

**LAYING THE GROUND FOR
LGBTI SENSITIVE ASYLUM
DECISION-MAKING IN
EUROPE:**

**TRANSPOSITION OF
THE RECAST ASYLUM
PROCEDURES DIRECTIVE**

**AND OF THE RECAST
RECEPTION CONDITIONS
DIRECTIVE**



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Introduction

Directives 2013/32/EU (the recast “Procedures Directive”) and 2013/33/EU (the recast “Reception Conditions Directive”) are some of the directives that make up the Common European Asylum System (CEAS). In this document, references to recitals and articles of both Directives are prefaced as follows: APD (recast Asylum Procedure Directive) refers to Directive 2013/32/EU, and RCD (recast Reception Conditions Directive) refers to Directive 2013/33/EU. Read together with other such instruments, such as Directive 2011/95/EU (the recast “Qualification Directive”), they define a set of obligations for Member States and they shape a European asylum system that is much more sensitive to the cases of LGBTI applicants than was the case in the past. The present document explores the potential of the two Directives adopted in 2013 as regards the rights of LGBTI applicants and the obligations of national authorities in the implementation of the CEAS.

Directives 2013/32/EU and 2013/33/EU are complex pieces of legislation, which must be carefully analysed to ensure full and correct transposition. After providing a background to the adoption of the Directives and briefly highlighting their main features, the present guidelines analyse, in eight sections, key elements that impact the treatment of LGBTI applicants and the examination of their protection claims.

The analysis is divided into eight sections as follows: relevant principles that impact the interpretation of the terms of the Directives as well as the definitions of some crucial terms provided by the Directives (Section 1); the Directives’ provisions regarding applicants with special needs (Section 2); the issue of non-disclosure of personal circumstances of dependent applicants (Section 3); the Directives’ training and knowledge-development obligations within relevant national authorities (Section 4); the Directives’ provisions as regards Country of Origin Information and the concepts of safe countries (Section 5); the role of UNHCR and NGOs in providing assistance to applicants (Section 6); and finally provisions relating to life and safety in accommodation centres (Section 7).

i. Background to the adoption of the Directives

The first version of the RCD was adopted in 2003¹ and the first version of the APD in 2005;² Member States had two years within which to transpose them into their legislation and to implement them at national level. As part of the reform of the CEAS the Commission published its proposals for an amended Reception Conditions Directive in 2008 and for an amended Procedures Directive in 2009. The main aims of the proposals were respectively to ensure higher standards of treatment for asylum seekers with regard to reception conditions that would guarantee a dignified standard of living, in line with international law³ and to simplify, streamline and consolidate procedural arrangements across the Union and lead to more robust determinations at first instance, thus preventing abuse and improving efficiency of the asylum process.⁴

¹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

³ Proposal for a Directive laying down minimum standards for the reception of asylum seekers, COM (2008) 815 final, Explanatory Memorandum.

⁴ Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection, COM (2009) 554 final, Explanatory Memorandum.

Negotiations between the European Parliament (EP) and the Council commenced on the basis of these texts. Under the EU treaties these institutions are co-legislators in this area of EU activity, and therefore they have to reach a common agreement on the content of such legal instruments. However, it was soon clear that there was intense disagreement on several issues and that it would be impossible to reach an agreement. In order to overcome the impasse the Commission launched amended recast proposals in June 2011. It stressed therein that the amended proposals were based on the same fundamental principles and explained that the texts introduced clearer concepts and simplified rules and granted Member States more flexibility in integrating them into their national legal systems.

With the introduction of these new legal texts negotiations between the two co-legislators resumed. In the course of 2012 a series of “trialogues” between the European Commission, the EP and the Council took place. These are informal meetings where the content of the legal provisions is discussed and an effort is made to broker an agreement. A political compromise was finally reached in September 2012. For technical reasons, involving the timing of the finalization of the pending negotiations of other asylum instruments, the legal instruments were officially adopted and published in June 2013. Member States have two years, i.e. until July 2015 to transpose the RCD into their national law. The bulk of the provisions of the APD should also be transposed by July 2015; there is one exception in that Member States have a longer period to transpose a specific provision concerning the time-limit for examination of asylum applications at first instance.⁵

Throughout the negotiations of the instruments ILGA-Europe and national LGBTI organisations advocated for the adoption of specific safeguards relating to LGBTI applicants under both asylum procedures and reception conditions, and for the strengthening of Member States’ obligations regarding the identification of vulnerabilities. ILGA-Europe also advocated for the establishment of concrete training obligations for national decision-making bodies and other relevant authorities that would include training on how to deal with claims based on sexual orientation and gender identity. The final text reflects a number of these considerations; however a series of procedural exceptions, especially those linked with the ‘safety’ of the country of origin or of third countries risks undermining the progress achieved. On the whole, there has been marked progress in relation to previous versions of the legal texts, but the complexity and sometimes vague character of some new provisions make their application a real challenge.

ii. The main features of the Directives

This section highlights some of the main features of each Directive. The level of complexity of both legal instruments does not allow for a detailed account of their content.

The RCD consists of seven chapters. The first contains the purpose, definitions and scope of the instrument. Some of the main advances are the clarification of the applicability of the directive in detention facilities and in all phases of the asylum procedure, including the so-called ‘Dublin procedures’,⁶ as well as the broadening of its scope to cover applications for subsidiary protection. The second chapter focuses on general provisions on reception conditions. It contains a series of rights and guarantees, e.g. information, education and access to the labour market and it regulates in detail the detention regime, including the detention conditions and provisions concerning vulnerable detainees.

⁴ See also ECRE, *Guidance Note on the transposition and implementation of the EU Asylum Acquis*, February 2014, available at: <http://ecre.org/component/downloads/downloads/853.html>

⁵ A reference to the regulation which allocates responsibility between the Member States for examining an asylum application. See 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 (recast), 29 June 2013.

The third chapter includes the modalities for the withdrawal or reduction of reception conditions. The possibility to withdraw material reception conditions is retained but it is restricted to exceptional and duly justified cases, unless it concerns applicants who concealed financial resources. The fourth chapter focuses on the identification and treatment of vulnerable asylum seekers with special reception needs. The fifth chapter contains the rules on appeals of decisions relating to the granting, withdrawal or reduction of benefits and access to free legal assistance and representation. The sixth chapter outlines actions to improve the efficiency of the reception system, such as the establishment of national monitoring and control mechanisms. The final chapter contains final provisions of a mainly technical nature.

The APD is divided into six chapters. The first contains general provisions, including definitions, the scope of the instrument and the characteristics that national decision-making authorities should possess. The second chapter is focused on basic principles and guarantees. It includes important rights such as access to an asylum procedure and the right to remain in the Member State pending the examination of the application are detailed. This chapter also includes key guarantees relative to information, access to interpretation, to the opportunity of a personal interview and to free legal assistance and representation. Furthermore, it deals with the issue of the identification and treatment of vulnerable asylum seekers with special procedural needs.

The third chapter establishes rules on “standard” procedures at first instance. However, these rules can be circumscribed in a series of situations that are detailed in the directive and where there is a presumption of abuse, for example presentation of false information or clearly inconsistent and contradictory declarations. In such cases examination procedures may be accelerated and/or conducted at the border or in transit zones. The Directive provides for special procedural rules in the framework of border procedures.

In addition the Directive recognizes that certain applications may be considered inadmissible; however, applicants must at least have the possibility to contest the application of that article in an admissibility interview. Certain of these procedures are linked to the fact that the applicant has either accessed protection elsewhere (first country of asylum), or is coming from a third country that is considered safe (safe country of origin) or will adequately access protection in a third country (safe third country and European safe third country concepts). In addition, the chapter focuses on subsequent applications, i.e. a follow-up application in the same Member State, establishing special procedural rules for their examination.

The fourth chapter contains procedural rules on the withdrawal of international protection. It is followed by the fifth chapter which elaborates standards on appeals. The amended Directive strengthens the right to an effective remedy foreseeing, as a rule, suspensive appeals that provide for a full examination of both facts and points of law. However, in certain cases, such as inadmissible applications, appeals are not automatically suspensive and a court has to rule whether or not the applicant may remain on the territory of the Member State during the examination of his or her appeal. The final chapter contains provisions of a mainly technical nature, such as reporting obligations and the obligation to establish a national contact point to liaise with the Commission.

1 General interpretation of the Directives' provisions

Recitals shed light on the intention of the drafters and provide guidance on how the Directives' provisions should be interpreted. A series of recitals in both the APD and RCD stress the role of fundamental rights in understanding their terms. Every piece of EU legislation has to respect the EU Charter; the rights, freedoms and principles set out therein have the same legal value as the EU treaties. However, the explicit mention of a certain number of rights further enhances their position. In case of doubt Member States should give preference to the interpretation that will better realise the protection of fundamental rights.

In addition, the aim of the amended instruments is to result in a higher degree of harmonisation of legal norms, an objective which should in itself contribute to lessening the disparities of practices on the ground in the different Member States. Despite this greater convergence Member States retain the possibility of applying more favourable standards at national level. Practical cooperation efforts coordinated by the European Asylum Support Office (EASO) are also linked with several actions established in the Directive. Finally, a dedicated article in each Directive includes a series of definitions of key terms; this document analyses the definition of 'family members' in order to propose a correct interpretation at the national level.

1.1. Fundamental rights, principle of non-discrimination and gender sensitivity in the asylum system

Fundamental rights and non-discrimination:

Recitals 60 APD and 35 RCD state that the Directives respect the fundamental rights and observe the principles recognised by the EU Charter of fundamental rights. They add that "in particular, [these directives seek] to ensure full respect for human dignity and to promote the application of Articles [...] 21 [...] of the Charter and [have] to be implemented accordingly." Article 21 of the Charter (non-discrimination) prohibits "any discrimination based on any ground such as sex [...] or sexual orientation [...]" Articles 1 (human dignity), 4 (prohibition of torture and inhuman or degrading treatment) and 7 (respect for private and family life) are also explicitly mentioned.

Gender-sensitive procedures:

Recital 32 APD states that "[e]xamination procedures should be gender-sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution".

ILGA-Europe highlights the importance of reinforcing this provision on the basis of the interpretative principles that were established by the 2012 UNHCR Guidelines on sexual orientation and gender identity claims. Although the Guidelines are not legally binding, they convey the guidance provided by the agency following research and extensive consultations with the members of its Executive Committee. The UNHCR Guidelines raise, among other issues, the following considerations: that the interviewer needs to assure the applicant that all aspects of his or her claim will be treated in confidence; that the interviewer and the interpreter must avoid expressing, whether verbally or through body language, any judgement on the applicant's sexual orientation and behaviour; and finally that questioning about incidents of sexual violence needs to be conducted with the same sensitivity as in the case of any other sexual assault victims, whether victims are male or female.⁷

1.2. Harmonisation and upgrading of the standards offered to applicants for international protection

The EU's multi-annual programmes in the field of asylum and migration, starting with the Tampere conclusions, have consistently repeated that, in the longer term, rules should lead to a common asylum procedure and a uniform status for those who are granted asylum, valid throughout the Union.⁸ The Hague Programme envisaged that this would be a reality by 2010⁹ and the Stockholm Programme, covering the period between 2009 and 2014, set the final deadline of 2012.¹⁰ The latter Programmes stressed the importance of practical cooperation and solidarity, alongside legal harmonisation, in achieving this final aim.

Article 78 of the Treaty on the Functioning of the European Union (TFEU) crystallised in law the EU's stated ambition to progress to a higher level of legal harmonisation with a view to creating a CEAS. This provision moves away from the establishment of "minimum standards" and speaks instead of the development of a "common policy". This policy should consist, among other elements, of a uniform status for asylum, common procedures for the granting and withdrawing of asylum as well as standards concerning the conditions of reception of applicants. This change is also reflected in the amended RCD and APD.

● **General objectives of the amended asylum Directives and higher degree of harmonisation in accordance with higher standards**

Recitals 6 and 7 APD indicate that the evaluation of the "minimum standard" directives and the adoption of second generation directives, already foreseen by the Hague Programme, was the result of the acknowledgement "that considerable disparities remained between one Member State and another concerning the grant of protection [...]." Recitals 8 APD and 5 RCD quote the Stockholm Programme adopted in 2009 and state that "individuals should be offered the same level of treatment as regards procedural arrangements and status determination, regardless of the Member State in which their application [...] is lodged".

⁷ 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 60. Available at: www.unhcr.org/refworld/docid/50348afc.html

⁸ Tampere European Council, *Presidency Conclusions*, 15-16 October 1999, at para 15. Available at: http://www.europarl.europa.eu/summits/tam_en.htm

⁹ Council of the European Union, *Presidency Conclusions: Annex I-The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, Brussels, 5th November 2004, Doc. 14292/04, at p. 18. Available at: http://www.consilium.europa.eu/uedocs/cmsUpload/EU_4.5-11.pdf

¹⁰ Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Doc. 17024/09, Brussels, 2nd December 2009, at p.69. Available at: http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf

- **Possibility to introduce or maintain more favourable provisions**¹¹

Recitals 14 APD and **28 RCD** and **Articles 5 APD** and **4 RCD** make clear that Member States retain the power “to introduce or maintain more favourable provisions for third-country nationals or stateless persons who ask for international protection [...]” Thus despite the enhanced standards which go beyond minimum requirements, it is acknowledged that full legal harmonisation has not taken place. However, Member States’ human rights obligations as enshrined in primary EU law (such as the Treaties and the Charter) take precedence over any potential restraints set by secondary law (such as the Directives).¹²

1.3. EASO and the Asylum and Migration Fund as support mechanisms

Both Directives recognise the crucial role that the European Asylum Support Office has to play in achieving the aims and actions established under the Directives. The following sections will detail the role of the agency in training activities¹³ and in the gathering and dissemination of accurate, up-to-date and reliable country of origin information.¹⁴ **Recital 10 APD** further mentions that Member States “[s]hould take into account relevant guidelines developed by EASO.” The funding provided by the former European Refugee Fund (from 2014 on integrated into the Asylum, Migration and Integration Fund) also supports the practical application of the instruments.

Recognising the role these two mechanisms have to play, **Recitals 9 APD** and **6 RCD** indicate that “[t]he resources of the European Refugee Fund and of the European Asylum Support Office (EASO) should be mobilised to provide adequate support to Member States’ efforts in implementing the standards set in the second phase of the Common European Asylum System [...]”

1.4. Definition of ‘family members’

Article 2 (c) RCD provides a definition of ‘family members’. According to the Directive there are two initial general preconditions: (a) the family must already have existed in the country of origin, and (b) the family members should currently be present in the same Member State as the applicant. This definition includes “the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals”, and “the minor children of couples [these couples].”

This definition, which is consistent with definitions used in other pieces of EU asylum legislation (Directive 2011/95/EU, Regulation (EU) No 604/2013 “Dublin III”), is problematic in that it does not include different family models, in particular in the case of LGBTI people’s families. The test established in Article 2(c) RCD will most often be satisfied in relation to Member States with registered partnership laws that include same-sex couples. However, this provision generally leaves family members unprotected in Member States that do not recognise registered partnerships. Such exclusion will

¹¹ See ILGA-Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014. Available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials

¹² See also, Steven Peers, *EU Justice and Home Affairs Law*, OUP, 3rd edn., 2011, p. 309.

¹³ See Section 4 of this document.

¹⁴ See Section 5 of this document.

disproportionately impact same-sex couples who very often do not enjoy the right to marry. This position is most likely inconsistent with the most recent principles of ECtHR case law on the protection of private and family life applied to LGBTI people and their families. In the case of *Schalk & Kopf* the Court 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”.¹⁵

For Member States with registered partnership laws that explicitly exclude same-sex couples, the ECtHR recently found in a case concerning Greece that such practices do not comply with the Convention as they violate the non-discrimination provision of the Convention, taken in conjunction with Article 8 (right to respect for private and family life).¹⁶ This interpretation was confirmed by analogy in a recent judgement of the European Court of Justice in relation to discrimination on the basis of sexual orientation in employment, when the Court ruled that it was discriminatory to treat a person in a same-sex civil partnership differently from a person married to an opposite-sex spouse (Case C-267/12 Hay, judgment of 12 December 2013).¹⁷ Thus, this exclusion of same-sex couples clearly violates fundamental rights and should not be included in national transposition laws. Further analysis of what can be done to ensure an optimal transposition can be found in ILGA-Europe’s Transposition Guidelines on Directive 2011/95/EU (“the Qualification Directive”).¹⁸

In transposing and applying the Directives, Member States should pay attention to fundamental rights and in particular attention to the principle of non-discrimination, whose application they should mainstream in the implementation of all their obligations. More precisely, they should make use of the possibility of adopting and maintaining more favourable policies in order to comply with their fundamental rights obligations and to fulfil them to the greatest extent.

Member States should also ensure that provisions relating to family members and their rights should not be transposed a *minima*, but align with ECtHR case-law on private and family life and the rights of LGBTI people and their families.

¹⁵*Schalk and Kopf v. Austria* (Application no. 30141/04) **Judgement 24 June 2010.**

¹⁶*Vallianatos and others v. Greece* (Application nos. 29381/09 and 32684/09), Judgment 7 November 2013.

¹⁷ILGA-Europe, *Guidelines for transposition: EU Crime Victims’ Directive and homophobic/transphobic hate crimes*, December 2013, by Steven Peers, p.10. Available at: http://www.ilga-europe.org/home/issues/hate_crime_hate_speech/ilga_europe_reports

¹⁸ILGA-Europe, *Guidelines on the Refugee Status Directive: Protecting LGBTI Persons Seeking Asylum*, 2012.

2 Applicants with special needs and related obligations of the Member States

This section can be read together with sections 8 on Interviewers and interpreters and 9 on LGBTI sensitivity trainings and special expertise in ILGA Europe, *Good practices related to LGBTI asylum applicants in Europe*.¹⁹

Both Directives seek to address the issue of treatment and identification of applicants whose vulnerability results in special reception needs or whose situation results in the need to benefit from special procedural guarantees. The RCD defines vulnerability in an open-ended list and establishes obligations relative to the identification of special needs of vulnerable applicants in terms of reception as well as to the treatment of such applicants. Although not explicitly linking vulnerability and special procedural needs, the APD contains an open-ended list of factors and characteristics that may impact upon the individual and establishes obligations on the identification and safeguards regarding the treatment of such applicants. LGBTI persons might have special procedural or reception needs due to their experiences of persecution, the nature of their claim or the way that national asylum and reception systems are organised.

2.1. Applicants in need of special procedural guarantees

Definition of ‘applicant in need of special procedural guarantees’:

Article 2 (d) APD defines an ‘applicant in need of special procedural guarantees’ as “[a]n applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances.” **Recital 29 APD** makes it clear that the need for such special procedural guarantees can be “[d]ue, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other forms of psychological, physical or sexual violence.” Sexual orientation and gender identity are explicitly mentioned as potential factors in this open-ended list. In addition, it has to be emphasized that victims of sexual orientation or gender identity related persecutions can also experience individual circumstances that include forms of violence mentioned in this list.

¹⁹ILGA-Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014. Available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials

General obligations of the Member States as regards applicants in need of special procedural guarantees:

Article 24 (3) APD provides that “[M]ember States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.” **Recital 29 APD** clarifies that such applicants “[s]hould be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.”

Obligations related to the use or suspension of accelerated procedures and procedures conducted at the border:

Despite the obvious contradiction, the APD does not establish a general exemption for applicants in need of special procedural guarantees from procedures that contain fewer guarantees for every asylum seeker, such as accelerated or border procedures. Nevertheless, **Article 24 (3) APD** provides that when adequate support to applicants in need of special procedural guarantees cannot be provided within the framework of accelerated procedures and/or procedures conducted at the border or in transit zones, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, they shall not apply such procedures.²⁰ This provision should be effectively transposed and broadly interpreted in order to avoid undermining the special attention that the Directive sought to grant to vulnerable applicants with special procedural guarantees.

Prioritisation of the examination of claims:

Article 31 (7) APD allows Member States to prioritise the examination of an application in particular “[w]here the applicant is vulnerable, within the meaning of Article 22 of the RCD or is in need of special procedural guarantees, in particular unaccompanied minors”. Contrary to accelerated procedures, prioritisation entails frontloading the examination of the claim; however the full array of guarantees provided by the Directive applies. Such a procedure, which can also be applicable where an application is likely to be well-founded, is aimed at allowing these categories of asylum seekers to access protection more swiftly.

Obligations related to appeal procedures:

As previously mentioned, although appeals are as a rule suspensive, the Directive foresees some exceptions. The Directive does not provide that the appeals of applicants in need of special procedural guarantees that have been exempted from accelerated and/or border procedures will automatically be suspensive. However, **Article 24 (3) APD** foresees that in such cases Member States shall, at a minimum, provide the following guarantees: necessary interpretation, legal assistance, and at least one week to prepare the request and submit to the court or tribunal the arguments in favour of granting the right to remain on the territory pending the outcome of the remedy. **Recital 30 APD** reinforces this by stating that an applicant in need of special procedural guarantees “[s]hould also [be] provided with additional guarantees in cases where his or her appeal does not have automatic suspensive effects, with a view to making the remedy effective in his or her particular circumstances.”

²⁰This provision is further strengthened by Recital 30 APD which clarifies that “[w]here adequate support cannot be provided to an applicant in need of special procedural guarantees in the framework of accelerated or border procedures, such an applicant should be exempted from those procedures”.

Need of special procedural guarantees becoming apparent at a later stage of the procedure:

This section can be read in conjunction with Section 5 on late disclosure of ILGA Europe, *Good practices related to LGBTI asylum applicants in Europe*.²¹

Article 24 (4) APD provides that “[M]ember States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure.” This provision is important for the case of LGBTI applicants. Once again interpretative guidance in order to correctly implement this provision can be found in the authoritative 2012 UNHCR guidelines in which the UN agency stresses that some LGBTI applicants may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence.²² As a result they may, for instance, change their claims during the process by initially stating that their sexual orientation is imputed to them or making a claim on a ground unrelated to their sexual orientation or gender identity, to eventually expressing that they are LGBTI.²³

2.2. Applicants with special reception needs

Definition of ‘special reception needs’:

Article 2 (k) RCD defines an applicant with special reception needs as “a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided by the Directive” **Article 21 RCD in turn** provides that “[M]ember States shall take into account the specific situation of vulnerable persons 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, in the national law implementing this Directive”.

The Directive uses an open-ended list, sexual orientation and gender identity are not explicitly mentioned. It has to be emphasized, however, that victims of sexual orientation or gender identity-related persecutions can often present individual circumstances that include forms of violence mentioned in this list, such as rape or sexual violence. A 2011 Report of the UN High Commissioner for Human Rights covering, amongst other issues, acts of violence against individuals based on their sexual orientation and gender identity noted that: “[H]omophobic and transphobic violence has been recorded in all regions. Such violence may be physical (including murder, beatings, kidnappings, rape and sexual assault) or psychological (including threats, coercion and arbitrary deprivations of liberty)”.²⁴ In addition, LGBTI asylum seekers too often feel excluded from services and fear (or experience) discrimination and harassment from their own ethnic and national communities in the country of asylum, adding to the challenges they face.²⁵ Such exclusion and isolation inevitably increase the vulnerability of LGBTI asylum seekers, many of whom depend for their survival on the kindness of strangers and casual acquaintances.²⁶

General obligations of the Member States as regards applicants with special reception needs:

²¹ ILGA-Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014. Available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials

²² UNHCR, *Guidelines on International Protection No. 9*, fn.5, at para 59.

²³ Ibid.

²⁴ Report of the UN High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41, November 2011, para 20.

²⁵ Refugee Support, *Over not Out: The housing and homelessness issues specific to lesbian, gay, bisexual and transgender asylum seekers*, May 2009, p.63. Available at: <https://www.metropolitan.org.uk/images/Over-Not-Out.pdf>

²⁶ Ibid, p.64.

Article 22 (1) RCD provides that Member States shall “provide for appropriate monitoring of [applicants with special reception needs] situation” in order to “take into account their special reception needs throughout the duration of the asylum procedure”. **Recital 14 RCD** indicates that “the reception of persons with special reception needs should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs.” A series of articles clarify Member States’ obligations towards minors, unaccompanied minors and victims of torture and violence.²⁷ According to **Article 25 RCD** the latter should receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.

Obligations of the Member States’ towards detained applicants with special reception needs:

As a rule, the Directive does not exempt from detention vulnerable persons with special reception needs. **Article 11 (1) RCD** states that “[t]he health, including mental health of applicants in detention who are vulnerable persons shall be of primary concern to national authorities.” The same article adds that “[w]here vulnerable persons are detained Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health”. These guarantees do not seem to fully take into account the situation of vulnerable individuals with special reception needs. EU-wide research has shown that detention has detrimental effects on the physical and mental health of almost every individual and has the potential to render them vulnerable.²⁸ The situation of those with pre-existing vulnerabilities can therefore only be aggravated. A thorough application of the principles of necessity and proportionality, enshrined in the Directive, calls for the application of less coercive alternative measures for these categories of asylum seekers.²⁹

2.3. Identification of applicants with special procedural and reception needs

Identification of applicants as having special procedural and reception needs is a necessary prerequisite for them to benefit from the special guarantees foreseen in the Directives. Despite the self-evident importance of identification the implementation process of the previous version of the RCD was found to be deficient in this respect as a significant number of Member States had not put any identification procedure in place.³⁰ The amended instruments sought to address this gap.

Identification of applicants with special reception needs:

Article 22 (3) RCD clarifies that only vulnerable persons may be considered to have special reception needs. However, the Directive does not contain any explicit obligation to identify vulnerability. **Article 22 (1) RCD** provides that in order to effectively implement article 21 RCD [the article containing the definition of vulnerable persons] Member States shall assess whether the applicant is an applicant with special reception needs and they shall also indicate the nature of such needs. The assessment shall be initiated within a reasonable period of time after an application is made.

²⁷Articles 23-25 RCD.

²⁸JRS Europe, *Becoming Vulnerable in Detention*, 2010. Available at: http://www.jrseurope.org/publications/JRS-Europe_Becoming%20Vulnerable%20In%20Detention_June%202010_FULL%20REPORT.pdf

²⁹See article 8 (1), (2), (4) of the Directive.

³⁰See Odysseus Academic Network, *Comparative overview of the implementation of the directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU member states*, 2006, pp. 76-77. Available at: <http://www.refworld.org/pdfid/484009fc2.pdf>

Identification of applicants in need of special procedural guarantees:

Article 24 (1) APD provides that “[M]ember States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees”. **Recital 29 APD** confirms and clarifies the Member States’ obligation to “endeavour to identify [such applicants] before a first instance decision is taken.”

Nature of the assessment:

The RCD leaves a wide margin of appreciation to Member States regarding the implementation of this obligation. **Article 22(2) RCD** stresses that it need not take the form of an administrative procedure. **Article 24 (2) APD** opens up the possibility for Member States to integrate the assessment of the existence of special procedural needs into existing national procedures or to use a single procedure integrating the assessment of ‘special procedural guarantees’ into the assessment of ‘special reception needs’. The latter approach seems reasonable as it has the potential to ensure greater coherence in the treatment of vulnerable applicants and to allow for a global assessment of their special needs.

Special needs becoming apparent at a later stage:

This section can be read in conjunction with Section 5 on late disclosure in ILGA Europe, *Good practices related to LGBTI asylum applicants in Europe*.³¹

Article 22 (1) RCD provides that “[M]ember States shall also ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure”.

Article 24 (4) APD contains a similar guarantee, namely that: “[M]ember States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure”. The importance of such safeguards given the particularity of the experiences of LGBTI applicants was stressed earlier in this document.³² In that respect, the Fleeing Homophobia report noted some good practice from Sweden and the UK. Policy documents in both of those Member States acknowledge that it is not uncommon that sexual orientation is invoked later in the asylum procedure and accept that this fact should not affect credibility.³³

Obligation to report to the European Commission on the steps of the identification of special needs:

Annex 1 to Directive 2013/33/EU (RCD) provides that Member States have to submit information to the Commission by 20 July 2016 on different points, including an explanation of “[t]he different steps for the identification of persons with special reception needs, including the moment when it is triggered and its consequences in relation to addressing such needs [...]”. It is particularly important to advocate that in this report Member States clearly explain how they take into consideration the possible special reception needs of LGBTI applicants. Where Member States have chosen to use a single procedure to assess special reception needs together with the needs of special procedural guarantees, as permitted by **Article 24 (2) APD**, they would also have to report on the steps they take to assess the latter including on the basis of individual circumstances relating to sexual orientation and gender identity or related persecutions.

³¹ILGA-Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014. Available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials

³²See subsection 2.1. of this section.

³³Sabine Jansen and Thomas, Spijkerboer, *Fleeing Homophobia, Asylum Claims related to Sexual Orientation and Gender Identity in Europe*, COC Netherlands/VU University Amsterdam, September 2011, at pp. 67-68. Available at: <http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/onderzoeksproject-fleeing-homophobia/research-reports/index.asp>

The transposition and enforcement of Directives 2013/32/EU and 2013/33/EU should be carried out in a way that clearly defines the concepts of 'applicants in need of special procedural guarantees' and 'applicants with special reception needs', in conformity with the Directives' articles and recitals. In particular, Member States should maintain the approach of an indicative rather than an exhaustive list of individual circumstances to be taken into account. Ideally, they would explicitly include the factors of sexual orientation and gender identity in that list.

The identification of such asylum seekers should be the subject of particular attention by national law-makers and policy-makers, and result in clear and transparent mechanisms to be adopted. Failure to actually provide for an appropriate and full assessment would result in a general failure to implement all the provisions mentioned in the present section.

The actual implementation of the Member States' obligations in relation to applicants with special needs will require the adoption of national policies to appropriately identify such applicants, including at a later stage of the procedure, and to provide them with adequate support. These national policies should address the situation of applicants with claims based on sexual orientation and/or gender identity.

3 Non-disclosure of certain particular circumstances of dependent applicants

The APD allows for applications to be made by an applicant on behalf of his or her dependants, including dependent adults who consent to the lodging of the application on their behalf (**Article 7 (2) APD**). In such cases, each dependent adult shall be informed in private, before consent is requested, of the relevant procedural consequences of the lodging of the application on his or her behalf and of his or her right to make a separate application for international protection.

Non-disclosure of particular circumstances of an applicant:

Article 11 (3) APD provides that for the purpose of Article 7 (2) APD and whenever the application is based on the same grounds, Member States may take a single decision, covering all dependants, unless doing so would lead to the disclosure of particular circumstances of an applicant which could jeopardise his or her interests, in particular in cases involving gender, sexual orientation, gender identity and/or age-based persecution. In such cases, a separate decision shall be issued to the person concerned. This is an important safeguard for LGBTI applicants given the particularity of such claims and the far-reaching social consequences that the sharing of such information could have, even in the country of asylum.

An analogy can be made with a general principle enshrined in **Article 30 APD** according to which Member States shall not disclose information regarding individual applications or the fact that an application has been made. Although the latter provision refers more specifically to non-disclosure to the alleged actor(s) of persecution or serious harm the rationale is similar: not to jeopardise the position of the applicant through the sharing of information.

The specific provisions of Directive 2013/32/EU as regards non-disclosure of particular circumstances of the applicants should be fully and thoroughly transposed and enforced, in particular in cases involving sexual orientation or gender identity.

4 Training and knowledge development within relevant national authorities

This section can be read in conjunction with Sections 8 and 9 on LGBTI sensitivity trainings and special expertise of ILGA Europe, *Good practices related to LGBTI asylum applicants in Europe*.³⁴

One of the important advances in the amended Directives is the enhancement and concretisation of the training obligations of national asylum and other relevant authorities. Training is essential to quality decision-making and of great importance in the case of claims related to sexual orientation and gender identity. Sensitive interviewing requires permanent reflection by interviewers; in order to enable interviewers to meaningfully fulfil their role in this respect, training is needed both at the beginning of an interviewer's career, as well as in the form of professional development and training updates.³⁵ Apart from decision-makers, it is appropriate that other relevant stakeholders receive training. This applies to categories such as the personnel of reception centres, police officers, border guards etc. The role of EASO in developing relevant training material and in conducting specialized trainings mainly aimed at decision-makers from national administrations is central. At the time of writing, the agency is developing a new training module focusing on the issues of 'Gender, Gender Identity and Sexual Orientation' in the CEAS.

4.1. General principles to be applied to the personnel of asylum authorities

General principles regarding the capacities and training of personnel:

Article 4 (1) APD provides that the determining authority responsible for examining applications must be provided with "[a]ppropriate means, including sufficient competent personnel [...]". **Article 4 (4) APD** states that "[M]ember States shall ensure that the personnel of that authority has the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing the Directive". **Recital 16 APD** further enhances this obligation by stating that "[i]t is essential that decisions on all applications [...] be taken [...] by authorities whose personnel has the appropriate knowledge or has received the necessary training in the field of international protection".

³⁴ILGA-Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014. Available at : http://www.ilga-europe.org/home/publications/reports_and_other_materials

³⁵Sabine Jansen and Thomas, Spijkerboer, *Fleeing Homophobia, Asylum Claims related to Sexual Orientation and Gender Identity in Europe*, COC Netherlands/VU University Amsterdam, September 2011, at p. 57.

Detailed obligations in relation to training asylum authorities' personnel:

Article 4 (3) APD provides that Member States shall ensure that the personnel of the examining authorities is properly trained. To that end, Member States shall provide for relevant training which shall include the elements listed in **Article 6 (4) (a) to (e) of the EASO Regulation**.³⁶ That regulation lists the following areas: “international human rights and the asylum acquis of the Union, including specific legal and case-law issues” (a); “issues related to the handling of asylum applications from minors and vulnerable persons with specific needs” (b); “interview techniques” (c); “issues relating to the production and use of information on countries of origin” (e). All these categories are relevant to LGBTI claimants, in particular the specific training in handling vulnerable persons with specific needs, which could include the needs of LGBTI asylum seekers and, as will be analysed below, the use of country of origin information which is crucial when decision-makers consider the application of ‘safety concepts’. The APD further states that Member States shall also take into account the relevant training established and developed by the European Asylum Support Office (EASO).³⁷ These concrete obligations should be effectively transposed and potentially further developed in the national framework.

Possibility for the personnel examining applications to seek advice from experts:

Apart from the training obligations established in the Directive, **Article 10 (3) (d) APD** allows for the personnel examining applications and taking decisions “[t]o seek advice, whenever necessary, from experts on particular issues, such as [...] gender issues”. This specification is to be welcomed, given the complexity of LGBTI claims. Member States should be encouraged to seek expertise from a wide array of actors including civil society organisations with an expertise on the situation faced by LGBTI individuals in the different countries of origin. However, national authorities must ensure that the individuals and organisations consulted do indeed have the requisite expertise and that they are objective and impartial.

4.2. Requirements for a personal interview

Article 15 (1) and (2) APD establishes the general principle of a personal interview taking place “[w]ithout the presence of family members unless the determining authority considers it necessary [...]”, and “[u]nder conditions which ensure appropriate confidentiality.”

Competence of the interviewer on personal and general circumstances surrounding the application:

Article 15 (3) APD provides that Member States shall “[e]nsure that the person who conducts the interview is 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” **(a)**. Member States must also “[w]herever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so wishes [...]” **(b)**. Finally, Member States shall “[s]elect an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. [...] Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests [...]” **(c)**.

The explicit mention of the factors of sexual orientation and gender identity recognises the level of complexity of such claims. Decision-makers need to end their reliance on stereotypical behaviours or appearances for the evaluation of claims. In fact, there are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals; their life experiences can vary greatly even if they are from the same country.³⁸ This particular obligation is a strong obligation of result, as the term ‘shall’ is employed and there is no restriction or nuance in the Directive text.

³⁶ Regulation (EU) 439/2010.

³⁷ For more details see section 8 of this document.

The other two obligations on the provision of a same-sex interviewer or interpreter are not equally strong. First of all, the term “wherever possible” is employed; this leaves a wide margin of appreciation to Member States who may evoke unavailability or lack of resources. This obligation is further nuanced by the inclusion of the possibility for Member States to deny this request if “the determining authority has reason to believe it 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”.³⁹ This wording is obviously seeking to combat potential abusive requests where the request is based on an effort to stall the asylum determination, however, this seriously dilutes the safeguard. The terms are vague and could be applicable to a great number of cases; in addition it is virtually impossible for an applicant to disprove such a presumption and to objectively prove their emotional state. In order to render this guarantee effective Member States should either refrain from making use of this possibility or interpret it very restrictively.

4.3. Principles to be applied to the personnel of other national authorities

Obligations relating to other authorities which are likely to receive applications for international protection:

Article 6 (1) APD includes a non-exhaustive list of such authorities, including “[t]he police, border guards, immigration authorities and personnel of detention facilities”. It provides that Member States shall ensure that they “[h]ave the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged”. Information and training on vulnerable asylum seekers and their needs is therefore relevant for these authorities as well.

Personnel of another authority in charge of personal interviews with applicants:

The APD provides for exceptional arrangements “[w]here simultaneous applications [...] by a large number of third-country nationals or stateless persons make it impossible in practice for the determining authority to conduct timely interviews on the substance of each application”. This targets the specific situation of sudden mass inflows. **According to Article 14 (1) APD**, in such cases Member States may provide for the personnel of another authority to be temporarily involved in conducting interviews. The personnel of that other authority shall receive, in advance, the relevant training which shall include the elements listed in **Article 6 (4) (a) to (e) of the EASO Regulation**.⁴⁰ It is important to note that even in such exceptional circumstances the training obligations remain.

Training of officials who first come into contact with persons seeking international protection:

Recital 26 APD indicates that such officials, “[i]n particular officials carrying out the surveillance of land or maritime borders or conducting border checks, should receive relevant information and necessary training on how to recognise and deal with applications for international protection, inter alia, taking due account of relevant guidelines developed by EASO [...]”. This is a general obligation of training in order to be able to identify protection seekers. However, the issue of training on vulnerability is also relevant in this context.

³⁸UNHCR, *Guidelines on International Protection No. 9*, fn.5, at para 60.

³⁹See the text of Article 15(3)(b) and (c).

⁴⁰For more details on those elements see section 4.1. in this document.

Persons working in accommodation centres:

Article 18 (7) RCD provides that such persons “[s]hall be adequately trained and shall be bound by the confidentiality rules provided for in national law in relation to any information they obtain in the course of their work.” EASO training is also relevant in this context: one of the areas of training developed by the agency is on “[r]eception conditions, including special attention given to vulnerable groups and victims of torture”.⁴¹

The Directives’ provisions relating to training need to be effectively implemented by Member States. The competence of the personnel of all relevant authorities is a precondition for the correct implementation of EU law.

This is particularly relevant in the case of training relating to Member States’ obligations as regards the identification of applicants with special needs as well as their treatment and the processing of their cases. The provisions on training must therefore be interpreted as covering all relevant individual circumstances that are recognised by the asylum Directives, including sexual orientation and gender identity.

As a result, Member States need to develop adequate and complete training schemes in order to fully comply with the Directives’ provisions, taking into account the training materials that are developed by the European Asylum Support Office.

⁴¹See Article 6(4)(j), Regulation 439/2010 (EASO Regulation).

5

Country of Origin Information (COI) and concepts of safe countries

The APD contains specific rules for cases where the applicant has accessed protection elsewhere (first country of asylum, Article 35 APD), or is coming from a third country that is considered safe (safe country of origin, Article 36 APD) or will adequately access protection in a third country (safe third country, Article 38 APD and European safe third country concepts, Article 39 APD). In all of these cases Member States may make applications subject to an admissibility interview; in the case of European safe third countries in particular they might also decide to provide no or no full examination of the application.⁴² At the same time the Directive establishes certain safeguards as well as a number of conditions that need to be fulfilled in order for a country to be considered 'safe'. Among the safeguards is the use of COI by a range of sources before such concepts are applied. The lists of the different countries that are considered 'safe' are compiled at national and not at EU level.

5.1. Country of Origin Information (COI)

This section can be read in conjunction with Section 7 on Country of Origin Information in ILGA Europe, *Good practices related to LGBTI asylum applicants in Europe*.⁴³

Obligation to obtain precise and up-to-date country of origin information:

Article 10 (3) (b) APD makes clear that in order to ensure that decisions are taken on the basis of an appropriate examination, Member States "[s]hall ensure that precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, when necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions." **Recital 39 APD** also clarifies that "[i]n determining whether a situation of uncertainty prevails in the country of origin of an applicant, Member States should ensure they obtain precise and up-to-date information from relevant sources such as EASO, UNHCR, the Council of Europe and other relevant international organisations". The Directive thus stresses the role of UNHCR, EASO and civil society in this field.

- **UNHCR:** The UN agency releases documents assessing situations in certain countries/regions of origin and on this basis makes specific recommendations regarding the protection needs of applicants. Although not legally binding, these

⁴² See articles 35-39 RCD.

⁴³ ILGA-Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014. Available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials

documents, and any other information coming from the agency, need to be taken into account in the evaluation of national determination authorities.

- **EASO:** The EU agency, according to its establishing regulation, has a mission to both draft its own COI reports but also to gather relevant, reliable and up-to-date information which should also be made available through a portal, thus facilitating the task of Member States.⁴⁴ Though not purporting to give instructions to Member States about the grant or refusal of applications for international protection such documents can assist national decision-makers in their task.
- **Civil society:** the Directive makes explicit reference to information coming from relevant civil society human rights organisations. Therefore, civil society organisations with an expertise in LGBTI people’s human rights, who are very well equipped to provide specific and accurate information on the situation that LGBTI persons face in different countries of origin, should be invited to play such a role, whenever they have the capacity.

5.2. Concepts of safe country

The importance of COI becomes particularly apparent in the assessment of whether a country should, or should not, be considered safe for a particular applicant.

Possibility to contest ‘safety’ in individual cases: Given that general evaluations of countries as ‘safe’, and their inclusion on national lists, does not necessarily mean that applicants cannot have valid protection claims on the basis of their individual circumstances, all articles make provision for contesting their application.

Article 35 (2) APD states that “[t]he applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances”. **Article 36 (1) APD** provides that “[a] third country designated as a safe country of origin [...] may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if [...] 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”. Thus asylum seekers can challenge the application of first country of asylum and safe country of origin concepts by invoking individual circumstances that would necessitate a full examination of their application for international protection.

Furthermore, Article 38 (2) (c) APD provides that: “[a]s a minimum, [Member States] shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances”. **Article 39 (3) APD** contains a similar guarantee regarding the application of the European safe third country concept. **Recitals 40 and 42 APD** enhance these obligations. The latter recital clearly confirms that “[t]he designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in that country”.

⁴⁴ See Article 6(4)(a)-(e), Regulation 439/2010 (EASO Regulation).

Concepts of safe country and complexity of gender-related claims:

The Directive recognises that such considerations are particularly pertinent in the case of claims based on gender, sexual orientation and gender identity. **Recital 32 APD** indicates that “[t]he complexity of gender-related claims should be properly taken into account in procedures based on the concept of safe third country, the concept of safe country of origin or the notion of subsequent applications”.

This becomes clear when we consider a few practical examples. In France Senegal, Ghana, and Tanzania figure among the list of safe countries of origin.⁴⁵ Ghana and Senegal are also considered as safe countries of origin by Germany.⁴⁶ Research by ILGA concerning these countries reveals that they apply (long-term) imprisonment to same-sex couples.⁴⁷ The CJEU has recently ruled though that: ‘[a] term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution’.⁴⁸ The same judgment also concluded that the existence of criminal laws which specifically target homosexuals, whether they are applied or not, supports the finding that those persons must be regarded as forming a particular social group.⁴⁹

Regular review of the lists of safe countries and informative resources to be used:

Apart from the general guidelines on where information should be drawn from in the framework of COI, the Directive also indicates that special attention should be paid to a variety of sources in the framework of application of the different safe country concepts. Namely, **Recital 46 APD** states that: “[W]here Member States apply safe country concepts on a case-by-case basis or designate countries as safe by adopting lists to that effect, they should take into account, inter alia, the guidelines and operating manuals and the information on countries of origin and activities, including EASO Country of Origin Information report methodology, [...], as well as relevant UNHCR guidelines”. In relation to safe countries of origin Article 37(3) APD stipulates that: “[T]he assessment of whether a country is a safe country of origin in accordance with this article shall be based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations”. Recital 48 APD clarifies further that “[M]ember States should conduct regular reviews of the situation in those countries based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations”.

⁴⁵The information is available at the website of OFPRA: http://www.ofpra.gouv.fr/index.html?xml_id=276&dtd_id=11

⁴⁶Asylum Information Database, National Report: Germany, 2012, pp.40-42. Available at: http://www.asylumineurope.org/files/report-download/aida_report_germany.pdf

⁴⁷http://old.ilga.org/Statehomophobia/ILGA_map_2013_A4.pdf and ILGA, *State-sponsored Homophobia, A world survey of laws: Criminalisation, protection and recognition of same-sex love, 8th edition*, May 2013. Available at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf

⁴⁸CJEU, Joined Cases C 199/12 to C 201/12, X, Y and Z, 7 November 2013.

⁴⁹Ibid.

The Directives' provisions on Country of Origin Information (COI), read in conjunction with the missions and competences of EASO, create an obligation for the Member States to develop relevant expertise within their national asylum systems and to exchange the information available at national level. The APD also stresses that information from human rights organisations needs to be considered.

This has particular consequences on the application of all the concepts of safe countries, which should never hamper a thorough examination of an individual application where individual circumstances such as sexual orientation or gender identity have particular consequences on the nature or risk of persecution.

As a result, Member States should develop or adapt their national policies in a consistent manner.

6 The role of NGOs and UNHCR in providing information and assistance

Another positive development in the Directives is that they explicitly recognise the role of UNHCR and NGOs in the various stages of the asylum procedure. They are both providers of information to Member States, such as information on the situation of countries of origin⁵⁰, but they also have a role to play in providing direct information and assistance to individual asylum seekers.

6.1. Role of UNHCR in the asylum procedure

See also the dedicated sections on the position of UNHCR on several issues such as criminalization, country of origin information and discretion in ILGA Europe, *Good practices related to LGBTI asylum applicants in Europe*.⁵¹

A special role is recognised for UNHCR given its supervisory function of the 1951 Refugee Convention. **Article 29 (1) APD** provides that Member States shall allow UNHCR “[t]o have access to applicants, including those in detention, at the border and in the transit zones” (a); “[t]o have access to information on individual applications for international protection, on the course of the procedure and on the decisions taken, provided that the applicant agrees thereto” (b); and “[t]o present its views [...] to any competent authorities regarding individual applications for international protection at any stage of the procedure” (c). The latter is an interesting resource if considered in light of the UNHCR Guidelines on claims based on sexual orientation and/or gender identity.⁵² The possibility of having unimpeded access to asylum seekers, including those in detention, is also important because in practice they often face more barriers to accessing information.

⁵⁰ See Section 5 of this document for details.

⁵¹ ILGA-Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014. Available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials

⁵² UNHCR, Guidelines on International Protection No. 9, fn.5.

6.2. Provision of information and possibility of communication

Provision of information to applicants:

Recital 22 APD confirms an obligation for Member States to provide information to applicants, “[t]aking into account their particular circumstances”, to “[e]nable [them] to better understand the procedure [...]”.⁵³ The Recital indicates that Member States “[s]hould have the possibility to use the most appropriate means to provide such information, such as through non-governmental organisations [...]”. Moreover **Article 5(1) RCD** states that in the framework of reception: “[M]ember States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care”.

Possibility for applicants to communicate with NGOs and the UNHCR:

Article 12 (1) (c) APD (applicable to first instance procedures) provides that applicants “[s]hall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling”. According to **Recital 25 APD**, the procedure in which an application is examined “[s]hould normally provide an applicant at least with: [...] the opportunity to communicate with a representative of the UNHCR and with organisations providing advice or counselling to applicants for international protection [...]”. Moreover, **Article 21 (1) APD** allows Member States to have the free-of-charge legal and procedural information referred to in the Directive provided by non-governmental organisations. Finally, **Article 22 (2) APD** foresees that Member States may allow NGOs more specifically to provide legal assistance and/or representation to applicants.

Recital 21 RCD provides consistency between the APD and the RCD by indicating that “[i]n order to ensure compliance with the procedural guarantees consisting in the opportunity to contact organisations or groups of persons that provide legal assistance, information should be provided on such organisations and groups of persons.” Thus, bearing in mind that gender, sexual orientation or gender identity are, according to the APD, among the factors that might call for special procedural guarantees, the combined reading of the two directives suggests an obligation on Member States to provide information on organisations that provide legal support to LGBTI applicants.

6.3. Possibility to communicate with UNHCR and NGOs in special circumstances

Examples of good practice can be found in Sections 754 and 11 in ILGA Europe, *Good practices related to LGBTI asylum applicants in Europe*.⁵⁴

Finally, the Directives foresee the possibility for applicants finding themselves in particular situations to communicate with UNHCR and NGOs, as well as for the latter to have access to them.

The case of detention:

Article 10 (4) RCD stipulates that Member States shall ensure that “[f]amily members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy.”

⁵³ We stress again that Recital 29 APD makes explicit reference to gender, sexual orientation and gender identity among the open list of particular circumstances of the applicants which might call for special procedural guarantees.

⁵⁴ ILGA-Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014. Available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials

The case of external borders:

Article 8 (2) APD provides that “Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders”.

The case of accommodation centres:

Article 18 (2) RCD provides that where housing is provided in kind Member States shall ensure that “[a]pplicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies” (b) and that “[f]amily members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned are granted access in order to assist the applicants” (c).

From all of the above, it becomes apparent that national organisations representing LGBTI persons’ rights should liaise with national authorities in order to ensure the correct transposition of these provisions so that the full array of options is reflected in national law and practice. At a later stage they should be active, as far as their resources allow, in providing advice and legal assistance in individual cases.

The Directives include a number of provisions on the role of NGOs and on the role of UNHCR in communicating with, as well as providing information and assistance to, applicants.

These provisions should be transposed and implemented thoroughly. It is also a responsibility of NGOs providing support to LGBTI asylum seekers to understand the role they can play under these provisions, and to be aware of the opportunities offered by the legislation – including when it comes to the possibility given to UNHCR to intervene in the procedures.

7 Life and safety in accommodation centres⁵⁵

This section can be read in conjunction with Section 10 on Conditions in Reception Facilities in ILGA Europe, *Good practices related to LGBTI asylum applicants in Europe*.

The RCD establishes a series of safeguards relating to safety in accommodation centres, which, according to the Directive, are “any place used for the collective housing of applicants”.⁵⁶ EU-wide research concluded that “[h]omophobic and transphobic harassment and violence against LGBTI applicants are widespread and serious issues in most European countries. The situation of LGBTI applicants in reception centres, accommodation centres and in detention should be subject to further enquiries, and merits separate and profound attention”.⁵⁷ Thus, the relevant provisions of the RCD are particularly important for LGBTI applicants and could help address this reality they are facing.

7.1. Maintaining family unity

Maintaining family unity and protecting family life in accommodation centres:

Article 12 RCD provides that “M[ember States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the applicant’s agreement.” This provision should be understood as applicable to preserve the unity of LGBTI people’s families. As mentioned above, according to the ECtHR case-law stable partnerships of same-sex couples fall under the protection of “family life” under the European Convention.⁵⁸ At the same time the final provision, namely the terms ‘with the applicant’s agreement,’ should be understood as prohibiting Member States from imposing on LGBTI applicants a joint residence with family members they don’t want to stay with.

Article 18 (2) (a) RCD also provides that where housing is provided in kind by the Member State, this Member State shall ensure that “applicants are guaranteed protection of their family life”. Recital 22 APD further enhances the above obligations by stating that: “[W]hen deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members

⁵⁵ See ILGA Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014. Available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials

⁵⁶ See Article 2 (i) RCD.

⁵⁷ Sabine, Jansen and Thomas, Spijkerboer, *Fleeing Homophobia, Asylum Claims related to Sexual Orientation and Gender Identity in Europe*, COC Netherlands/VU University Amsterdam, September 2011 fn. 18, at p. 77.

⁵⁸ See section 1.4. of this document.

or other close relatives such as unmarried minor siblings already present in the Member State". We highlight that according to Article 2(c) RCD minor unmarried children are considered as family members, whether they were born in or out of wedlock, or adopted, as defined under national law.

7.2. Safety in accommodation centres

Gender-specific concerns and vulnerability in accommodation centres:

Article 18 (3) RCD provides that "[m]ember States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres [...]." This consideration is particularly pertinent for trans and intersex individuals. Depending on their particular circumstances, their situation might call for their transfer to individual rather than shared accommodation.

Prevention of violence in accommodation centres:

Article 18 (4) RCD provides that "[M]ember States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres [...]. It is worth stressing that **Recital 17 of the Directive on the rights of victims**⁵⁹ provides the following: "[v]iolence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. [...] Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (...), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilations and so-called 'honour crimes'".

In order to ensure the effective implementation of these safeguards, national organisations advocating for LGBTI individuals should share with authorities best practice on potential difficulties faced by LGBTI applicants in common accommodation. When incidents of gender-based violence and sexual assault take place, a thorough investigation should be undertaken and appropriate sanctions should be imposed. Authorities should consider whether the special reception needs of LGBTI applicants call for their removal from shared accommodation and the provision of individual housing.

The RCD includes a number of important provisions as regards the life of applicants in accommodation centres. These provisions have to be implemented in a sexual orientation and gender identity sensitive manner, in particular when it comes to rules relating to family life and to the prevention of violence.

This should happen irrespective of the fact that the dedicated provisions do not explicitly include sexual orientation or gender identity specific language. Member States have a responsibility to develop inclusive dedicated policies on the basis of their general human rights obligations, in particular those stemming from the ECHR.

8

The European Asylum Support Office (EASO) as support mechanism

The increasing role of EASO in providing support to Member States while implementing their obligations under the asylum Directives has been mentioned in different parts of the Guidelines. In order to provide a full picture of the agency's role in this field we have gathered the relevant references under this section.

EASO as a general support mechanism: the general role of EASO as a support mechanism is outlined in **Recitals 9 APD** and **6 RCD** and developed in section 1.3 of the present Guidelines.

EASO's work on developing relevant guidelines: Recital 10 APD further mentions that Member States "should take into account relevant guidelines developed by EASO."

EASO as a resource for training: the obligations and resources linked to the EASO regulation (439/2010) according to the provisions of Directive 2013/33/EU (APD) are listed in section 3.1 of this document.

EASO as a resource for COI: The role of EASO as mentioned in Article 10 (3) (b) APD is explained in section 4.1 of the present document.

9 Considerations on translation

The question of translation is also central for the proper implementation of the Directive at national level. In the past, some Directives' translation processes revealed how misconceptions regarding the content of terms can arise even at the institutional level. This already even happened in the context of the EU's asylum legislation.

So as to avoid such misinterpretations in the future ILGA-Europe together with the EP's Integroup on LGBT rights advocated for the use of accurate translations of the recast versions of the asylum Directives in all EU national languages. In order to ensure a smooth transposition process ILGA-Europe is proposing the following translations for the terms 'sexual orientation' and 'gender identity'. More information on the accurate content of several terms (in English) can be found at ILGA-Europe's on-line glossary.⁶⁰

English	Sexual orientation	Gender identity
Bulgarian	Сексуална ориентация	Полова идентичност
Croatian	sexuálníorientace	rodová identita, genderová identita
Czech	sexuální orientace	rodová identita, genderová identita
Danish	Seksuel orientering'	kønsidentitet
Dutch	Seksuele gerichtheid	Genderidentiteit
Estonian	Seksuaalne orientatsioon	Sooline identiteet
Finnish	Seksuaalinen suuntautuminen	Sukupuoli-identiteetti (often used together with "sukupuolen ilmaisu" which means "gender expression")
French	Orientation sexuelle	Identité de genre
German	sexuelle Orientierung	Geschlechtsidentität
Greek	σεξουαλικός προσανατολισμός (EU and national legislation: γενετήσιος προσανατολισμός)	ταυτότητα κοινωνικού φύλου or ταυτότητα φύλου
Hungarian	szexuális irányultság	nemi identitás
Italian	Orientamento sessuale	Identità di genere
Latvian	seksuālā orientācija	dzimumidentitāte
Lithuanian	Seksualinė orientacija	Lyties tapatybė
Maltese	orjentazzjoni sesswali	identità tal-generu
Polish	Orientacja seksualna	Tożsamość płciowa

Portuguese	Orientação sexual	Identidade de gênero
Romanian	Orientare sexuală	Identitate de gen
Slovakian	sexuálna orientácia	rodová identita
Slovenian	Spolna usmerjenost	Spolna identiteta/spolni izraz
Spanish	Orientación sexual	Identidad de género
Swedish	Sexuell läggning	Könsidentitet

10 Implementation process: the next steps

By 21 July 2015, Member States must ensure that their domestic legislation complies with the recast Directives. 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.

10.1. Does the national legislation comply with the Directives?

- ▶ 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 July 2015, national legislation should:

- ▶ Reflect fundamental rights and in particular the principle of non-discrimination.
- ▶ Ensure that provisions relating to family members and their rights should not be transposed a minima, but align with ECtHR case-law.
- ▶ Clearly define the concepts of ‘applicants in need of special procedural guarantees’ and ‘applicants with special reception needs’, in conformity with the Directives’ articles and recitals.
- ▶ Adopt national policies to appropriately identify such applicants, including at a later stage of the procedure, and to provide them with adequate support.
- ▶ Fully and thoroughly transpose and enforce legal provisions on non-disclosure of particular circumstances of the applicants, in particular in cases involving issues of sexual orientation or gender identity.
- ▶ Develop adequate and complete training schemes in order to fully comply with the Directives’ provisions, taking into account the training materials that are developed by the European Asylum Support Office.
- ▶ Interpret the provisions on training as covering all relevant individual circumstances that are recognised by the asylum Directives, including sexual orientation and gender identity.
- ▶ Develop expertise relevant to COI within their national asylum systems and exchange the available information at national level.
- ▶ Apply all the concepts of safe countries in a way which never prevents a thorough examination of an individual application where individual circumstances such as sexual orientation or gender identity have particular consequences on the nature of persecution or risk of persecution.

- ▶ Thoroughly implement provisions on the role of NGOs and on the role of UNHCR in communicating with, as well as providing information and assistance to, applicants.
- ▶ Implement in a sexual orientation and gender identity sensitive manner provisions relating to the life of applicants in accommodation centres, in particular when it comes to rules relating to family life and to the prevention of violence.

10.2. 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.

Complaints about failures to respect provisions or principles of EU law can be submitted to the European Commission in the following ways:

1) By sending a letter to the following address:

European Commission (Secretary-General) B-1049 Bruxelles BELGIUM

2) By sending an email to the following address:

SG-PLAINTES@ec.europa.eu

3) By filing a complaint through the Commission's representative office in your country.

In all cases the complaint may be lodged making use of the following form:

http://ec.europa.eu/eu_law/your_rights/your_rights_forms_en.htm

- ▶ Inform ILGA-Europe about the state of implementation of the Directive in your country and let us know how we can support your actions, including the actions suggested in this list.

Further information is available from:

Amnesty International – European Union Office:

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

Asylum Information Database (AIDA):

<http://www.asylumineurope.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/>

European Asylum Support Office (EASO):

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

European Council on Refugees and Exiles (ECRE):

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

ECRE, *Guidance Note on the transposition and implementation of the EU Asylum Acquis*,

February 2014, available at: <http://ecre.org/component/downloads/downloads/853.html>

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http://www.ilga-europe.org/home/publications/policy_papers/green_paper_family_reunification

ILGA-Europe, *Guidelines for transposition: EU Crime Victims' Directive and homophobic/transphobic hate crimes*, by Steven Peers, December 2013

ILGA-Europe, *Good practices related to LGBTI asylum applicants in Europe*, by Sabine Jansen, May 2014:

http://www.ilga-europe.org/home/publications/reports_and_other_materials

ILGA-Europe, *Guidelines on the Refugee Status Directive: Protecting LGBTI Persons Seeking Asylum*, by Evangelia (Lilian) Tsourdi, 2012: http://www.ilga-europe.org/home/publications/reports_and_other_materials

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Odysseus Academic Network, *Comparative overview of the implementation of the directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU member states*, 2006:

<http://www.refworld.org/pdfid/484009fc2.pdf>

Organization for Refuge, Asylum and Migration (ORAM), *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings*, February 2011:

<http://www.oraminternational.org/Publications/index.htm>

Refugee Support, *Over not Out: The housing and homelessness issues specific to lesbian, gay, bisexual and transgender asylum seekers*, May 2009: <https://www.metropolitan.org.uk/images/Over-Not-Out.pdf>

Report of the UN High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41, November 2011:

http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf

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>

Sabine Jansen, Thomas, Spijkerboer, *Fleeing Homophobia, Asylum Claims related to Sexual Orientation and Gender Identity in Europe*, COC Netherlands/VU University Amsterdam, September 2011. <http://www.rechten.vu.nl/nl/onderzoek/conferenties-en-projecten/onderzoeksproject-fleeing-homophobia/research-reports/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

