



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

32 recommendations to the European Commission on the new EU LGBTI+ Equality Strategy [Roadmap - Ares(2020)2793707] July 2020

Our overriding concern is that the EU LGBTI+ Equality Strategy should acknowledge the need to prioritise and protect the rights and needs of LGBTI+ asylum claimants and refugees.

[SOGICA](#) (Sexual Orientation and Gender Identity Claims of Asylum: A European Human Rights Challenge) is a four-year (2016-2020) research project funded by the European Research Council (ERC) that explores the social and legal experiences of individuals across Europe claiming international protection on the basis of their sexual orientation or gender identity (SOGI). It is led by Professor Nuno Ferreira and a team of researchers at the University of Sussex who are Dr Carmelo Danisi, Dr Moira Dustin and Dr Nina Held. Our research addresses the experiences and needs of those LGBTI+ people who are discriminated and persecuted and claim international protection in EU Member States. Our feedback relates to how we can ensure that these asylum claimants and refugees are treated in a fairer and more appropriate way.

SOGI-related human rights violations are the basis of an increasing number of asylum claims, amounting to thousands across Europe each year (Jansen and Spijkerboer, 2011). These asylum claims are often treated in an insensitive way, i.e. based on inappropriate legal, cultural and social notions. These claims are also of a striking complexity and significance for assessing the efficiency and fairness of an asylum adjudication system. With case studies on Germany, Italy, the UK, the EU and the Council of Europe, we seek to determine how European asylum systems can treat SOGI claims more fairly, including through reform of the Common European Asylum System. It is critical that the European Commission is aware of these issues when finalising the new EU LGBTI+ Equality Strategy, to ensure that it recognises the needs of SOGI claimants and we see progress on SOGI asylum rights, particularly in the context of increasing xenophobia and LGBTI+ hate crime in many European countries (EU FRA, 2019).

Since the 1990s, the 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 claimants who claim asylum on the basis of SOGI. This has been vividly demonstrated by particular norms in EU asylum instruments and Court of Justice of EU (CJEU) judgments.



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The current CEAS can be said to have several shortcomings in relation to SOGI claims, including in relation to: country of origin information; the notion of ‘safe country of origin’; the burden of proof and the principle of benefit of the doubt; the concept of a ‘particular social group’; the lack of humanitarian visas for SOGI claimants with the consequence of re-traumatisation during the travel to Europe; and the definition of persecution. A new set of proposals for reform of the CEAS was put forward in 2016 by the European Commission, and these also affect SOGI asylum claims in precise and acute ways. The SOGICA project has made recommendations for improving the proposed CEAS reforms in order to better respond to the needs and experiences of SOGI claimants (Ferreira, 2018; SOGICA, 2018). Building on those, we set out below 32 recommendations that are crucial to ensure that the EU’s asylum policy provides better protection to people fleeing homophobia and transphobia.

Background and context

Throughout the last three decades, and in parallel with the Council of Europe (CoE), the EU has played an increasingly significant role in moulding asylum law and policy across the continent. The EU now has a full-fledged asylum policy. Building on the competences granted to the EU institutions by the 1997 Treaty of Amsterdam, in 1999 the European Council meeting at Tampere decided on a range of initiatives in the field of justice and home affairs, including a five-year programme to develop a common EU asylum and migration policy, in particular a Common European Asylum System (CEAS).¹ 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:² the Reception Conditions Directive,³ the Procedures Directive,⁴ and the Qualification Directive,⁵ 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).⁶

This recast process introduced substantial changes, but failed to introduce an equal level of protection across the EU (De Baere, 2013; Ippolito and Velluti, 2011; Velluti, 2014). This may be seen as positive, as it allows Member States to adopt standards more favourable to asylum claimants. Yet, it may also be seen as negative from the perspective of avoiding ‘forum shopping’ (i.e., asylum claimants choose where to claim asylum on the basis of the probability of receiving a positive decision and better living conditions), even if there is no evidence that such ‘forum shopping’ occurs to any significant extent (European Stability Initiative, 2015).

¹ Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, para. 13-14.

² The UK, Ireland and Denmark are not bound by these instruments due to ‘opt-out’ (in the case of Denmark) and optional ‘opt-in’ (in the case of the UK and Ireland) arrangements.

³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116.

⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95.

⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–26.

⁶ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107.

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.⁷ In answer to these events, in 2015 the European Commission launched the 'European Agenda on Migration' (European Commission, 2015), and in 2016 the European Commission put forward a series of legislative drafts pertaining to all elements of the CEAS, which are currently being negotiated by the EU law-making institutions, specifically the European Parliament and the Council of the EU. Whilst the proposal for reform of the Reception Conditions Directive also consists of a Directive,⁸ the proposals for reform of the Qualification and Procedures Directives take the shape of Regulations,⁹ which translates into much less flexibility for EU Member States in implementing EU standards and very limited scope to set higher standards.¹⁰ This harmonisation effort entails a serious risk of lowering the current standards (Peers, 2017).

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

More broadly, the EU plays a critical role in promoting equality and human rights across and within Member States, both directly, through agencies such as the EU Fundamental Rights Agency, and in the very many organisations and initiatives the EU supports. There are channels for mainstreaming SOGI asylum here that are not utilised as they might be. All too often, SOGI asylum falls through the cracks between LGBTI+ and migrant initiatives and this proposed roadmap is an opportunity to address this omission that we hope the EU will utilise.

⁷ See, for example, [Unravelling the Mediterranean Migration Crisis](#).

⁸ 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).

⁹ 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).

¹⁰ 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).

Recommendations

1. Safe passage to Europe

SOGI minorities seeking asylum in Europe often undergo horrifying experiences in their countries of origin, forcing them to undergo long and risky journeys in an attempt to escape (Danisi, Dustin, Ferreira and Held, 2020, Chapter 5). European countries have a responsibility to reduce the risk of persecution in countries of origin through their external relations policies, including through EU structures and mechanisms. Given the specific risks faced by SOGI minorities and considering recent developments within international human rights law (Danisi, 2019), the EU should build on the 2018 motion by the European Parliament and introduce humanitarian admission programmes and visas to help people in flight reach Europe safely. Such programmes and visas could be operated through 'humanitarian corridors', similar to those facilitated by the Community of Sant'Egidio or Protected Entry Procedures.

2. A statistical evidence base

Any transparent and accountable asylum system needs to maintain and publish rigorous and up-to-date statistics on different types of asylum claims and their outcomes. Yet, nothing in the current EU framework requires domestic authorities to record asylum claimants' SOGI, which makes it impossible to produce reliable statistics. Such statistics are essential to allow for a better understanding of why people seek asylum, which has an impact, for example, on the scope of the Country of Origin Information (COI) reports and specific reception needs. The EU should ensure that there is a record of the number of SOGI claims submitted, and the grounds used to refuse or accept them. This could be addressed by including these elements in Article 27 of the Proposed Procedures Regulation and encouraging Member States to keep statistical records as a matter of good practice. This information should be made public in order to support the work of NGO service providers, lawyers, researchers and activists.

3. Regulating Dublin transfers

Current Dublin Regulation rules – which allocate responsibility for asylum claims to particular EU Member States – do not prevent claimants from falling into situations of stark uncertainty.¹¹ No individual guarantees to address SOGI claimants' specific needs are currently asked from destination countries' authorities. To address these protection gaps, the pending reform of the Dublin Regulation should be used by the EU to review the criteria in place for allocation of responsibility to a State for a given asylum claim by paying attention to aspects that are more in tune to SOGI claimants' needs and rights, such as family and other personal connections, cultural background, linguistic knowledge and protection of SOGI minorities. Where transfers are allowed, specific individual guarantees should be required, at least in terms of access to adequate health care and specific accommodation solutions.

¹¹ 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, OJ L 180, 29.6.2013, p. 31–59.

4. The specific needs of SOGI claimants need to be recognised

The way an asylum claimant 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' (repeated in Article 20(3) of the Qualification Directive). Although SOGI asylum claimants 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.

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 (European Parliament, 2017a). Crucially, however, the European Parliament also proposes to add LGBTI+ asylum claimants to the category of 'applicant[s] with specific reception needs' (European Parliament, 2017a, Amendment 34), in a move perhaps inspired by the decision of the European Court of Human Rights in [O.M. v. Hungary](#). If approved, this norm could have far-reaching positive consequences for SOGI asylum claimants and could ensure greater harmony between the rules on reception and procedures at a domestic level (ECRE, 2017). We recommend that the EU adds LGBTI+ asylum claimants to the category of 'applicants with specific reception needs'.

5. Implementing the right to information

Many of the SOGICA project participants told us that they were unaware that SOGI was a basis for claiming asylum when they first arrived in Europe. Moreover, EU law does not require that asylum claimants 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 claimants may either seek to lodge an asylum claim based on other aspects of their experience of persecution or not lodge an asylum claim at all, thus jeopardising their chances of obtaining international protection. This lack of information may also lead to late or no identification of special procedural needs, which EU Member States are under the obligation to identify (ECRE, 2017, p. 21), and poorly prepared legal claims.

The EU should ensure that information about asylum and the right to make a SOGI-based claim is provided, including in easy-read formats and different languages, at a minimum at ports of entry and at asylum interview, reception and accommodation centres, also when its agencies – like Frontex – are directly involved in such operations. The EU should also ensure that, at the start of the screening or initial interview, interviewers confirm that the claimant is aware of the different reasons for claiming asylum, including SOGI persecution. This is something that could be addressed through an amended version of Article 5 of the Proposed Reception Conditions Directive. However, none of these measures should mean that failure to declare SOGI as the basis for claiming asylum is subsequently held against claimants.

6. Doing justice to 'late' claims

One aspect of SOGI asylum claimants' experiences that 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 claimant 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, SOGI asylum claimants 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 possess relevance to a European decision-maker. Most importantly, many SOGI asylum claimants 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, as in [M.K.N. v. Sweden](#).

Usefully, the CJEU has asserted in [A, B and C](#) (para. 69-71) that delays in disclosing one's sexuality should not automatically be held against asylum claimants to harm their credibility. This should prove valuable in guiding domestic authorities in not placing excessive importance on late disclosures, which seems to have already borne [some fruit](#). Yet, it would have been useful if such guidance had been included in one of the CEAS 2016 reform proposals. ILGA Europe suggests adding such guidance to Recital No. 29 of the Proposed Qualification Regulation (ILGA Europe, 2016, pp. 5–6), and UNHCR suggests reflecting this in a revised version of Article 4(5) of the Proposed Qualification Regulation (UNHCR, 2018, pp. 9–10). The latter alternative would offer greater legal strength and prominence to this element, so we urge the EU to revise Article 4(5) of the Proposed Qualification Regulation as to prohibit using delays in disclosing one's sexuality to automatically harm claimants' credibility.

7. Limiting the duration of asylum procedures

The length of time that many claimants must wait for an initial decision and then for their appeal – sometimes totalling years – is a cause of much distress, as during this period people are generally unable to study, work, secure family reunion or move forward in any way with their lives. The EU should help Member States build their capacity to shorten the time and publish targets for both initial decisions to be made and for appeals to take place, although not at the expense of a thorough consideration of claimants' cases.

8. Statutory guidance and training on SOGI asylum

Currently, each EU Member State decides on SOGI claims based on different guidance, and instructions. The European Asylum Support Office (EASO) should produce, or help domestic asylum authorities produce, and make public SOGI guidance for decision-makers, and ensure it is applied consistently and regularly reviewed. SOGI asylum claimants and refugees should be recognised as the main source of expertise in this field of policy and law, and should be involved in preparing and delivering guidance and training materials.

The Procedures Directive states that interviewers should be ‘competent to take account of the personal and general circumstances surrounding the application, including the applicant’s cultural origin, gender, sexual orientation, gender identity or vulnerability’ (Article 15(3)(a)). However, in many European countries, the training received by asylum decision-makers and interpreters is dramatically insufficient and inappropriate, in particular when dealing with SOGI asylum claims (Gavrielides, 2017). For this reason, the European Parliament has asserted that, ‘[t]ogether with relevant agencies, the Commission and Member States should ensure that asylum professionals, including interviewers and interpreters, receive adequate training – including existing training – to handle issues relating specifically to LGBTI persons’ (European Parliament, 2014). Even where good policies and guidance exist, there is a worrying degree of inconsistency in decision-making, with claimants from the same country and sometimes with very similar experiences receiving inconsistent decisions, and officials failing to apply existing law and policy correctly. EASO should enhance its support to domestic asylum authorities to ensure all parties, including interviewers, decision-makers, judges, interpreters, and service-providers, receive training on SOGI asylum, to improve their confidence in the quality of their work as well as to benefit SOGI asylum claimants. Training should be mandatory on induction and repeated at regular intervals. The specificities of guidance and training materials depend on the institutional context, however there are some elements that should be included in all materials, including: the importance of empathy, awareness of equality and human rights, appropriate terminology, confidentiality assurances, how to create a safe space, training on the effects of trauma and unconscious bias.

9. The characteristics of interviewers and interpreters

Interviewers’ and interpreters’ characteristics, especially their gender, ethnicity and religion, may affect the outcome of the asylum claim (UNHCR, 2012, para. 60). The Procedures Directive requires authorities, wherever possible, to arrange for interviewers and interpreters to be of the same sex as the applicant if the applicant so requests, ‘unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner’ (Article 15(3)(b) and (c)). It is submitted that ‘sex’ should be interpreted as ‘gender’ in this context, to protect trans asylum claimants’ rights, and the EU should ensure that Member States’ asylum authorities inform claimants they have the right to request a male or female interviewer and interpreter and facilitate the exercise of this right.

Ethnicity and religion have not been mentioned as characteristics the asylum applicant can refer to when expressing a preference about the interviewer and the interpreter, even if it is known that asylum claimants – in particular, SOGI applicants – may find it extremely challenging to describe their experiences of SOGI-related persecution in front of someone of a particular (often their own) ethnicity or religion. Ethnicity and religion should thus be included in this norm of the Proposed Procedures Directive. This would also better reflect the intersectional nature of asylum claimants’ experiences of the asylum procedure. As this amendment would entail racial and religious discrimination, the use of this exception should only occur within the strict derogation limits allowed by the current EU discrimination directives, particularly through the notion of ‘genuine occupational requirement’.¹²

¹² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26 (in particular Article 4), and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22 (in particular, Article 4).

10. Offering adequate interpretation services

Interpreters have an important role in interviews and at appeal hearings, and it is critical that SOGI claimants feel confident about interpreting services in both these settings. An interpreter who is homophobic or transphobic, or perceived by the claimant to be such, can seriously damage communication. SOGI claimants may be wary of using interpreters from their own ethnic communities, fearing that they will share the homophobia or transphobia that claimants have fled, or that they will put claimants at risk by disclosing their SOGI to community members. EU asylum law should allow claimants to provide their own interpreter at the expense of the state, and to request a replacement where they have concerns about the interpreter provided. Furthermore, all rules in Article 15 of the Procedures Directive (Article 12 of the Proposed Procedures Regulation) applying to interviewers should also apply to interpreters (ILGA Europe, 2016, p. 10), in the light of the potentially crucial role of interpreters in the evolution and outcome of the adjudication proceedings.

11. Improving legal advice and representation

SOGI asylum claims are often particularly complex and require specialised legal representatives. Yet, many claimants have difficulty accessing good legal advice, and people in detention centres, reception centres or remote accommodation are particularly disadvantaged. Part of the problem is a general lack of sufficient funding for legal aid, and the EU should ensure that Member States invest sufficiently in legal aid, not only as an ethical requirement, but also in the interest of efficiency. By securing free legal representation even before the screening process, potential claimants will be able to understand the possible grounds on which they can claim asylum and how to prepare their initial claim. In compliance with the right to access an effective asylum procedure (Article 18 Charter of Fundamental Rights), legal representation for SOGI claimants should be compulsory and supported through legal aid from the start of process (including at administrative level and during appeal). This extends to ensuring access to legal representatives and NGOs offering legal advice for claimants living in detention and accommodation centres, as well as at hearings. Where no free legal representation is available at administrative level, then independent legal advice and information by NGOs should be guaranteed and well-publicised.

12. General procedural needs

There are a number of practical improvements that EASO should ensure Member States' asylum authorities make both in relation to interview and appeal hearings. Officials should always introduce themselves, check the claimants' name and confirm how they would like to be addressed. Confidentiality protocols should be in place, including for interpreters, and the claimant should be informed of these. Interviewers and judges should avoid questions that seek a linear evolution or moment of discovery such as 'when did you realise you were gay (or lesbian/bisexual/transgender/etc.)' in favour of open-ended questions that allow the claimant to tell their story in their own time and terms. We recommend that claimants be allowed to take a supporter or friend, as well as their legal representative, to their interview to provide moral support. To improve accountability and claimants' trust in proceedings, there should be accessible complaints procedures as there are in most areas of public service.

13. No such thing as 'safe countries'

Some EU Member States have long designated some countries as 'safe', which entitles authorities to adopt an accelerated procedure and may lead to holding that an asylum claim is inadmissible, or the claimant 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). SOGI asylum claimants are often from countries that may be in such lists of 'safe countries', but they 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. The shortcomings of the 'safe country' notion have long been exposed (Costello, 2016; ECRE, 2016). So far, there is no list of 'safe countries' at an EU level, but EU institutions are [considering a Proposed 'Safe Countries of Origin' Regulation](#), which adopts a list of 'safe countries of origin' to be valid across all CEAS Member States. Yet, some of the countries the proposal includes – most notably Turkey – are renowned for reports of homophobic and transphobic policies and violence (Ramón Mendos, 2019).

The European Parliament has thus rightly pointed out that SOGI minorities can be subjected to abuse in countries held to be 'safe' for the purposes of asylum determination, so their claims for asylum may be entirely legitimate (European Parliament, 2016, point 12). More generally, any EU list of 'safe countries' would need to be consistent with the principle of non-refoulement and the rights of vulnerable groups (European Parliament, 2016 point 18). Article 47 of the Proposed Procedures Regulation states that a country can only be considered 'safe' for a particular applicant if, amongst other requirements, 'he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances'. This is welcome, however, in practice, the most effective and law-compliant way forward is for the [EU to simply do without any such list of 'safe countries' or the notion of 'safe country' itself](#) – both at a European and Member State level.

14. Accelerated procedures

'Safe country' lists are often accompanied by 'fast-track' procedures, which are detrimental to SOGI claimants, whose cases are recognised as being complex and time-consuming to prepare. Rather than making use of accelerated decision-making procedures for claimants of certain nationalities, [EU law should favour the same thorough consideration for all claims](#).

15. Improving the quality of Country of Origin Information (COI)

Accurate and extensive COI is critical to good asylum decision-making, yet data on SOGI asylum is scarce and often outdated, leading to flawed decisions. This is often the case even where there is extensive general COI relating to other Convention grounds such as political or religious persecution. Where SOGI-specific COI does exist, it often homogenises the treatment of all LGBTI+ individuals on the basis of gay men, ignoring the specific experiences of lesbian women, bisexual and trans people, while the persecution of individuals with intersex variations is invisible. [EASO should ensure that Member States' asylum and judicial authorities make better use of existing resources in decision-making and develop its COI resources by including specific legal and social data on SOGI minorities](#). General and SOGI asylum NGOs should be invited to contribute their expertise and knowledge (and appropriately paid for their input).

16. Making use of all the Refugee Convention grounds

In order to recognise the many factors and identities that are the basis for SOGI persecution, EU bodies and institutions, in particular EASO and CJEU, should make sure Member States' asylum authorities use of all the Refugee Convention grounds when assessing SOGI asylum claims, rather than invariably relying on the 'particular social group' (PSG) category. This means fostering a better understanding on the part of decision-makers that an individual's rejection of state-sponsored or legitimated homophobia or transphobia may be the basis for claiming protection on the basis of political opinion.

17. Establishing membership of a PSG

When relying on the PSG ground, claimants need to prove membership to a PSG. The Proposed Qualification Regulation retains both sexual orientation and gender identity as characteristics that may give rise to a PSG (Article 10(1)(d)). Although intersex and trans (broadly defined) individuals could also constitute a PSG, these characteristics are not expressly mentioned in this norm, which is a missed opportunity (ILGA Europe, 2016, p. 4). Some inspiration could be drawn from the Canadian Immigration and Refugee Guidelines on Sexual Orientation and Gender Identity and Expression (IRB, 2017), which fails to include sex characteristics but at least includes gender expressions (Dustin and Ferreira, 2017). Oddly enough, Recital No. 30 of the Qualification Directive refers to 'gender, including gender identity and sexual orientation' in the context of 'particular social group', as if sexual orientation were an aspect of gender. Despite the undeniable links between sexual orientation, on the one hand, and gender norms and roles, on the other (Wilets, 1996), it is unfortunate to conflate both. For the sake of terminological and conceptual accuracy, and adhering more closely to the Yogyakarta Principles, sexual orientation, gender identity, sex characteristics and gender expression should be referred to as autonomous characteristics in any future EU law.

The EU legal definition of PSG can be found in Article 10(1)(d) of the Qualification Directive, and it includes a 'fundamental characteristic test' and a 'social recognition test'. Whilst the UNHCR advocated an alternative application of these tests for the purposes of determining whether a PSG can be identified, in X, Y and Z the CJEU imposed a cumulative application. 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 disregards that the tests are introduced with 'in particular', thus indicating that a PSG can be found in circumstances beyond these two tests. Furthermore, the Qualification Directive (and all EU asylum law) should be interpreted in a way that is consistent with the Refugee Convention, as recalled throughout all CEAS instruments. The CJEU's interpretation of the notion of PSG is thus unduly restrictive and has been widely criticised (ICJ, 2014). The European Parliament appropriately proposed an amendment that renders the tests alternative, instead of cumulative (European Parliament, 2017b, Amendment 85). We urge all EU bodies and institutions to adopt the alternative approach.

18. Persecution over membership of a PSG

To accurately reflect international refugee law and European jurisprudence – such as the judgment in the F case (par. 31) – EU bodies and institutions should ensure that Member States' decision-makers concentrate on whether SOGI claimants are likely to be persecuted on SOGI grounds if they were to be returned to the country of origin, rather than on whether claimants are 'truly' LGBTI+.

19. Criminalisation of same-sex sexual acts as persecution

Against UNHCR guidance ([Guidelines No. 9, para. 26-29](#)), the CJEU (in [X, Y and Z](#)) and some Member States' asylum authorities do not recognise legislation criminalising same-sex sexual acts as persecution unless that legislation is enforced and entails significant penalties. This ignores the broader societal discrimination that accompanies legislation and the fact that unenforced legislation may be enforced at any time. EU bodies and institutions should recognise criminalisation of same-sex sexual acts, regardless of enforcement, as sufficient to make a finding of persecution.

20. No internal flight or relocation alternatives

Even if a SOGI asylum claimant proves persecution and membership of a PSG, authorities often use what is referred to as 'internal relocation alternative' to justify not granting international protection. This refers to the possibility of a claimant returning to the country of origin and relocating within it to escape persecution (a possibility often linked by decision-makers to some guise of 'discretion' or 'concealment' regarding one's SOGI). This is a highly contentious tool in the context of SOGI asylum, in light of how widespread discrimination and violence against SOGI minorities can be in the countries of origin of most SOGI asylum claimants. Where there is criminalisation of same-sex sexual acts, it usually applies to a country's entire territory, rendering internal flight or relocation alternatives for SOGI claimants from those countries unfeasible. Furthermore, the extensive use of social media and internet also renders the possibility to relocate within one's country of origin increasingly unrealistic, unless a good degree of 'concealment' of one's SOGI is expected.

The current Qualification Directive deals with this notion under Article 8, as 'internal protection', stating that asylum authorities can carry out such an assessment bearing in mind both 'the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant'. The Proposed Qualification Regulation would render this assessment compulsory (Article 8(1)), while the European Parliament would retain its optional character and add that internal protection can only be found to be viable if 'the State or agents of the State are not the actors of persecution or serious harm' (European Parliament, 2017b, Amendment 75). EU bodies and institutions should acknowledge that internal relocation is generally unsuitable for SOGI claims, enquiring into such possibility should remain optional, and the burden of proof in relation to that aspect should lie on decision-makers.

21. Abolishing 'discretion reasoning'

The CJEU recognised in [X, Y and Z](#) (para. 70-71) that it is unacceptable to require SOGI claimants to return to their country of origin and live 'discreetly' by concealing their SOGI. However, 'discretion reasoning' persists in some Member States in the assumption that it is reasonable to return to their countries of origin claimants who would 'choose' to hide their SOGI for reasons other than persecution, such as social customs. This is a dangerous policy in assuming that decision-makers can establish the future behaviour of an individual and ignoring the fact that choosing whether or not to disclose their SOGI is rarely completely within the individual's control. EU bodies and institutions should ensure that Member States remove all traces of 'discretion' thinking from decision-making.

22. Standard and burden of proof

Asylum claimants are often required to meet unfairly high evidentiary standards. In practice, asylum authorities in several EU Member States apply a standard of proof that goes beyond the 'reasonable degree' threshold claimants are required to meet under international refugee law, often simultaneously violating the principle of the benefit of the doubt. Asylum authorities also often fail to adopt a sufficiently active role in evidence-gathering.

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.' EU Member States have much leeway to impose heavy evidence gathering burdens on asylum claimants. 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 renders international protection claims more difficult for applicants who so far could have relied on more beneficial evidentiary rules at domestic level, thus translating into a negative amendment for SOGI claims. The UNHCR has thus rightly argued that the proposed wording should be abandoned and the burden of proof should be shared (UNHCR, 2018, pp. 9–10). EU bodies and institutions should ensure Member States' asylum authorities respect the correct standard of proof, including the principle of the benefit of the doubt, and share the burden of proof with asylum claimants.

23. Use of humane means of evidence

Although it is now accepted that [evidence of an explicit sexual nature should not be elicited or accepted](#), interrogating claimants about their relationships and behaviour regularly goes beyond what should be permissible. The excessive scrutiny of claimants' sexual history and experiences of persecution that often takes place in interviews and hearings fails to respect their personhood and would not be acceptable in other settings. EU bodies and institutions should ensure that Member States' asylum and judicial authorities should apply the same standards of civility and dignity to SOGI (and all) asylum claimants as to any other member of society when gathering evidence.

24. Stereotyping

Decision-makers often fail to understand the individual claimant, because of assumptions and prejudices. These include, among others, expectations that claimants have a partner or are sexually active, take part in LGBTIQ+ activism, provide a 'coming out' narrative, and have difficulty reconciling their SOGI with their religious beliefs. Conforming to such stereotypes undermines the individual premise of refugee decision-making. EU bodies and institutions should ensure Member States' asylum and judicial authorities conform to CJEU jurisprudence (par. 62 in [X, Y and Z](#)) and do not rely on 'stereotyped notions' neither during the interviews, nor in their decisions.

25. Credibility

Credibility is a key element in many, if not most, SOGI asylum decisions, by which we mean overall belief in the claimant's testimony. Decision-making is too often based on an attempt to objectively 'prove' a claimant's SOGI and starts from a position of scepticism that the claim is 'genuine'. Time and again during the SOGICA project fieldwork, claimants asked us, despairingly or wearily: 'So how can I prove my SOGI?' EU bodies and institutions – in particular EASO and CJEU – should guide Member States' asylum and judicial authorities to take the evidence, particularly the personal testimony, submitted by claimants as the starting point for credibility assessment. The default position should be belief in claimants' account of who they are and what has happened to them.

26. Facilitating family reunification

If international protection is granted, a first priority for some individuals is to be reunited with their children and partners. The Family Reunification Directive allows refugees to be joined by 'family members',¹³ which categorically include spouses and (unmarried and 'underage') 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). If transposed in a minimalistic way by Member States, these norms leave SOGI refugees in a less advantageous position than heterosexual/cis-gender refugees. Many SOGI refugees will not have lived with their partners in their country of origin for any period of time because of the dangers this would bring, but those partners should nonetheless be considered 'unmarried' partners. Even where SOGI refugees have lived with their partner, they will generally have much greater difficulty in producing evidence of this to prove subsisting family or intimate relations, 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 authorities should not reject an application based solely on the lack of documentary evidence.

Article 23 of the Qualification Directive complements the Family Reunification Directive by ensuring that Member States promote the family unity of any beneficiary 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). This proposal is welcome, but it remains insufficient.

There have thus been calls for clearer inclusion of same-sex couples and their relatives within the notion of 'family members' in the Proposed Qualification Regulation, as well as in the Proposed recast of the Dublin Regulation (European Parliament, 2017b, Amendment 16; ILGA Europe, 2016, pp. 4–5; UNHCR 2018, pp. 31–32). The EU should ensure that definitions of family include same-sex unions for the purpose of family reunification, and that the evaluation of SOGI claimants' requests takes into account both their difficulty in having their relationships recognised in their countries of origin or transit, as well the connected struggle to provide evidence of such unions.

¹³ Articles 9 ff of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03/10/2003 P. 0012 – 0018.

27. Promoting social integration

In case of a positive decision on some form of international protection, social integration is left largely to Member States' discretion. This has produced largely unsatisfactory results. We recommend that the EU supports Member States in developing holistic policies for refugee integration that recognise the specific needs of SOGI claimants. The priority for such policies is to ensure that every claimant and refugee feels safe and welcomed from the time of arrival, and is quickly recognised as a respected member of the host society. This is essential in light of the wide-spread hostility to refugees (and migrants more generally) in Europe, juxtaposed with persistent and often increasing homophobia and transphobia.

28. Safe and adequate accommodation

Housing 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 claimants, and national authorities should prevent assault and gender-based violence, including sexual assault and harassment. The inclusion of 'vulnerability' amongst these considerations undoubtedly brings within the scope of protection of this norm many SOGI asylum claimants, and the European Court of Human Rights decision in O.M. v. Hungary reinforces the need to bear in mind the special needs of SOGI asylum claimants in the context not only of housing but detention as well. The European Parliament's Committee on Women's Rights and Gender Equality has also stressed 'the need for LGBTI-sensitive reception facilities across all Member States' and highlighted that 'violence against LGBTI individuals is common in reception facilities' (European Parliament, 2016, point 12).

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

We recommend EU bodies and institutions work with Member States' asylum authorities to: 1) pay particular attention to the safety of SOGI claimants in asylum accommodation, where residents are vulnerable to homophobic, transphobic, racist and anti-migrant violence and hate crime; 2) give SOGI claimants the choice to be accommodated with other SOGI claimants in separate facilities if that is their wish; and, in any case, 3) avoid any 'camp-style' accommodation. Separate facilities need to be discreet, of small scale, and only used upon confirmation that the claimants in question prefer it to general asylum or refugee accommodation, to ensure their safety and self-determination. Trans-specific accommodation upon request should be a priority. Such accommodation is often better provided by NGOs than contracted out to large companies. Individuals should have as much choice as possible about the area where they live and the type of housing in which they live, and have access to appropriate information, support groups and social activities.

¹⁴ See, for example, in Berlin, the Official Shelter for LGBTI Refugees coordinated by Schwulenberatung.

29. Fostering physical and mental health

Another priority for SOGI asylum claimants is often their health. SOGI asylum claimants have particular health needs that are often overlooked: like many asylum claimants, they are likely to have mental health problems and often suffer from depression. Hormonal or gender-affirming therapy for trans claimants and refugees, including continuity of medical care, is also an area of need.

Article 19 of the Reception Conditions Directive guarantees that asylum claimants 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 claimants receiving gender-affirming care. If they are already undergoing hormonal treatment, it is imperative for medical reasons that the treatment not be interrupted; yet, practice across Europe varies greatly in this respect (TGEU, 2016). The EU should amend Article 17(3) of the Proposed Reception Conditions Directive to include undergoing hormonal treatment. EU bodies and institutions should also support Member States in increasing service provision and ensure SOGI asylum claimants and refugees are aware of their healthcare entitlements. More broadly, the EU should also work towards ensuring that access to healthcare is universal, not restricted to emergency provision, and include staff and interpretation services trained on asylum and SOGI matters.

30. Facilitating equal access to the labour market and education system

SOGI claimants are often discriminated against at work on grounds of both SOGI and ethnic background or refugee status; they may also need to rely on community support to find work – all factors which may make it hard for them to be open about their identities, and make it necessary for EU bodies and institutions to ensure Member States tackle these particular experiences of workplace discrimination. The denial of the right to work to many asylum claimants, in combination with a long asylum process, may not have a particular SOGI dimension but was raised by nearly all of the SOGICA project participants as a cause of stress and hardship. This means that EU bodies and institutions should ensure Member States include in social integration policies measures to improve access to the labour market, further and higher education, and training.

31. Nurturing civil society initiatives and NGOs

Asylum claimants often trust NGOs and depend on them for support, far more than they depend on other service providers. There are excellent SOGI refugee organisations that offer invaluable help. However, NGOs often support either refugees or SOGI minorities, but not both. This means SOGI asylum claimants and refugees are not always able to obtain holistic services that are responsive to all their needs. There must be adequate funding for SOGI-specific refugee NGOs to expand their reach. There is also potential for NGOs working in different fields to explore partnership options and develop joint or shared services, but always drawing on the expertise of the SOGI-specific refugee organisations and SOGI refugees themselves. Community organisations set up by SOGI claimants themselves are a huge source of support and expertise, but often face a particular struggle to obtain funding. The EU should make its funding more accessible to new community organisations with expertise on SOGI asylum, as well as support collaboration between NGOs working in different areas.



32. SOGI rights around the world

Granting refugee status to SOGI asylum claimants who have reached Europe, while vital, is a poor alternative to helping individuals not to need to flee their countries of origin and undergo perilous and costly journeys to Europe in the first place. The EU, in collaboration with other regional and international organisations, should encourage greater respect for SOGI minorities' rights and needs around the world, including by building the capacity of LGBTI+ activists and NGOs.

Furthermore, considering the EU efforts to control migration flows through agreements with third countries, we urge the EU to end any cooperation with countries of transit that discriminate against SOGI minorities and may use EU funds to adopt policies discriminating against SOGI asylum claimants.

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