Comments on the Court of Justice of the EU's Developing Case Law on Asylum*, in *International Journal of Refugee Law*, 2013, 2, pp. 377-381.

10 See, for example, *Unravelling the Mediterranean Migration Crisis*, at www.medmig.info.

11 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration*, 13 May 2015, COM(2015)240 Final.

cess, to look into the implementation and application of the asylum rules', b) giving 'further guidance to improve the standards on reception conditions and asylum procedures to provide Member States with well-defined and simple quality indicators and reinforcing protection of the fundamental rights of asylum-seekers', c) transposing and implementing in practice the recast asylum directives in the context of infringement procedures; d) enhancing the practical cooperation offered by EASO (European Asylum Support Office), in particular in relation to producing Country of Origin Information; e) tackling more effectively 'abuses' of the asylum system; and f) strengthening 'safe' Country of Origin norms in the Procedures Directive. In relation to asylum, the Agenda concludes with the need to debate three main developments: a common Asylum Code, the mutual recognition of asylum decisions, and the adoption of a single asylum decision process to guarantee equal treatment of asylum seekers throughout Europe.

As a consequence of the 2015 European Agenda on Migration, in 2016 the European Commission put forward a series of 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 of reform of the Reception Conditions Directive also consists of a Directive[12], the proposals for reform of the Qualification and Procedures Directives take the shape of Regulations[13], which translates into much less flexibility for EU Member States in implementing EU standards and very limited scope to set higher standards[14]. Although this harmonisation effort may be seen positively for discouraging secondary movements of asylum seekers across the EU, it also entails a serious risk of lowering the current standards[15]. There are also proposals to introduce an EU list of 'safe countries' (discussed in section 3.2)[16], establish a Union Resettlement Framework[17], recasting the Dublin Regulation[18], recasting the EURODAC Regulation[19], creating an EU Asylum Agency[20], and establishing a crisis relocation mechanism[21]. These broad-ranging proposals take into account the rich body of case law that the Court of Justice of EU (CJEU) has produced to clarify the interpretation of key norms in the existing CEAS regulations and directives and their previous incarnations.

12 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.

13 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.

14 P. Craig, G. de Búrca, *EU Law: Text, Cases, and Materials*, Oxford/New York, OUP, 2015, pp. 106-109. 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).

15 S. Peers, *The New EU Law on Refugees Takes Shape: More Harmonisation but Less Protection?*, in *EU Law Analysis*, 23 July 2017.

16 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) 0452.

17 Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016) 0468.

18 Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 0270.

19 Proposal for a Regulation of the European Parliament and of the Council on the establishment of EURODAC for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM(2016) 0272.

20 Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 0271.

21 Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM(2015) 0450.

This contribution will consider how the EU has so far contributed to shaping the current European legal and policy framework on which asylum seekers claiming international protection on grounds of their sexual orientation or gender identity (SOGI) can rely[22]. The focus will be on how the EU has addressed the increasing number and complexity of such asylum claims. Although the EU does not collect statistics on SOGI asylum claims, it is clear that thousands of the asylum seekers who arrive in Europe each year rely on their SOGI to present a claim for international protection[23]. The law and policy produced by the EU has an immense influence on how domestic authorities address these SOGI asylum claims, so it is crucial to have a thorough understanding of the applicable EU framework. It is important to note that the few SOGI asylum cases that the CJEU has so far dealt with have raised very important issues, and one cannot say that the Court has dealt with them in an entirely appropriate fashion. With a new set of proposals for reform of CEAS currently on the table (hereinafter the 'Proposed' instruments), it is crucial to take stock of the current EU SOGI asylum law and critically analyse the CEAS reform proposals from a SOGI perspective. This has so far been done through NGO briefings and short blog pieces[24], but not through a comprehensive academic piece of research. This contribution will thus fill in that gap in the European asylum and SOGI literature, by offering a rigorous and timely analysis of SOGI asylum claims in the context of the existing EU asylum law and policy and its reform. The focus of this analysis will lie on the current framework and reform proposals, but references will also be made to previous wording of relevant instruments where particularly relevant. Additionally, emphasis will be placed on the initial Commission proposals, but counter-proposals and suggestions of amendments will also be mentioned where relevant.

This contribution will start by exploring how the EU has dealt with SOGI asylum claims so far, particularly through case law (section 2). The impact of the CEAS reform proposals on SOGI asylum claims will then be analysed from the perspective of a range of particular aspects of the asylum process (section 3). Some final observations will then be made on the range of issues that need to be addressed in future legal and policy reforms (section 4).

2. The SOGI European Union asylum system

In this section, a range of statutory instruments, case law and to a lesser extent policy documents will be analysed to determine what is the scope, nature and characteristics of the EU SOGI asylum system, and critically identify any scope for improvement. It has been clear for several years in the context of EU asylum law and policy-making that asylum can be claimed on SOGI-related grounds. Article 10(1)(d) 2004 Qualification Directive clarified that, for the purposes of claiming international protection, a 'particular social group' could be based on a common characteristic of sexual orientation. Institutions within the EU have also occasionally sent out encouraging signs: the European Parliament, for example, explicitly referred to SOGI asylum in its call for a multiannual policy to protect the fundamental rights of LGBTI (lesbian, gay, bisexual, transsexual and intersex) people, and called on the Commission and relevant agencies to bear in mind SOGI issues in the implementation and monitoring of EU asylum legislation[25]. Moreover, following the 2017 reports of persecution of gay men in Chechnya, the European Parliament called on the Commission to engage with international human rights organisations and Russian civil society to assist those who had fled Chechnya, and on the Member States to facilitate asylum request procedures for these asylum seekers[26].

22 For ease of writing, "SOGI" and "queer" will be used interchangeably throughout this contribution, but it is recognised that terminology in this field is ever changing and that 'queer' is usually understood as having a broader scope than "SOGI".

23 S. Jansen, T. Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, Amsterdam, Vrije Universiteit Amsterdam, 2011, pp. 15-16.

24 ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers and Refugees in the Reform of the Common European Asylum System*, 2016), at https://www.ilga-europe.org/resources/policy-papers/protecting-rights-lgbti-asylum-seekers-and-refugees-reform-common-european.; S. Peers, *The New EU Law on Refugees Takes Shape*, *ivi*.

25 European Parliament, *Roadmap against Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity*, P7_TA(2014)0062, 2014.

26 European Parliament, *Resolution on the Implementation of the Council's LGBTI Guidelines, Particularly in Relation to the Persecution of (Perceived) Homosexual Men in Chechnya, Russia*, 2017/2688(RSP), 2017.

2.1. The CEAS instruments

The current EU asylum directives (mentioned in section 1) contain very limited direct references to SOGI. A few exceptions stand out. First, the Qualification Directive includes not only sexual orientation (already included in the 2004 Qualification Directive), but also gender identity as characteristics that may constitute a basis to identify a "particular social group""(PSG). 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)[27]

Second, Recital No. 29 of the Procedures Directive 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. Third, the Procedures Directive considers SOGI explicitly amongst the asylum claimants' characteristics that may warrant special procedural guarantees. Article 15(3)(a)) 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". 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)). Except for the need for the interviewer to take into consideration the "applicant's cultural origin or vulnerability", all these requisites were introduced by the recast 2013 Procedures Directive, which represents a positive evolution for SOGI asylum seekers. Despite this auspicious start, from a SOGI perspective there are many worrying aspects in the EU regulation of asylum procedures (further explored in section 3). The Reception Conditions Directive omits completely any reference to SOGI. As it will be become clear throughout this article, this is insufficient to address appropriately the needs and circumstances of SOGI asylum seekers.

Furthermore, 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"[28]. 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. 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, they should be classified as "vulnerable" in many instances.

27 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, *Protecting the Rights of LGBTI Asylum Seekers*, *ivi*, 4.

28 This definition is repeated in Article 20(3) of the Qualification Directive.

2.2. The jurisprudence of the Court of Justice of the EU

The CJEU has also had a growing number of opportunities throughout the years to establish a position in relation to SOGI asylum claims, even if it has not entirely seized the opportunity to vindicate the need for international protection of these individuals. In *X, Y and Z*[29], the Court determined that the existence of criminal laws targeting homosexuals supports the finding that those persons form or belong to a particular social group for the purposes of the Refugee Convention, but the criminalisation of homosexual acts does not in itself constitute an act of persecution. This finding went against what domestic high judicial instances had established[30], what previous studies had advocated[31], and it was criticised widely, for example, for failing to place these criminal law norms within their broader societal context of discrimination and intolerance[32]. The Court also found in this case that to be considered a member of a particular social group for the purposes of the Refugee Convention, one must fulfil both tests indicated in Article 10(1)(d) of the Qualification Directive: the claimant must be considered a member of a group that is socially recognisable in the country of origin (the social recognition test) and the claimant's sexual identity must be considered a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce to it (the fundamental characteristic test). This reflects a strict interpretation of this norm, and has been considered unduly burdensome and inconsistent with the UNHCR guidance[33]. 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. On a more positive note, the Court found against the "discretion requirement", thus dismissing the possibility of returning asylum claimants to their countries on the basis that they could be discreet about their sexual identity. This has been rightly praised[34], but concerns remain in relation to the possibility of questioning asylum claimants about how they expressed their sexuality in their countries of origin and how they would express it if they were returned, as the CJEU did not expressly rule out this line of questioning[35]. The Court's decision did, nonetheless, have the merit of leading to the amendment of the Dutch relevant provisions that were not consistent with this decision, as well as more progressive case law in countries such as Bulgaria[36].

In the subsequent case of *A, B and C*[37], the CJEU dealt with evidentiary standards in SOGI asylum claims. The CJEU clearly refused the idea that asylum claimants' sexual self-identification was determinative – according to the CJEU, the declared sexual orientation "constitute[s], having regard to the particular context in which the applications for asylum are made, merely the starting point in the process of assessment of the facts and circumstances". This is not incompatible with EU law as such, but does differ from the decision-making patterns in some EU Member States and published guidance, according to which applicants' self-declared sexuality does not need to be probed by the authorities[38]. The Court

29 European Court of Justice, 7 November 2013, Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*.

30 See, for example, decision of the Italian Supreme Court: Corte di cassazione, ordinanza del 20 settembre 2012, n. 15981.

31 S. Jansen, T. Spijkerboer, *ivi*.

32 International Commission of Jurists (ICJ), *X, Y and Z: A Glass Half Full for "Rainbow Refugees"?*, 2014; N. Markard, *EuGH zur sexuellen Orientierung als Fluchtgrund: Zur Entscheidung X, Y und Z Gegen Minister voor Immigratie en Asiel vom 7.11.2013*, in *Asylmagazin*, 2013, 12, pp. 402-408, www.asyl.net/fileadmin/user_upload/beitraege_asylmagazin/Beitraege_AM_2013/AM2013_12inhalt.pdf.

33 ICJ, *ivi*.

34 A. van der Vleuten, *Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe*, in *LGBT Activism and the Making of Europe: A Rainbow Europe?*, P.M. Ayoub, D. Paternotte (eds.), Basingstoke, Palgrave, 2014, p. 138.

35 European Council on Refugees and Exiles (ECRE), *Preliminary Deference? The Impact of Judgments of the Court of Justice of the EU in Cases X.Y.Z., A.B.C. and Cimade and Gisti on National Law and the Use of the EU Charter of Fundamental Rights*, 2017.

36 *Ibid*.

37 European Court of Justice, 2 December 2014, Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*.

38 N. Ferreira, *Portuguese Refugee Law in the European Context: The Case of Sexuality-Based Claims*, in *International Journal of Refugee Law*, 2015, 3, pp. 411-432; S. Jansen, T. Spijkerboer, *ivi*, p. 17; UNHCR, *Guidelines on International Protection No. 9: Claims to*

appropriately rejected the use of sexualised evidence or stereotyped assessments in SOGI asylum claims (including medical tests such as phallometric testing and explanation of sexual practices), as such evidence violates the dignity and privacy of the claimants (Articles 1 and 7 CFR). The Proposed Qualification Regulation appropriately retains this conclusion in its Recital No. 29[39]. Questions based on stereotypes can, however, still be asked, as part of overall balanced lines of questioning (seemingly allowed by par. 62 of the decision), and the asylum claimant's self-declaration does not preclude the authorities from assessing the claimant's claims (par. 52). The Court also asserted that delays in disclosing one's sexuality should not automatically be held against the claimant to harm their credibility (para. 69-71).

Some commentators have referred to the decision in *A, B and C* in positive terms and seen it as part of a trend to interpret the Qualification Directive more generously, because the CJEU required domestic decision-makers to take into consideration all relevant facts in the context of asylum adjudication and precluded certain means of evidence that offend asylum seekers' dignity and privacy[40]. Yet, despite the overall positive outcome of this decision, it has been pointed out that the Court unhelpfully still allowed stereotyped questioning, which risks emboldening domestic authorities to rely on inappropriate, culturally specific stereotypes instead of appreciating the "wide diversity of the expression of human sexual identity, especially in countries where homosexuality is taboo"[41]. Markard also points out that the CJEU did not include the Advocate General's recommendation to give applicants sufficient opportunity to respond to doubts relating to their credibility[42]. Moreover, the Court missed the opportunity to endorse the UNHCR guidance and provide further guidance on what type of evidence should be accepted and expected in cases involving SOGI asylum seekers, which has left decision-makers rather at a loss[43]. This, however, has had the positive effect of prompting some domestic authorities to develop their own guides for questioning SOGI asylum claimants[44]. The decision also contributed to positive developments in several EU Member States, including the prohibition of photographic and video evidence of sexual practices in the UK and Sweden[45].

A third case – *F. v Bevándorlási* és Állampolgársági *Hivatal* – again related to means of evidence applicable to one's sexuality, this time involving projective personality tests in Hungary[46]. The case related to a gay Nigerian man who had applied for asylum in Hungary on the basis of his sexual orientation at his first interview with the authorities. The (non-binding) Opinion of the Advocate General in this case only reluctantly discredited the use of such tests to prove one's sexual orientation and, at the end, left room for the Hungarian court to continue to use such tests to adjudicate the asylum claim[47], something that has been criticised for potentially violating EU asylum law[48]. The subsequent (binding) Court's

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Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 2012, HCR/GIP/12/09, 16.

39 "Specifically as regards homosexuality, the individual assessment of the applicant's credibility should not be based on stereotyped notions concerning homosexuals and the applicant should not be submitted to detailed questioning or tests as to his or her sexual practices". ILGA Europe and the UNHCR suggest, however, that this Recital should more appropriately refer to sexual orientation and gender identity, rather than homosexuality: ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers*, *ivi*, 5-6; UNHCR, *Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466*, 2018, 11, at www.refworld.org/docid/5a7835f24.html.

40 T. Johansson, L. Nyström, J. Sandgren, *A, B, C v. Staatssecretaris van Veiligheid En Justitie, Joined Cases C-148/13 to C-150/13 (2 December 2014)*, in *EU Constitutional Law – Örebro Universitet*, 27 April 2015, at https://eulaworebro.wordpress.com/2015/04/27/a-b-c-v-staatssecretaris-van-veiligheid-en-justitie-joined-cases-c-14813-to-c-15013-2-december-2014/.

41 S. Peers, *LGBTI Asylum-Seekers: The CJEU Sends Mixed Messages*, in *EU Law Analysis*, 2 December 2014, at http://eulawanalysis.blogspot.com/2014/12/lgbti-asylum-seekers-cjeu-sends-mixed.html.

42 Opinion of Advocate General Sharpston in Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, delivered on 17 July 2014, para. 76 ff; N. Markard, *CJEU Ends Degrading Questioning of Homosexual*, in *European Commission on Sexual Orientation Law (ECSOL)*, 7 December 2014, at www.sexualorientationlaw.eu/95-cjeu-ends-degrading-questioning-of-homosexual-asylum-seekers-european-union.

43 European Council on Refugees and Exiles, *Preliminary Deference?*, *ivi*; S. Peers, *LGBTI Asylum-Seekers*, *ivi*.

44 European Council on Refugees and Exiles, *Preliminary Deference?*, *ivi*.

45 *Ibid*.

46 European Court of Justice, 25 January 2018, Case C473/16, *F v Bevándorlási és Állampolgársági Hivatal*.

47 Opinion of Advocate General Wahl in Case C473/16, *F v Bevándorlási és Menekültügyi Hivatal (formerly Bevándorlási és Állampolgársági Hivatal)*, delivered on 5 October 2017.

48 N. Ferreira, D. Venturi, *Tell Me What You See and I'll Tell You If You're Gay: Analysing the Advocate General's Opinion in Case C-473/16, F v Bevándorlási* És Állampolgársági *Hivatal*, in *EU Immigration and Asylum Law and Policy*, 24 November 2017, at

judgment, in contrast, more forcefully condemned the use of such tests in SOGI asylum cases, and precluded their use on the basis of Article 7 of the Charter of Fundamental Rights of the EU (on the right to respect for private and family life) and Principle 18 of the Yogyakarta Principles (protecting individuals from medical abuses based on sexual orientation or gender identity)[49]. This is thus overall a commendable decision; yet, perhaps for fearing going beyond the remit of the case, the Court again failed to offer any positive guidance on what evidence national authorities can rely on in cases involving SOGI claims, and refused to recognise the importance of sexual self-identification.

The accepted or required means of evidence in SOGI claims have thus not been prescribed in EU law – any legally recognised form of evidence can be used in this context. The decisions in *A, B and C* and in *F* have, however, made it clear that the use of sexualised evidence, stereotyped assessments and projective personality tests in SOGI asylum claims is precluded for violating the dignity and privacy of the claimants. This includes medical tests such as phallometric testing and explanation of sexual practices, but the CJEU has contentiously left room for questioning on the basis of stereotypes provided it is part of an overall balanced line of questioning. This CJEU decision is also in tension with the call from the European Parliament's Committee on Women's Rights and Gender Equality on all EU Member States to "combat harmful stereotypes about the behaviour and characteristics of LGBTI women and to fully apply the Charter in respect of their asylum claims"[50]. One of the central elements to be proven in a SOGI asylum claim is the claimant's SOGI itself. Whilst the practice in several domestic jurisdictions, the recommendations of scholars and the UNHCR guidance favour the acceptance of an asylum seeker's self-declared sexuality,[51] the CJEU has used its decisions in *A, B and* C and *F* to assert that one's self-identification as member of a sexual minority is relevant, but insufficient to prove that sexuality. Consequently, domestic authorities in the EU may still assess the asylum seeker's claim in this regard, which can become extremely damaging for SOGI asylum seekers when done inappropriately.

Overall, the body of EU case law that has developed around SOGI asylum claims indicates an insufficient willingness to protect SOGI asylum seekers from persecution. As Ammaturo points out, "[i]f there were a genuine interest in defending individuals – either citizens or non-citizens – from human rights abuses, stories of structural violence or harassment would be enough to grant protection, without the applicants having to demonstrate a threat of death or an extreme punishment"[52]. In none of the case law discussed here is there any reliance on the UNHCR's Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity[53], and only in the *F* case is there a reference to the Yogyakarta Principles. This limited attention paid to specialised international guidance plays out in various ways, as it will now be seen in relation to particular aspects of the asylum decision-making process in the context of the CEAS reform proposals.

3. The reform of CEAS from a SOGI asylum perspective

In the light of the analysis of the overall developments of the CEAS (section 1) and of how CEAS has applied to SOGI asylum claims (section 2), it is time to now turn to the analysis of the current CEAS reform proposals from a SOGI perspective. These reform proposals have been subjected to wide ranging commentary and criticism, for example by ECRE[54]. 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 Inter-

http://eumigrationlawblog.eu/tell-me-what-you-see-and-ill-tell-you-if-youre-gay-analysing-the-advocate-generals-opinion-in-case-c-47316-f-v-bevandorlasi-es-allampolgarsagi-hivatal/.

49 *The Yogyakarta Principles – The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, 2007, at http://www.yogyakartaprinciples.org/.

50 European Parliament, *Report on the Situation of Women Refugees and Asylum Seekers in the EU*, 2016, 2015/2325(INI), point 12, at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0024+0+DOC+XML+V0//EN.

51 N. Ferreira, *Portuguese Refugee Law in the European Context*, *ivi*; S. Jansen, T. Spijkerboer, *ivi*, 17; UNHCR, *Guidelines on International Protection No. 9*, *ivi*, 16.

52 F.R. Ammaturo, *European Sexual Citizenship: Human Rights, Bodies and Identities*, London, Palgrave Macmillan, 2017, 57.

53 UNHCR, *Guidelines on International Protection No. 9*, *ivi*.

54 AIDA – Asylum Information Database, *ECRE Completes Analysis of Common European Asylum System Reform Proposals*, 2017, at http://www.asylumineurope.org/news/28-02-2017/ecre-completes-analysis-common-european-asylum-system-reform-proposals.

group on LGBTI Rights held a meeting in 2017 on protecting the rights of LGBTI asylum seekers and refugees in the context of the CEAS reform[55]. This reform constitutes a good opportunity to introduce more appropriate norms addressing SOGI asylum claimants' rights and needs. In this section, these proposals will be analysed from a SOGI asylum perspective, considering in particular issues of arrival and reception (3.1), legal procedure (3.2), evidence (3.3), qualification (3.4), and life after the granting (or denial) of international protection (3.5). An overall remark is fitting from the start: whilst many norms in the current CEAS instruments should encompass not only sexual orientation and gender identity, but also sex characteristics and gender expression[56], it would make it linguistically cumbersome to list all these characteristics in each relevant norm, so it is suggested that – more simply, but equally effective – a Recital in each CEAS proposed instrument should make it clear that where there is a reference to sex, gender or gender identity in a particular, that reference should be interpreted as including sex characteristics and gender expression.

3.1. The arrival and reception of SOGI asylum seekers to the European Union

The EU is not itself the main actor responsible for administering the arrival of asylum seekers to EU territory – the Member States are – but the asylum legal and policy framework the EU has developed nonetheless affects SOGI asylum seekers, by action and omission. In fact, the minimum standards currently set by EU asylum law and policy has a considerable impact on the way national authorities manage the arrival and reception of SOGI asylum seekers. Nothing in the current EU framework requires domestic authorities to record asylum seekers' SOGI, which makes it impossible to produce reliable statistics. This could be addressed by including these elements in Article 27 of the Proposed Procedures Regulation. Moreover, 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[57], 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. Despite this less-than-ideal start, there is some scope for SOGI considerations in the reception process.

In relation to the notion of 'vulnerability (discussed in section 2), 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 further proposes to talk about 'specific' rather than 'special' reception needs, again without clearly changing the notion's substance[58]. 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*[59]. This amendment is indeed necessary: despite the risk of the term 'vulnerable' being used in ways that disempower and victimise individuals, its use in the CEAS instruments is essential to protect the rights and interests of asylum seekers in specific circumstances, and SOGI asylum claimants generally find themselves in such circumstances. If eventually approved, this amendment could thus have far-reaching positive consequences for SOGI asylum seekers and ensure greater harmony between the rules on reception and procedures at a domestic level[60].

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.

55 European Parliament Intergroup on LGBTI Rights, *Meeting on Protecting the Rights of LGBTI Asylum Seekers and Refugees in the Reform of the Common European Asylum System*, 2017.

56 ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers*, *ivi*.

57 European Council on Refugees and Exiles, *The Concept of Vulnerability in European Asylum Procedures*, 2017, 21.

58 European Parliament, *Report on the Proposal for a Directive of the European Parliament and of the Council Laying down Standards for the Reception of Applicants for International Protection (Recast)*, 2017, - A8-0186/2017, at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0186+0+DOC+XML+V0//EN&language=en.

59 European Court of Human Rights, 5 July 2016, *O.M. v. Hungary*, no. 9912/15; European Parliament Amendment 34.

60 European Council on Refugees and Exiles, *The Concept of Vulnerability*, *ivi*.

The inclusion of ‘vulnerability’ amongst these considerations undoubtedly brings within the scope of protection of this norm many SOGI asylum seekers (as discussed above), and the Strasbourg Court decision in *O.M.* 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’[61]. 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’[62]. Although SOGI-specific housing arrangements are increasingly offered in countries with a significant number of SOGI asylum seekers[63], 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[64].

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 varied greatly in this respect[65]. To make matters worse, the EU legal framework does not include a clear obligation to this effect; this can secured by amending Article 17(3) of the Proposed Reception Conditions Directive[66].

3.2. The European Union SOGI asylum legal procedure

Procedural fairness has rightly acquired a central place in asylum studies, in light of the impact that it has on the vindication of the rights of asylum seekers and granting (or not) of some form of international protection. Accordingly, it is crucial to look into the SOGI specificities of the EU asylum procedures – focus will be placed on the use of accelerated procedures, the notion of ‘safe countries’, and the characteristics of interviewers and interpreters.

Article 31(8) of the Procedures Directive allows asylum authorities to adopt accelerated procedures where an application is likely to be unfounded or where there are serious national security or public order concerns. This includes, amongst other scenarios, the applicant coming from a “safe country of origin” (Article 31(8)(b)), misleading the authorities (Article 31(8)(c)), offering clearly inconsistent and contradictory, clearly false or obviously improbable representations (Article 31(8)(e)), and not making an application for international protection as soon as possible, given the circumstances of his or her entry (Article 31(8)(h)). This means that the asylum procedure may be shortened, but Recital No. 20 of the Procedures Directive also highlights that such shorter time limits need to remain reasonable and are without prejudice to an adequate and complete examination being carried out and to the applicant’s effective access to basic principles and guarantees. Although none of the scenarios mentioned relates specifically to SOGI asylum claimants, some of these scenarios may be of particular relevance to them. This is especially the case in relation to not making an application for international protection as soon as possible owing to not knowing that SOGI-based persecution constitutes a basis for asylum, the notion

61 European Parliament, *Report on the Situation of Women Refugees*, *ivi*, point 12.

62 Committee on Women’s Rights and Gender Equality, *Report on Equality between Women and Men in the European Union in 2014-2015*, 2017, 2016/2249(INI), para. 42, at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0046+0+DOC+PDF+V0//EN.

63 See, for example, Schwulenberatung Berlin, *Official Shelter for LGBTI Refugees*, 2018, at www.schwulenberatungberlin.de/refugees-english#paragraph_5.

64 ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers*, *ivi*, 7-8.

65 TGEU Transgender Europe, *Welcome to Stay*, 2016, at http://tgeu.org/wp-content/uploads/2016/10/TGEU_TransAsylum-Brochure_WEB.pdf.

66 ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers*, 7-8.

of "safe country of origin", and offering false representations owing to fear of the public authorities. Indeed, SOGI asylum seekers may take longer to gather the courage and confidence to speak about their sexuality or gender identity to the host country authorities, even where they are aware that refugee law may offer them protection. This issue – often referred to as "late disclosure" – also often affects SOGI asylum seekers' credibility (section 3.3). For these reasons, Preamble 17 of the Proposed Procedures Regulation is welcome, as it clarifies that "[w]here it is not possible to provide adequate support in the framework of an accelerated examination procedure or a border procedure, an applicant in need of special procedural guarantees should be exempted from those procedures". Whereas SOGI asylum seekers will often be in need of special procedural guarantees, they should not commonly be affected by accelerated procedures.

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 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[67]. As Guild points out, the "safe country of origin" notion "is the most controversial as it denies the very essence of the refugee, the individual who claims a well-founded fear of persecution from his or her country of origin"[68]. So far, there is no list of "safe countries" at a European level – only at in some EU Member States. In a worrying move, the EU institutions are currently considering a Proposed "Safe Countries of Origin" Regulation, which adopt a list of "safe countries of origin" to be valid across all Member States part of CEAS[69]. This proposal includes as "safe countries" Albania, Bosnia and Herzegovina, former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey. Some commentators are indeed of the opinion that an EU list of "safe countries of origin" would help the EU cope with the "unusual migration flows", by accelerating and simplifying the asylum claims of the individuals in question.[70] 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[71]. 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[72]. 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[73]. 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 requirement, "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". This is welcome, however, in practice, the most effective and law-compliant way forward may well be to simply reject any such list of "safe countries" and the notion of "safe country" itself – both at

67 C. Costello, *Safe Country? Says Who?*, in *International Journal of Refugee Law*, 2016, 4, pp. 601-622; ECRE, *Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467*, 2016, at www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf.

68 E. Guild, *From Persecution to Management of Populations: Governmentality and the Common European Asylum System*, in *Nijmegen Migration Law*, Working Papers Series, 4, 2012, p. 25.

69 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.

70 C. d'Oultremont, *The Migration Crisis: A Stress Test for European Values*, *European Policy Brief*, 38, 2015, at www.egmontinstitute.be/wp-content/uploads/2015/09/Policy-Brief-Migration-final-CO.pdf.

71 ILGA, A. Carroll, L. Ramón Mendos, *State-Sponsored Homophobia – A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, 2017, at http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf.

72 European Parliament, *Report on the Situation of Women Refugees*, *ivi*, point 12.

73 *Ibid*, point 18.

a European and domestic level – as the notion is unsatisfactory and risks leading to the violation of the principle of non-refoulement.

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[74]. As mentioned above (section 2), the Procedures Directive reflects the concerns expressed in this literature – in particular in Article 15(3) – by considering the sex of interviewers and interpreters, which has positive consequences for SOGI asylum seekers. Ethnicity and religion have not, however, been mentioned as one of the 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 – including SOGI applicants – may find it extremely challenging to describe their experiences of SOGI-related persecution in front of someone of certain (often their own) ethnicity or religion. It would therefore be positive to include the consideration of ethnicity and religion in this norm in the Proposed Procedures Directive. This would also better reflect the intersectional nature of asylum seekers' experiences of the asylum procedure. 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[75], in the light of the potentially crucial role of interpreters in the evolution and outcome of the adjudication proceedings.

Considering the sensitiveness of the information usually involved in SOGI asylum claims, these asylum seekers legitimately expect confidentiality and discretion from the asylum authorities. For that reason, when a SOGI asylum case has been dealt with in the context of a joint application submitted on behalf of (child or adult) dependants, Article 11 of the Procedures Directive (which remains essentially the same in Article 35 of the Proposed Procedures Regulation) determines that the procedure should not lead to a single decision if that would lead to the disclosure of an applicant's particular circumstances, including one's sexual orientation or gender identity. A decision (confidential to the SOGI asylum seeker) should be issued separately from the decision relating to the joint application.

3.3. Proving claims based on SOGI in the European Union

As the discussion of the EU SOGI asylum case law above has indicated (section 2), SOGI asylum claims are notoriously difficult to prove. This sub-section will discuss some of the key evidentiary challenges that, in the light of that EU case law, SOGI asylum seekers generally face in terms of proving their asylum claims, even bearing in mind the enormous discrepancies between the decision-making processes across EU Member States.

Evidentiary requirements are of utter importance, as the Qualification Directive indicates. The accepted or required means of evidence in SOGI claims have not been prescribed in EU law – any legally recognised form of evidence can be used in this context. It has, however, been made clear in the CJEU's decisions in *A, B and* C and in *F* that the use of sexualised evidence, stereotyped assessments and projective personality tests in SOGI asylum claims is precluded for violating the dignity and privacy of the claimants. 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. 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

74 UNHCR, *Guidelines on International Protection No. 9*, *ivi*, para. 60.

75 ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers*, *ivi*, 10.

UNHCR has thus rightly argued that the proposed wording for Article 4 should be abandoned and the burden of proof should be shared[76].

To carry out their assessment, national authorities will need to rely on precise and up-to-date country of origin information (COI) and information regarding countries through which the asylum seeker may have transited, including "laws and regulations of the country of origin and the manner in which they are applied" (Article 4(3)(a) Qualification Directive; Articles 10(3)(b) and 45 Procedures Directive). On the basis of this information, national authorities may consider a country of origin or transit a "safe country" (Articles 35 ff Procedures Directive). As analysed above, this is a highly contentious notion, particularly inappropriate in relation to SOGI asylum seekers. The importance of good quality COI regarding SOGI asylum claims is thus paramount. For this reason, the European Parliament has recommended that "[t]ogether with the EASO and in cooperation with the European External Action Service, the Commission and Member States should ensure that the legal and social situation of LGBTI persons in countries of origin is documented systematically and that such information is made available to asylum decision-makers as part of Country of Origin Information"[77]. Following this European Parliament's Resolution, the EASO produced guidance on collecting country of origin information regarding LGB asylum claimants – leaving out trans asylum claimants owing to the insufficient data held in this regard[78]. This is also in line with EASO's foreseen role as a common educational platform for national asylum officials[79].

As with any other asylum claim, the success of SOGI asylum claims is fundamentally dependent on the credibility assessment carried out by the decision-maker in the context of Article 4 of the Qualification Directive. As many scholars have already pointed out, a "culture of disbelief" pervades some domestic asylum authorities, such as the Home Office in the UK[80]. The benefit of the doubt – a principle whose importance in asylum adjudication is highlighted in the UNHCR guidance – is ultimately ignored by many decision-makers, thus unlawfully short-changing SOGI asylum seekers[81]. In relation to gender related asylum claims, the European Parliament has asserted that credibility assessment should be carried out in a more objective and gender-sensitive way, and decision-makers should receive training on credibility assessment to include gender dimensions, thus also considering female applicants' cultural, social and psychological profiles, including cultural background, education, trauma, fear, shame and/or cultural inequalities between men and women[82]. The same applies entirely to SOGI-related asylum claims. Explicitly recognising the important and necessary role of the principle of the benefit of the doubt would do much to improve the assessment of credibility in EU asylum law[83].

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

76 UNHCR, *Comments on the European Commission Proposal for a Qualification Regulation*, *ivi*, 9-10.

77 European Parliament, *Roadmap against Homophobia*, *ivi*.

78 EASO, *Researching the Situation of Lesbian, Gay, and Bisexual Persons (LGB) in Countries of Origin*, 2015.

79 European Council, *The Stockholm Programme — An open and secure Europe serving and protecting citizens*, OJ C 115, 4 May 2010, pp. 1-38.

80 J. Millbank, *The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, in *International Journal of Refugee Law*, 2009, 1, pp. 1-33; J. Souter, *A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom*, in *Oxford Monitor of Forced Migration*, 2011, 1, pp. 48-59.

81 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 2011.

82 European Parliament, *Report on the Situation of Women Refugees*, *ivi*.

83 UNHCR, *Comments on the European Commission Proposal for a Qualification Regulation*, *ivi*, 10.

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[84]. As 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 (para. 69-71), domestic authorities should not place excessive importance on late disclosures[85]. It would have been useful if this decision had been reflected in one of the CEAS 2016 reform proposals[86].

The evidentiary challenges here discussed affect all the elements of an asylum claim that a SOGI asylum claimant needs to prove. Those elements will now be considered.

3.4. The SOGI refugee status determination process in the European Union

As with any other asylum claim, SOGI asylum claimants need to prove the elements required to be granted refugee status, namely a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and an inability or unwillingness to use the protection of that country (Article 1A(2) of the Refugee Convention). It is essential to analyse here how the elements of "persecution" and "particular social group" (PSG), in particular, play out in the context of SOGI asylum claims at a European level. This will also lead us to consider the "discretion" and "internal relocation" arguments.

A definition of the notion of "persecution" was only introduced at EU level in 2004 by Article 9(1) of the Qualification Directive. This norm defines "persecution" as an act "sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, *in particular* the rights from which derogation cannot be made under Article 15(2) [ECHR]" (emphasis added), or an accumulation of various measures with the same effect. The use of the expression "in particular" should encourage asylum authorities to consider as "persecution" acts that violate derogable rights as well, which can be of benefit to SOGI asylum seekers. In Article 9(2) of the Qualification Directive one can find several examples of what can constitute persecution, including acts of physical or mental violence (including acts of sexual violence), legal/administrative/police/judicial measures in themselves discriminatory or implemented in a discriminatory way, prosecution or punishment which is disproportionate or discriminatory, and denial of judicial redress resulting in a disproportionate or discriminatory punishment. The emphasis on the discriminatory character of acts can, again, prove beneficial to SOGI asylum seekers, so often subjected to, or at risk of, discriminatory penalties in their countries of origin. Finally, Article 6 of the Qualification Directive rightly recognises that non-State actors can be "actors of persecution or serious harm" when the State or whatever entity controls it is unable or unwilling to provide protection against persecution or serious harm. This can also be beneficial to SOGI asylum seekers, considering relatives, friends, neighbours and wider community members often initiate or are accomplices of the discriminatory and violent acts SOGI asylum seekers try to escape. All these norms remain substantively unaffected by the Proposed Qualification Regulation. Similarly, the CJEU's understanding (expressed in *X, Y and Z*) that the criminalisation of homosexual acts does not in itself constitute an act of persecution remains valid, despite running against the views of scholars and NGOs alike[87]. The EU institutions are thus missing a valuable opportunity to redress this serious shortcoming in EU SOGI asylum law.

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. 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[88]. Some inspiration could be drawn from the Canadian Immigration and Refugee

84 European Court of Human Rights, 27 June 2013, *M.K.N. v. Sweden*, no. 72413/10.

85 See, for example, decision of the Italian Supreme Court: Corte di Cassazione, ordinanza del 5 marzo 2015, n. 4522.

86 ILGA Europe, for example, suggests adding such guidance to Recital No. 29 of the Proposed Qualification Regulation: ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers*, *ivi*, pp. 5-6., and the UNHCR suggest reflecting this in a revised version of Article 4(5) of the Proposed Qualification Regulation: UNHCR, *Comments on the European Commission Proposal for a Qualification Regulation*, *ivi*, pp. 9-10.

87 ICJ, *X, Y and Z*: *A Glass Half Full for "Rainbow Refugees"?*, *ivi*; S. Jansen, T. Spijkerboer, *ivi*.

88 ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers*, *ivi*, 4.

Guidelines on Sexual Orientation and Gender Identity and Expression[89], which fails to include sex characteristics but at least includes gender expressions[90]. 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[91], it is unfortunate to conflate both in such terminological and conceptual inaccuracy and enshrine that result in statute. 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. In relation to the cumulative approach to the PSG tests in Article 10(1)(d) of the Qualification Directive (discussed in section 2), the European Parliament appropriately proposed an amendment that renders the tests alternative by replacing "and" with "or"[92]. The CJEU also took the opportunity in *X, Y and Z* to underline that the existence of criminal laws targeting homosexuals supports the finding that those persons form or belong to a particular social group for the purposes of the Refugee Convention. Although this may seem positive, it places insufficient value on these criminal norms for the purposes of the notion of persecution, as seen above. More positively, Article 10(2) of the Qualification Directive (retained by the Proposed Qualification Regulation) states that "perceived characteristics" are equally relevant, so it is enough for an applicant to prove that they are perceived by the actors of persecution as LGBTI.

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. This is a highly contentious tool in the context of SOGI asylum, in the light of how widespread discrimination and violence against sexual minorities can be in the countries of origin of most SOGI asylum seekers. The possibility of relocating within one's country of origin is also increasingly unrealistic owing to the extensive use of social media and internet, unless a considerable degree of "concealment" of one's SOGI is demanded. 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". It remains to be seen how EU institutions, especially the CJEU, perceive this tool in the light of the current legal framework and social context. 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"[93]. Considering the generally inappropriate nature of the "internal relocation alternative" SOGI asylum claimants, the European Parliament's amendment should be favoured. On a more positive note, (a new) Article 8(4) of the Proposed Qualification Regulation adds sexual orientations amongst the applicant's personal circumstances that need to be particularly taken into account when making an "internal protection" assessment.

An argument that for some time gained considerable traction in some European domestic jurisdictions in relation to SOGI asylum claims is that the claimants could return to their countries of origin and be "discreet" about their sexuality to avoid harm – what came to be termed the "discretion argument", "discretion reasoning" or "discretion requirement", but is in fact "concealment" for all purposes. In *X, Y and Z*, the CJEU brought to an end this idea, highlighting the inconsistency between expecting discretion from asylum seekers to avoid harm and the rationale of the international refugee system itself. It has, however, been pointed out that the CJEU should have also ruled out the possibility of asylum

89 Immigration and Refugee Board of Canada, *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression*, 26 April 2017, at www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir09.aspx.

90 M. Dustin, N. Ferreira, *Canada's Guideline 9: Improving SOGIE Claims Assessment?*, in *Forced Migration Review*, 2017, pp. 80-83.

91 J.D. Wilets, *Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, in *Albany Law Review*, 1997/1996, pp. 989-1050.

92 European Parliament, *Report on the 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*, 2017, A8-0245/2017, Amendment 85.

93 *Ibid*, Amendment 75.

authorities questioning asylum claimants about how they expressed their sexuality in their countries of origin and how they would express it if they were returned, as this is still allowed in the UK with the detrimental effect of returning SOGI asylum claimants to their country of origin on the basis that they would conceal their SOGI out of respect for social convention as opposed to fear of persecution[94]. Appropriately, the Proposed Qualification Regulation would enshrine the prohibition of the "discretion requirement" in Article 10(3), by prohibiting an expectation that applicants "behave discreetly or abstain from certain practices, where such behaviour or practices are inherent to his or her identity, to avoid the risk of persecution in his or her country of origin".

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[95]. The European Parliament's proposal should be favoured, for protecting more effectively the rights and wellbeing of SOGI claimants.

All in all, it remains a considerable challenge for SOGI asylum seekers to be granted international protection in the context of the EU legal and policy framework here described. The ultimate decision-makers, though, can only be found at domestic level, not EU, as it will now be considered.

3.5. Life after the granting (or denial) of international protection to SOGI claimants

The EU legal and policy framework has very little to say about what happens after domestic asylum decision-makers take a decision on a SOGI asylum claim. Yet, some aspects of a SOGI asylum seeker's life after a final decision on the claim are influenced by the EU framework.

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[96]. "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-gen-

94 *LC (Albania) v The Secretary of State for the Home Department & Anor* [2017] EWCA Civ 351; ECRE, *Preliminary Deference?*, *ivi*.

95 European Parliament, *Report on the Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals*, *ivi*, Amendment 68.

96 Articles 9 ff of the *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*, OJ L 251, 03 October 2003, pp. 12-18.

der asylum seekers. 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 to 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. As a reflection of Europe's own variety in, and often discriminatory nature of, same-sex marriage and partnership regulations, it is unlikely that enough consensus will be gathered any time soon to amend this Directive as to render it equally favourable to SOGI refugees. 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)[97]. 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 new Qualification Regulation, as well as in the Proposed recast of the Dublin Regulation[98]. One could go even further and call for equal treatment of couples and families independently of gender, gender expression and sex characteristics of any of their members.

Even if an asylum seeker obtains a positive international protection decision, the Qualification Directive determines a range of reasons on the basis of which refugee status ceases, including acquisition of another nationality, having misrepresented or omitted facts in the asylum process, and being considered a danger to the security of the host Member State (Articles 11 and 14). Amongst the relevant reasons, there is also the change in the circumstances on the basis of which an asylum seeker was granted refugee status (Article 11(1)(e)). If the change of circumstances is held by the domestic authorities to be of "such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded", the refugee can be lawfully returned to the country of origin (Article 11(2)). These norms may affect SOGI refugees to a great extent, if, for example, domestic authorities interpret changes to criminalisation of homosexuality in a country of origin as a sign that there is no longer persecution or authorities consider that there is no risk of persecution anymore for a trans individual who "reverted" to identifying according to the sex assigned at birth. Yet, application of these norms to SOGI refugees needs to occur very cautiously, as formal or official changes in countries of origin may take decades to be genuinely reflected in wider social practices, whilst discrimination and violence against SOGI individuals may continue to be widespread and underreported. Furthermore, the risk of persecution may persist in subtler ways and take shapes that may be unfamiliar to decision-makers.

In case of a negative decision on international protection or the ceasing of refugee status, and the consequent issuance of a deportation order, the EU Return Directive has nothing to say about the claimant's SOGI – only age deserves some consideration (Article 17). There is currently no proposal to reform this instrument. It is submitted that, at the next possible legislative occasion, SOGI should also warrant particular attention in the return process, in the light of the scope for discrimination and victimisation during the removal and beyond.

97 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; S. Peers, *The New EU Law on Refugees Takes Shape*, *ivi*.

98 European Parliament, *Report on the Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals*, *ivi*, Amendment 16; ILGA Europe, *Protecting the Rights of LGBTI Asylum Seekers*, *ivi*, 4-5; UNHCR, *Comments on the European Commission Proposal for a Qualification Regulation*, pp. 31-32.

4. The way forward for the European Union SOGI asylum framework

The overall EU asylum policy has become increasingly restrictive since its inception. As Guild points out, "[m]echanism after mechanism is described which permits the administrator to avoid listening to the story of the asylum seeker. Safe country of origin, safe third country, presumptions of manifestly unfounded applications, assessments of countries of origin – all these mechanisms are designed to release the national administrator from the duty to treat the individual as an individual"[99]. Not all these mechanisms and the way they are used are entirely due to EU law and policy, but it is also true that EU law and policy is an accomplice (when not a nurturer) of these mechanisms, rather than a much-needed obstacle. This feeds into a "Fortress Europe" mentality, which, in the words of Ammaturo, "only exacerbates the creation of outsiders who are denied the possibility of participating in the fate and decisions of a political community that perceives them as "threats" or "impostors", while simultaneously instrumentalising politically their presence and experiences on the national soil"[100].

SOGI asylum is a particularly complex and challenging area within EU asylum law and policy. Some authors have criticised the "civilised West" for nurturing a "save the queers" narrative[101]. Other authors have criticised Western countries for using "queers" as trophies, whilst making these persons undergo arduous asylum procedures[102]. It is indeed essential to criticise Western political manipulative strategies that may be at play, to the extent that they may be hypocritical. Yet, as we have argued elsewhere, not "saving the queers" (to use Bracke's expression) would be similarly criticisable for being inhumane, violating international and human rights law, and effectively facilitating the oppression of LGBTI individuals around the globe – so European policy and decision-makers find themselves in a "catch 22" situation[103]. In short, if anything, the "save the queers" narrative is simply not acted upon enough, and it should materialise in a more consistent and effective way, including through improvements to the EU asylum policy along the lines suggested throughout this contribution, particularly in the context of the current CEAS reform. As it has become apparent throughout this contribution, the current proposals suffer from severe shortcomings. Key aspects that need to be addressed relate to the notion of "safe country of origin", the burden of proof, sexual self-identification, subsisting guises of the "discretion requirement", the current cumulative application of the PSG tests, and the insufficiency of criminalisation for the purposes of the notion of "persecution". There is also further scope for improvement in relation to the Proposed Union Resettlement Framework (which should be amended to include SOGI asylum seekers amongst those eligible for targeted Union resettlement schemes)[104] and the need to introduce EU-wide humanitarian visas that can benefit SOGI asylum seekers.

To navigate the substantive and procedural aspects of their asylum claims, SOGI asylum claimants can rely on a range of NGOs based in particular European countries – including general asylum NGOs, general SOGI NGOs, and NGOs specialised in SOGI asylum[105]. At a European level, though, those NGOs that carry out work related to SOGI asylum concentrate on policy work rather than direct support or advice[106], leaving asylum seekers with very limited possibility of gaining a comprehensive picture of the SOGI asylum system in Europe in any useful time. This gap in refugee advice could be usefully addressed to support SOGI asylum seekers grasp the SOGI specificities of the EU asylum procedure explored in this contribution. Overall, an immense body of work still needs to be carried out to make justice to SOGI asylum claims.

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99 E. Guild, *ivi*, p. 10.

100 F.R. Ammaturo, *ivi*, 110.

101 S. Bracke, *From "Saving Women" to "Saving Gays": Rescue Narratives and Their Dis/Continuities*, in *European Journal of Women's Studies*, 2012, 2, pp. 237-252.

102 R. Mole, *Homonationalism: Resisting Nationalist Co-Optation of Sexual Diversity*, in *Sexualities*, 2017, 5-6, pp. 660-662; S. Keenan, *Subversive Property: Law and the Production of Spaces of Belonging*, Abingdon/Oxon/New York, Routledge, 2015.

103 N. Ferreira, *Sexuality and Citizenship in Europe: Sociolegal and Human Rights Perspectives*, in *Social & Legal Studies*, 2018, 2, pp. 253-265.

104 European Parliament, *Report on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Union Resettlement Framework and Amending Regulation (EU) No 516/2014 of the European Parliament and the Council (COM(2016)0468 – C8-0325/2016 – 2016/0225(COD)) (A8-0316/2017)*, 2017, Amendment 50.

105 For a list of relevant organisations, see www.sogica.org/en/useful-links/.

106 For example, European Council on Refugees and Exiles and ILGA-Europe.