

# **GUIDELINES**

**on the transposition  
of the Asylum  
Qualification Directive:  
protecting LGBTI  
asylum seekers**

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# Introduction

In 2004, the European Union adopted a Directive setting out rules governing minimum standards on conditions under which refugee status is granted as part of the Common European Asylum System (CEAS).<sup>1</sup> It applies to third country nationals (i.e. persons from outside the EU) who request asylum within a Member State of the EU. It covers the criteria for being awarded international protection, but also the rights of persons once they are recognised as refugees or beneficiaries of subsidiary protection.

Amongst those who apply for asylum, some are lesbian, gay, bisexual, trans or intersex (LGBTI). Some of them will be fleeing persecution unrelated to their sexual orientation or gender identity, for example due to their involvement in political movements opposed to the government of their country of origin. In other cases, their sexual orientation or gender identity is the principal reason why they have experienced persecution or are at risk of persecution. The Directive, which had to be transposed by 10 October 2006, has been highly relevant to the processing of such claims within the EU.

In 2009 the European Commission issued a proposal to recast the Directive. According to the Commission the aims of the proposal included addressing inconsistencies, achieving a higher level of harmonization and ensuring coherence with the jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).<sup>2</sup> Negotiations between the European Parliament and the Council led to the adoption of the recast Directive in December 2011.<sup>3</sup> Certain States have special 'opt-out' arrangements for EU immigration legislation; in this case, Ireland and the UK decided not to opt in to the recast Directive.<sup>4</sup> These two Member States continue to be bound by the provisions of the 2004 version of the Directive. Denmark is not bound by either version of the Directive.

The purpose of these guidelines, which update the previous version published by ILGA-Europe in 2005, is to identify the relevant parts of the Directive for applicants for international protection persecuted because of their being lesbian, gay, bisexual, trans or intersex. In particular the guidelines highlight the changes brought by the 2011 amendments in order to enable national organisations to assess whether national legislation meets the Directive's standards in this area, and to devise advocacy strategies for an adequate transposition if this is not the case.

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<sup>1</sup> Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L304/12. Available at: [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l\\_304/l\\_30420040930en00120023.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_304/l_30420040930en00120023.pdf)

<sup>2</sup> Explanatory Memorandum, 2009 Qualification Recast Proposal, at pp. 2-4.

<sup>3</sup> Directive 2011/95/EU of the European Parliament and of the Council, of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011], OJ L 337/9 [Recast Qualification Directive]. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>

<sup>4</sup> Recital 50, Directive 2011/95/EU.

# 1. Background to the Directive

Although all Member States have ratified the 1951 Geneva Convention on the status of refugees, the practical application of the Convention varies considerably. Whilst many Member States have established case-law on awarding asylum in cases of sexual orientation related persecution this is not the case throughout the EU.<sup>5</sup> In addition, the way sexual orientation and gender identity related persecution are considered by asylum authorities often remains inconsistent.

The 2004 version of the Directive brought some progress through the establishment of common minimum standards for granting refugee status at EU level as part of the effort to establish a CEAS. The 2004 Directive set *minimum* standards; it did not prevent national legislation being more generous in the criteria for recognising refugees. The 2011 version seeks to go beyond the establishment of minimum standards, however, the possibility for individual Member States to introduce more favourable rules at national level remains.<sup>6</sup>

During the negotiations for the 2004 Directive and its recast version in 2011, ILGA-Europe and national LGBTI organisations campaigned for explicit reference to persecution on the basis of sexual orientation and gender identity to be included within the Directive. In the 2004 Directive, although the reference to sexual orientation remained somewhat ambiguous, it represented significant progress. The Directive also included references to gender-specific acts of persecution. During the negotiations on the amended Directive ILGA-Europe and national LGBTI organisations once again raised the issue of explicit reference to gender identity and this time the European Parliament succeeded in ensuring inclusion of this notion in the Directive (see section 5 below).

## 2. The main contents of the Directive

The Directive sets out the criteria for deciding on whether an individual should be recognised as a refugee. The basic test to determine who qualifies for refugee status in Article 2(d) of the Directive is drawn from the Geneva Convention:

**refugee ‘means.... a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country[...]**

This definition can be difficult to satisfy. In particular, it normally requires evidence of persecution, as defined in Article 9 of the Directive. Persecution must be targeted at the individual applicant or protection must be unavailable for one of the five Convention reasons for persecution. However, there are also other categories of persons who, even if they do not qualify for refugee status, cannot be returned without breaching other human rights obligations. The novelty of the 2004 Directive was that it encompassed some of these other categories that go beyond the definition of a refugee, providing for a new protection status entitled ‘subsidiary protection’ (Article 2(f) in the 2011 Directive).

Subsidiary protection is granted where individuals do not qualify as refugees, but there are ‘substantial grounds’ supporting the presence of ‘a real risk of suffering serious harm’ if returned to the country of origin. Refugee status and subsidiary protection status are thus the two categories of international protection established at EU level. Many asylum

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<sup>5</sup> Recent findings on the situation at national level are available through research published in 2011 which documents and analyses the treatment of LGBTI cases in the majority of EU Member States as well as Norway; see SPIJKERBOER, T., JANSEN, S., *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, 2011. Available at: <http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/onderzoeksproject-fleeing-homophobia/index.asp>

<sup>6</sup> Art. 3, Directive 2011/95/EU.

applications based on claims of sexual orientation or gender identity persecution fail because of lack of evidence. Therefore, the alternative status of subsidiary protection is often relevant for LGBTI persons.

In addition to the criteria for these two statuses, the Directive also sets out the basic social rights of refugees and persons receiving subsidiary protection in areas such as employment, healthcare, housing and education. The previous version of the Directive established a differentiated level of rights for beneficiaries of subsidiary protection. However, the 2011 version of the Directive brought the rights for the two categories of beneficiaries of international protection more in line with each other. The relevant rules are outlined in Chapter VII of the Directive entitled 'Content of international protection'.

The Directive does not govern the procedures for handling asylum applications, e.g. examination at first instance, appeal procedures and special procedures such as 'fast track' processes for certain types of applications. These are governed by another Directive.<sup>7</sup> Moreover, this Directive does not set out the rules for the living conditions of persons waiting for a decision on their application; these issues are dealt with by a Directive establishing minimum standards on reception conditions.<sup>8</sup> The Commission has also issued proposals to recast both those instruments and negotiations for their amendment were on-going between the Council and the European Parliament at the beginning of 2013.

The following guidelines will focus on the provisions of particular importance to LGBTI persons of the Directive as amended in December 2011. It will examine the assessment of applications; award of refugee status; award of subsidiary protection status; and rules relating to family members of both categories of beneficiaries of international protection.

## 3. The assessment of applications for international protection

### **(a) The source of persecution**

Persecution based on sexual orientation or gender identity can come from a number of sources that may or may not be linked with the State. The Directive clarifies that protection must be provided in respect of both State and non-State actors. Article 6 defines the 'actors of persecution and serious harm' as:

**'(a) the State;**

**(b) parties or organisations controlling the State or a substantial part of the territory of the State;**

**(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm [...]'**

In some countries, there are discriminatory laws, most notably laws criminalising consensual sexual relations between persons of the same sex.<sup>9</sup> When such laws are actively enforced, the State is a direct source of persecution. However, even when they are not actively enforced ILGA-Europe considers that legislation criminalising consensual same-sex relations

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<sup>7</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13.

<sup>8</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18.

<sup>9</sup> See ILGA, *State-sponsored homophobia: A world survey of laws criminalizing same-sex sexual acts between consenting adults*, May 2012. Available at: [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2012.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf)

should also be considered as an act of persecution. Such laws contribute to an atmosphere of State-sponsored homophobia and since the possibility of prosecution continues to exist, LGBTI people are defenceless against homophobic violence, discrimination and extortion that may emanate from State officials. The existence of criminalising legislation also enables non-State actors to persecute or harm LGBTI people with impunity, since the victims of persecution cannot seek protection or redress.<sup>10</sup> In addition, regardless of the existence of such persecutory legislation, persecution can arise from wider social attitudes and behaviour, for example, harm inflicted by members of the family or generalised escalation in LGBTI-phobic hate crimes and discrimination.

For an application to be successful applicants for international protection must also be unable to avail themselves of protection against persecution or serious harm. In Article 7 the 2011 Directive retained the possibility of protection being granted by non-State actors. A broad interpretation of this concept has proven problematic.<sup>11</sup> However, the formulation of this article was strengthened in 2011 and it now specifies that protection ‘must be *effective* and of a *non-temporary nature*’. As a minimum, the Directive requires that actors of protection take ‘reasonable steps’ to prevent persecution or serious harm, ‘inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm’ and also sets the prerequisite that ‘the applicant has access to such protection’. The transposition of this provision into national law must not allow for the concept of ‘non-State actors of protection’ to be used in situations where protection is not effective in practice.

Therefore, provided that the other criteria set out in the Directive are met, the Directive allows for the granting of international protection in a situation where the State of origin of the asylum seeker could in theory prevent LGBTI-phobic persecution, but tacitly tolerates a generalised escalation of LGBTI-phobic violence and discrimination by failing to provide proper police or judicial protection for individuals.

The other criteria to be met include, for example, considerations around the ‘internal protection alternative’, a concept established by Article 8 of the Qualification Directive: asylum might still be denied if a person would be safe from persecution or serious harm in ‘a part of the country of origin’. However, in order for this condition to be fulfilled, the applicant would have to be able to ‘safely and legally travel to and gain admittance to that part of the country and reasonably be expected to settle there’.

In the case where LGBTI people are explicitly targeted by national criminal legislation, persecution cannot be remedied by State authorities in any part of the territory. As a result, LGBTI applicants for international protection would not be able to turn to the authorities for protection because this may lead to criminal sanctions against them on account of their sexual orientation or gender identity, and hence asylum authorities should consider that no internal protection alternative is available.<sup>12</sup>

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<sup>10</sup> ILGA-Europe, *Statement on pending preliminary rulings by CJEU regarding alleged persecution on the ground of sexual orientation*, August 2012. Available at: [http://www.ilga-europe.org/home/news/latest\\_news/statement\\_cjeu\\_august\\_2012](http://www.ilga-europe.org/home/news/latest_news/statement_cjeu_august_2012)

<sup>11</sup> See European Commission, *Report on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection*, 16 June 2010, COM(2010)314 final, at p. 6 where it is stated that some Member States also considered NGOs as actors of protection with regard to women at risk of female genital mutilation and honour killings; however, in practice, protection provided by these actors proves to be ineffective or of short duration. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0314:FIN:EN:PDF>

<sup>12</sup> SPIJKERBOER, T., JANSEN, S., *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, 2011, at p. 29. Available at: <http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/onderzoeksproject-fleeing-homophobia/index.asp>

**Guideline:** National legislation must include protection against persecution arising from State actors as well as from non-State actors where neither the country of origin nor any other actors of protection are willing and able to provide effective protection. It should be applied in such a way that when sexual orientation or gender identity is criminalised in the country of origin LGBTI applicants are not required to invoke the protection of the authorities.

### **(b) Rules of evidence**

In practice, it is often difficult for individual applicants to provide sufficient proof of persecution.<sup>13</sup> As many applicants for asylum in the EU come from a country where displaying non-conventional sexual orientation or gender identity is extremely dangerous, there is often very little evidence to demonstrate their LGBTI status.<sup>14</sup> Additionally applicants have often concealed their sexual orientation or gender identity in order to minimize the risk of persecution. They may, for instance, have been married and had children in their own countries due to the inability to remove themselves from social conventions.<sup>15</sup> There will therefore be instances where an individual only comes out after departure from the country of origin.

Ascertaining the applicant's LGBTI background is essentially an issue of credibility; the applicant's own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or in the community.<sup>16</sup> The assessment of credibility needs to be undertaken in an individualised and sensitive way; medical testing of the applicant's sexual orientation is an infringement of basic human rights and must not be used.<sup>17</sup>

The Directive provides some guiding principles that could assist in the handling of sexual orientation and gender identity claims:<sup>18</sup>

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<sup>13</sup> Report of the Committee on Migration, Refugees and Demography (Council of Europe), *Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe*, Doc. 8654, 25 February 2000, par. 37.

<sup>14</sup> LEIGH, V. et al authors, *Study for the EP: Towards an EU roadmap for equality on grounds of sexual orientation and gender identity*, 2012, at p. 52. Available at: <http://www.europarl.europa.eu/committees/en/libe/studiesdownload.html?languageDocument=EN&file=78131>

<sup>15</sup> Ibid.

<sup>16</sup> UNHCR, *Guidelines on International Protection No. 9: Claims to 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*, 23 October 2012, HCR/GIP/12/01, at para.62-64. Available at: [www.unhcr.org/refworld/docid/50348afc2.html](http://www.unhcr.org/refworld/docid/50348afc2.html)

<sup>17</sup> Ibid and see further UNHCR, *UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, April 2011, available at: <http://www.unhcr.org/refworld/docid/4daeb07b2.html>.

<sup>18</sup> Art. 4(5) and Arts. 5(1), 5(2), Directive 2011/95/EU.

- The absence of documentary evidence should not be decisive;
- Credible, coherent and plausible statements by the applicant should be accepted, especially where the applicant explains the absence of documentary evidence;
- A risk of persecution arising from acts engaged in after leaving the country of origin can suffice for qualification, provided these are consistent with 'convictions or orientations' already held before departure.

The rules contained in the Asylum Procedures Directive are also of relevance to this issue; at the time of writing negotiations between the European Parliament and the Council were on-going. However, the recast proposal presented by the European Commission in 2011 included the possibility of providing special procedural guarantees to certain applicants due to their personal circumstances. In identifying such needs, gender, sexual orientation and gender identity would be some of the factors to be taken into account.<sup>19</sup>

**Guideline:** National legislation should not make documentary evidence a pre-requisite for granting refugee status. It should also permit claims based on activities undertaken after leaving the country of origin. Credibility assessment procedures need to be undertaken in an individualised and sensitive way, medical testing to establish an individual's sexual orientation or gender identity should not be provided for in either the legislation or practice.

## 4. Qualification for refugee status

There are two elements to qualifying for refugee status: *persecution*, and the fact that this persecution or the absence of protection against such persecution is related to a *reason* covered by the Directive.

### (a) Persecution

One difficulty experienced by LGBTI asylum-seekers is that evidence of sexual orientation or gender identity discrimination in the country of origin is not always regarded as amounting to persecution. For example, in Spain, the case of a transwoman from Nicaragua who was discriminated against in the fields of education, health care and work, as well as by her family, and who later became a prostitute, and was sexually abused by both clients and policemen was characterised as 'discrimination' only, and no asylum was granted.<sup>20</sup> However, it is acknowledged that even less overt abuses may suffice, depending on their nature and severity, and especially if they are proved to be repetitive.<sup>21</sup>

<sup>19</sup> See European Commission, *Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)*, COM(2011) 319 final, 1 June 2011, Article 2(d) and Article 24.

<sup>20</sup> Audiencia Nacional (National Court) 13 May 2010, rec. no 296/2009; as mentioned in SPIJKERBOER, T., JANSEN, S., *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, 2011, at p. 72.

<sup>21</sup> GOODWIN-GILL, G., Mc ADAM, J., *The Refugee in International Law*, 3rd edition, Oxford: Oxford Univ. Press, 2007, at p. 92.

On the one hand, the Directive requires acts of persecution to be ‘a severe violation of basic human rights’ making reference to non-derogable rights under the European Convention on Human Rights (ECHR),<sup>22</sup> which implies a high threshold. On the other hand, the Directive, in Article 9(1)(b), also recognises that persecution may ensue from an ‘accumulation of various measures including violations of human rights which is sufficiently severe as to affect an individual in a similar manner’.

Moreover, the Directive contains in Article 9(2) a non-exhaustive list of forms of persecution including:

- (a) acts of physical or mental violence, including acts of sexual violence;**
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;**
- (c) prosecution or punishment which is disproportionate or discriminatory;**
- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;**
- (f) acts of a gender-specific or child-specific nature.**

Whilst discrimination is not defined in the Directive, its preamble makes reference to respecting the Charter of Fundamental Rights (Recital 16), mentioning in particular Article 21 of the Charter which includes sexual orientation within the non-exhaustive list of prohibited grounds of discrimination.<sup>23</sup>

**Guideline:** The definition of ‘persecution’ in national legislation should explicitly include sexual violence, laws and/or law enforcement measures that are discriminatory or operated in a discriminatory fashion, discriminatory prosecution or punishment, discriminatory denial of judicial redress as well as persecutory acts of a gender-specific or child-specific nature.

### **(b) Persecution for a reason covered by the Directive**

It is not sufficient simply to demonstrate the presence of persecution; this must be connected to a reason for persecution covered by the Directive. As clarified by the 2011 text of the Directive in Article 9(3), in cases of persecution emanating from non-State actors, it is sufficient that there is a connection between such a reason and the absence of protection against such persecution. The list of protected reasons is based on the 1951 Geneva Convention. Whilst sexual orientation and gender identity are not explicitly mentioned as grounds of persecution, the Directive includes the broad ground of persecution due to ‘membership of a particular social group’. This category has been the vehicle for recognising persecution linked to sexual orientation and gender identity. Recent research findings at EU-level show that almost all EU Member States have granted asylum to individuals due to sexual orientation persecution.<sup>24</sup>

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<sup>22</sup> Art. 9(1)(a), Directive 2011/95/EU.

<sup>23</sup> *Charter of Fundamental Rights of the European Union*, OJ C364/01, 18.12.2000, as amended in December 2007, OJ C303/01, 14.12.2007. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>

<sup>24</sup> SPIJKERBOER, T., JANSEN, S., *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, 2011.

What is the definition of a ‘particular social group’? The Directive in Article 10(1)(d) sets out two general criteria:

- the members of the group ‘share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it’;
- the group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

According to the UNHCR as well as the majority of scholars and advocates the correct interpretation of the Directive text on this point is to understand the two approaches-‘protected characteristics’ and ‘social perception’ as alternative and not cumulative tests.<sup>25</sup> However, the Directive text remains ambiguous as amendments proposed by members of the European Parliament on this point were not adopted.

The 2011 version of the text of the Directive has been strengthened to make explicit reference to sexual orientation *and* gender identity under this point. The amended Article 10(1)(d) mentions that:

**‘Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;[...]**

This statement contains four important elements.

- Member States must include within national legislation the *possibility* for refugee status to be awarded in respect of persecution based on sexual orientation. The Directive recognises that in principle the ground of ‘particular social group’ can include groups based on sexual orientation.
- The Directive now explicitly mentions *gender identity* as one of the gender related aspects which must be given due consideration when determining membership of a particular social group.
- In any individual case, it will have to be determined if a social group based on sexual orientation or gender identity exists in that particular country of origin. In reaching a conclusion on this question, the general criteria mentioned above will have to be applied. There may be argument in relation to some countries whether ‘lesbian’, ‘bisexual’, ‘gay’, ‘trans’ or ‘intersex’ identities exist in the sense of a social group. This is ultimately a matter for case-by-case decision making by adjudicators.
- Unlawful sexual activity within the EU Member States is not covered by the concept of sexual orientation. This statement does not have implications in practice since no EU State criminalises consensual, adult same-sex sexual relations.

However even this strengthened wording does not unambiguously include intersex individuals. Nonetheless, the Directive does recognise in Article 9(2) that ‘gender-specific’ acts fall within the concept of persecution. The same Article also mentions ‘child-specific’ acts, which can also be relevant in cases of persecution of intersex people. As with sexual orientation and gender identity, issues are likely to arise around whether the group is regarded as having a distinct identity within society.

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<sup>25</sup> UNHCR, *Guidelines on International Protection No. 9: Claims to 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*, 23 October 2012, HCR/GIP/12/01, at para. 44.

Finally, one of the issues where divergent interpretations persist in relation to LGBTI cases is whether or not a 'discretion requirement' exists. More specifically, the 'discretion requirement' refers to the expectation that lesbian, gay, bisexual, trans or intersex persons can or should be 'discreet', i.e. secretive about their sexual orientation or gender identity to avoid or diminish the risk of persecution in the country of origin.<sup>26</sup>

On this particular question, relevant references for a preliminary ruling of the Dutch Council of State are pending before the CJEU.<sup>27</sup> However, the CJEU has recently positioned itself on a similar issue in a case concerning religious freedom. Therein it stated that no provisions of the Directive can be interpreted as establishing that in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice.<sup>28</sup>

In other words, the Court considered that, in assessing an application for refugee status on an individual basis, the national authorities cannot reasonably expect the applicant to abstain from the manifestation or practice of certain religious acts.<sup>29</sup> ILGA-Europe believes that this legal reasoning should also apply to cases of persecution relating to membership of a particular social group, in particular to when such groups are defined on the basis of sexual orientation or gender identity.

**Guideline:** National legislation should expressly recognise that 'a particular social group' includes groups defined on the basis of sexual orientation. Member States must now also make explicit reference in their legislation to 'gender identity' as one of the gender related aspects to be considered when seeking to establish membership of a particular social group. The notion of gender related aspects should be interpreted broadly in order to encompass persecution faced by intersex individuals. Asylum applicants should not be required, by the national legislation or because of asylum authorities' practice, to hide their sexual orientation or gender identity upon return to their country of origin in order to avoid persecution.

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<sup>26</sup> ILGA-Europe, *Statement on pending preliminary rulings by CJEU regarding alleged persecution on the ground of sexual orientation*, August 2012.

<sup>27</sup> References for a preliminary ruling from the Raad van Staat (Netherlands) lodged on 27 April 2012, Cases C-199/12, C-200/12 and C-201/12, OJ C-217/8.

<sup>28</sup> CJEU, Joined Cases C 71/11 and C 99/11, Y and Z, 5 September 2012, at par. 78.

<sup>29</sup> CJEU, *Certain forms of serious interference with the public manifestation of religion may constitute persecution for reasons of religion*, Press Release No 108/12, Luxembourg, 5 September 2012, at p.2. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-09/cp120108en.pdf>

## 5. Qualification for subsidiary protection status

The Directive also provides for a second protection status, subsidiary protection. This status is granted on the basis of the existence of a real risk of 'serious harm' if returned to the country of origin. This is defined in Article 15(a) and (b) of the Directive as:

**'(a) death penalty or execution; or**

**(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or**

**(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'**

Since 2004, national asylum authorities and Courts have made use of this alternative to refugee status where they considered that LGBTI asylum-seekers failed to qualify as refugees. Their reasoning can, for example, be based on the fact that in some countries of origin homosexuality remains punishable by the death penalty. A more frequent occurrence is torture based on an individual's sexual orientation and gender identity.<sup>30</sup>

**Guideline:** National legislation should include provision for subsidiary protection where there is a real risk of the individual facing the death penalty or torture or inhuman or degrading treatment or punishment in their country of origin.

## 6. The family members of beneficiaries of international protection

Certain provisions within the Directive concern the family of the individuals qualifying for refugee status or subsidiary protection. In particular, social rights of refugees, such as access to work, will be extended to family members even where they do not individually qualify for refugee status / subsidiary protection.<sup>31</sup> The definition of family, found in Article 2(j) of the Directive, is subject to two general preconditions: (a) the family already existed in the country of origin, and (b) the family members are currently present in the same Member State. This Directive is not, therefore, concerned with immigration rights for family reunification. Family reunification for refugees is regulated by Chapter V of Directive 2003/86/EC, also known as the 'Family reunification Directive'. Regrettably, under its Article 3(2), family reunification of beneficiaries of subsidiary protection is not covered by that Directive and therefore remains a matter that is regulated by national law.

Under the Qualification Directive, 'family members' include:

- the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State

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<sup>30</sup> ILGA, *State-sponsored homophobia: A world survey of laws criminalizing same-sex sexual acts between consenting adults*, May 2012.

<sup>31</sup> Art. 23(2), Directive 2011/95/EU.

concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,

- the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
- the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried.

This provision therefore requires unmarried partners of beneficiaries of international protection to be considered as family members where national law or practice on third country nationals provides comparable treatment for married and unmarried couples.

This test will most often be satisfied in relation to Member States with registered partnership laws that include same-sex couples. These Member States generally provide for similar recognition in immigration matters for same-sex married partners and registered partners (e.g. Netherlands, Sweden, Denmark, Finland, UK), although there are some exceptions (e.g. France at the time of writing). However, this provision generally leaves family members unprotected in Member States that do not recognise same-sex couples in their national legislation, including Member States that established national legislation on registered partnership that explicitly excludes same-sex couples.

It is questionable whether such practices are in compliance with fundamental rights standards. On a political level, the Parliamentary Assembly of the Council of Europe (CoE) has recently underlined that ‘the denial of rights to de facto “LGBT families” in many Member States must also be addressed, including through the legal recognition and protection of these families’.<sup>32</sup> In addition, the Committee of Ministers of the CoE adopted a recommendation on combating discrimination based on sexual orientation or gender identity.<sup>33</sup> Paragraph 24 of the recommendation invites States that do not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, to ‘consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live’.

Recent case-law of the ECtHR also goes in that direction. In the case of *Kozak*<sup>34</sup> the ECtHR ruled that ‘de facto marital cohabitation’ must be understood to include persons in a same-sex relationship in Poland. This ruling affirms that if Member States provide certain rights to cohabiting different-sex partners, the same rights have to be made available equally to same-sex partners.<sup>35</sup> In the case of *Schalk & Kopf*<sup>36</sup> the Court further noted that “a cohabiting same-sex couple living in a stable partnership fell within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would”. This represented a shift in the reasoning of the Court, as it is the first time that it referred to

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<sup>32</sup> Parliamentary Assembly of the Council of Europe, Resolution 1728 (2010), *Discrimination on the basis of sexual orientation and gender identity*, at par. 10. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm>

<sup>33</sup> Committee of Ministers of the CoE, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010: <https://wcd.coe.int/ViewDoc.jsp?id=1606669>

<sup>34</sup> *Kozak v. Poland* (Application no. 13102/02) Judgement of 2 March 2010

<sup>35</sup> ILGA-Europe, *Contribution to the Green Paper on the right to family reunification of third country nationals living in the European Union*, February 2012, at p. 13. Available at: [http://www.ilga-europe.org/home/publications/policy\\_papers/green\\_paper\\_family\\_reunification](http://www.ilga-europe.org/home/publications/policy_papers/green_paper_family_reunification)

<sup>36</sup> *Schalk and Kopf v. Austria* (Application no. 30141/04) Judgement 24 June 2010.

same-sex couples as families for the purpose of Article 8 (right to respect for private and family life) of the European Convention of Human Rights.<sup>37</sup>

**Guideline:** Where national legislation on third country nationals provides comparable rights to married and unmarried couples, all unmarried couples must benefit from those rights, including same-sex couples. Member States that draw a distinction between married and unmarried couples in their legislation on third country nationals, and that as a consequence exclude same-sex couples from the scope of the family members covered by the Directive, should gradually amend their legislation in line with the recommendations adopted by the Committee of Ministers of the Council of Europe and with the ECtHR jurisprudence which found that such couples fall within the notion of ‘family life’ under the Convention.

## 7. Considerations on translation

The question of translation is central to the proper implementation of the Directive at national level. The translation process of the 2004 Directive text revealed how misconceptions regarding the content of terms can arise even at the institutional level. One such example is that the French translation of the term ‘gender related aspects’ in Article 10(d) of the 2004 Directive was an inaccurate phrase on ‘aspects relating to equality between men and women’<sup>38</sup> which of course fails to convey the meaning intended by the drafters.

In order to avoid such misinterpretations in the future, ILGA-Europe together with the EP’s Intergroup on LGBT rights advocated for the use of accurate translations of the 2011 recast version of the Directive in all EU national languages. However, ensuring an accurate translation of the Directive’s provisions through the national transposition process is equally important. In the tables below, ILGA-Europe is proposing the following translations for the terms ‘sexual orientation’ and ‘gender identity’, and suggests they should be used to adequately transpose Article 10 of the Directive. More information on the accurate content of several terms (in English) can be found at ILGA-Europe’s online glossary.<sup>39</sup>

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<sup>37</sup> ILGA-Europe, Press Release on the *Schalk and Kopf v. Austria* case, 24 June 2010. Available at: [http://ilga-europe.org/home/news/for\\_media/media\\_releases/schalk\\_and\\_kopf\\_v\\_austria](http://ilga-europe.org/home/news/for_media/media_releases/schalk_and_kopf_v_austria)

<sup>38</sup> ‘Aspects liés à l’égalité entre les hommes et les femmes’ in the French version

<sup>39</sup> The glossary is available at: [http://www.ilga-europe.org/home/publications/ilga\\_europe\\_glossary](http://www.ilga-europe.org/home/publications/ilga_europe_glossary)

## Table 1 - Sexual orientation

**Directive 2011/95/EU-Article 10(1)d:** Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of *sexual orientation*

English	Sexual Orientation
Bulgarian	Сексуална ориентация
Croatian	Sexuální orientace
Czech	Sexuální orientace
Danish	Seksuel orientering
Dutch	Seksuele gerichtheid
Estonian	Seksuaalne orientatsioon
Finnish	Seksuaalinen suuntautuminen
French	Orientation sexuelle
German	Sexuelle Orientierung
Greek	Σεξουαλικός προσανατολισμός (EU and national legislation: γενετήσιος προσανατολισμός)
Hungarian	Szexuális irányultság
Italian	Orientamento sessuale (EU treaties: tendenza sessuale)
Latvian	Seksuālā orientācija
Lithuanian	Seksualinė orientacija
Maltese	Orjentazzjoni sesswali
Polish	Orientacja seksualna
Portuguese	Orientação sexual
Romanian	Orientare sexuală
Slovakian	Sexuálna orientácia
Slovenian	Spolna usmerjenost
Spanish	Orientación sexual
Swedish	Sexuell läggning

## Table 2 - Gender Identity

**Directive 2011/95/EU-Article 10(1)d:** Gender related aspects, including *gender identity*, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group

English	Gender identity
Bulgarian	Полова идентичност
Croatian	Rodová identita, genderová identita
Czech	Rodová identita, genderová identita
Danish	Kønsidentitet
Dutch	Genderidentiteit
Estonian	Sooline identiteet
Finnish	Sukupuoli-identiteetti (often used together with “sukupuolen ilmaisu” which means “gender expression”)
French	Identité de genre
German	Geschlechtsidentität
Greek	Ταυτότητα κοινωνικού φύλου or ταυτότητα φύλου
Hungarian	Nemi identitás
Italian	Identità di genere
Latvian	Dzimumidentitāte
Lithuanian	Lyties tapatybė
Maltese	Identità tal-ġeneru
Polish	Tożsamość płciowa
Portuguese	Identidade de gênero
Romanian	Identitate de gen
Slovakian	Rodová identita
Slovenian	Spolna identiteta/spolni izraz
Spanish	Identidad de género
Swedish	Könsidentitet

## 8. Implementation process – the next steps

By 21 December 2013, Member States must ensure that their domestic legislation complies with the recast Directive. The list below provides organisations with steps they can take in the coming months to monitor implementation and full compliance of national legislation with the Directive.

### ***(a) Does the national legislation comply with the Directive?***

▶ Using these guidelines, national legislation or proposed national legislation should be checked for compliance. Administrative practices should also be reviewed to ensure that they do not contravene the provisions of the Directive.

## Compliance checklist

### **By 21 December 2013, national legislation should:**

- ✓ Include protection against persecution arising from non-State actors
- ✓ Make sure that where sexual orientation or gender identity is criminalised in the country of origin LGBTI applicants should not be required to invoke the protection of the authorities against non-State actors
- ✓ Not make documentary evidence a pre-requisite for granting refugee status
- ✓ Ensure that credibility assessment procedures are undertaken in an individualised and sensitive way
- ✓ Not allow for medical testing to establish an individual's sexual orientation
- ✓ Explicitly include sexual violence, laws and/or law enforcement measures that are discriminatory or operated in a discriminatory fashion, discriminatory prosecution or punishment, discriminatory denial of judicial redress as well as persecutory acts of a gender-specific or child-specific nature in the definition of 'persecution'
- ✓ Expressly recognise that 'a particular social group' includes groups defined on the basis of sexual orientation

- ✓ Make explicit reference to 'gender identity' as one of the gender related aspects to be considered when seeking to establish membership of a particular social group
- ✓ Ensure that the notion of gender related aspects is interpreted broadly in order to encompass persecution faced by intersex individuals
- ✓ Make sure that it does not require asylum applicants to hide their sexual orientation or gender identity upon return to their country of origin in order to avoid persecution
- ✓ Include a provision for subsidiary protection where there is a real risk of the individual facing the death penalty, torture or inhuman, degrading treatment or punishment in their country of origin
- ✓ Ensure that, where national legislation on third country nationals provides comparable rights to married and unmarried couples, all unmarried couples benefit from those rights, including same-sex couples
- ✓ Where national legislation on third country nationals draws distinctions between married and unmarried couples it should be gradually amended in line with the recommendations adopted by the Committee of Ministers of the Council of Europe and the ECtHR jurisprudence which found that such couples fall within the notion of 'family life' under the Convention.

### ***(b) What if national legislation does not meet this checklist?***

- ▷ Bring non-compliance to the attention of the Ministry responsible for asylum legislation.
- ▷ Identify strategies to initiate a change in national legislation where necessary (e.g. lobby ministers, parliamentarians, rally support from other NGOs and other civil society organisations, etc.).
- ▷ Launch public awareness campaigns and publicise individual cases where LGBTI persons and families are negatively affected by the non-compliance in order to enhance knowledge and understanding of the obstacles they face.
- ▷ Seek legal advice for individual cases on possible remedies with reference to the Directive.

▷ Bring it to the attention of and initiate formal complaint procedures for individual cases before the National Ombudsman.

▷ Make specific reference to the Directive in any document, public statement and letter to government and elected officials you send regarding the issue of LGBTI asylum seekers.

▷ Raise the issue with other NGOs working on issues of asylum law.

▷ Raise your concerns with the Commission. (The relevant office is the Asylum Unit B2, Directorate B 'Immigration, Asylum and Borders', DG HOME, European Commission.)<sup>40</sup>

▷ Inform ILGA-Europe about the state of implementation of the Directive in your country and let us know how we can support your actions.

### *Further information is available from:*

Amnesty International – European Union Office:

<http://www.amnesty-eu.org/>

Committee of Ministers of the CoE, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010:

<https://wcd.coe.int/ViewDoc.jsp?id=1606669>

Court of Justice of the European Union:

<http://curia.europa.eu/>

CJEU, *Certain forms of serious interference with the public manifestation of religion may constitute persecution for reasons of religion*, Press Release No 108/12, Luxembourg, 5 September 2012:

<http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-09/cp120108en.pdf>

European Council on Refugees and Exiles (ECRE):

<http://www.ecre.org/>

ILGA, *State-sponsored homophobia: A world survey of laws criminalizing same-sex sexual acts between consenting adults*, May 2012:

[http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2012.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf)

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<sup>40</sup> More information can be found at:  
[http://ec.europa.eu/staffdir/plsql/gsys\\_www.branch?pLang=EN&pId=3769&pDisplayAll=0](http://ec.europa.eu/staffdir/plsql/gsys_www.branch?pLang=EN&pId=3769&pDisplayAll=0)

ILGA-Europe, *Contribution to the Green Paper on the right to family reunification of third-country nationals living in the European Union*, February 2012:

[http://www.ilga-europe.org/home/publications/policy\\_papers/green\\_paper\\_family\\_reunification](http://www.ilga-europe.org/home/publications/policy_papers/green_paper_family_reunification)

ILGA-Europe, *Statement on pending preliminary rulings by CJEU regarding alleged persecution on the ground of sexual orientation*, August 2012:

[http://www.ilga-europe.org/home/news/latest\\_news/statement\\_cjeu\\_august\\_2012](http://www.ilga-europe.org/home/news/latest_news/statement_cjeu_august_2012)

LEIGH, V. et al authors, *Study for the EP: Towards an EU roadmap for equality on grounds of sexual orientation and gender identity*, 2012:

<http://www.europarl.europa.eu/committees/en/libe/studiesdownload.html?languageDocument=EN&file=78131>

Parliamentary Assembly of the Council of Europe, Resolution 1728 (2010), *Discrimination on the basis of sexual orientation and gender identity*:

<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm>

SPIJKERBOER, T., JANSEN, S., *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, 2011:

<http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/onderzoeksproject-fleeing-homophobia/index.asp>

UNHCR, *Guidelines on International Protection No. 9: Claims to 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*, 23 October 2012, HCR/GIP/12/01:

[www.unhcr.org/refworld/docid/50348afc2.html](http://www.unhcr.org/refworld/docid/50348afc2.html)

UNHCR, *UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, April 2011:

<http://www.unhcr.org/refworld/docid/4daeb07b2.html>



