

Policy paper: the recast of the EU asylum Procedure and Reception Directives July 2011

This policy paper builds on [a previous policy paper](#) published by ILGA-Europe in January 2011. While significant progresses have been achieved in the negotiation process between the European Parliament and the Council as regards the asylum Qualification Directive, and while the European Asylum Support Office (EASO) recently became operational, the situation is quite different when it comes to the Procedure Directive, the Reception Conditions Directive and the Dublin II Regulation.

As a result, the European Commission published on 1st June 2011 new proposals on the Procedure and the Reception Conditions Directives. The recasting legislative procedure needs to re-start from the beginning. In this context, and taking into consideration the changes made by the Commission in its proposals as well as the position adopted by the European Parliament, ILGA-Europe needed to update its position on the two above mentioned directives.

ILGA-Europe's key demands

- ILGA-Europe calls on the European Parliament, the Council and the Commission to adopt a sensitive recast version of the asylum Procedure Directive, taking into consideration the amendments adopted by the European Parliament in April 2011. The new directive should include adequate definition and identification mechanisms for applicants in needs of special procedural guarantees. Special attention should also be given to the competence of the personnel in charge of interviewing applicants.

-ILGA-Europe calls on the European Parliament, the Council and the Commission to adopt a sensitive recast version of the asylum Reception Conditions Directive. Consistency with other EU asylum law instruments should be ensured as regards claims relating to sexual orientation and gender identity. In particular, relevant special reception needs should be addressed, while protection from homophobic and transphobic assaults should be ensured in reception centres.

What can ILGA-Europe and its members do?

ILGA-Europe is monitoring this recasting process, and provides its input to improve the existing legislation. We are in a position to engage in a dialogue with the European institutions during the whole recast process. Another of our inputs is to bring to our members a better comprehension of the European standards.

ILGA-Europe will regularly communicate with its membership at national level. Lobbying and advocacy targeting national governments are also very important, and national LGBT organisations have a role to play.

Following the entry into force of the Lisbon Treaty, the recast directives and regulations will be adopted under the co-decision procedure, which is a reinforcement of the European Parliament's role. However, the Council still has to adopt all the new legislative proposals by a qualified majority, and the debates are expected to be highly controversial.

Background information:

Under the EU asylum legislation and the “Qualification Directive” 2004/83/EC adopted in 2004¹, persons persecuted because of their sexual orientation can lodge a claim for asylum in the European Union. The directive does not include specific references to persecution on the ground of gender identity.

Amendments introducing gender identity as a recognised reason for persecution have been tabled by the European Parliament and are currently negotiated by the Parliament and the Council.

The EU asylum legislation includes a number of other directives and regulations. In the current version, none of them have a specific impact on LGBT asylum seekers.

However, the European Parliament has introduced a number of references to sexual orientation and gender identity in its first reading on the recasting of the Procedure Directive. Some of these amendments were retained by the European Commission in its new proposal.

Meanwhile, following the establishment of the European Asylum Support Office, a new EU agency, ILGA-Europe, the European Women’s Lobby (EWL) and the END FGM Campaign of Amnesty International have published: [“En-gendering the European Asylum Support Office” – Recommendations for the integration of a gender perspective into the work of the European Asylum Support Office](#)

¹ Council directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

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1. The recasting process of the “Procedure Directive” (2005/85/CE)²

Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status was adopted on 1st December 2005. Its recasting negotiation has been launched following a proposal issued by the European Commission in October 2009. This proposal would have improved the existing directive, as it clearly introduced the concept of “asylum seekers with special needs”. However, it did not take into consideration the special needs of many LGBT asylum seekers who face a number of huge cultural and linguistic obstacles during the asylum procedure, and who may have been victims of serious forms of psychological, physical or sexual violence.

ILGA-Europe has identified the above mentioned issues and raised them with the European Parliament. The work done with the Parliament’s rapporteur, Sylvie Guillaume MEP, as well as with other MEPs led to the adoption of 6 amendments that would make the directive fully sensitive of asylum claims relating to sexual orientation and gender identity. As a result, [the report of the European Parliament](#), adopted on 6 April 2011, is a benchmark for ILGA-Europe’s position.

However, it appeared that no agreement would be reached between Member States and the European Parliament. To solve that deadlock, the European Commission had announced that a new proposal would be published. [This proposal \(COM\(2011\)319\)](#) was issued on 1st June 2011. The European Commission, while taking into consideration Member States’ concerns, also retained a number of the amendments made by the European Parliament. As a result, the 2011 proposal contains explicit improvements in terms of LGBT rights, if compared to the 2009 version.

1.1. An inclusive definition of “applicants in need of special procedural guarantees”

By introducing such a definition and using an inclusive language in article 2 (d), the recasting proposal of the Commission considerably improves the directive:

² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status: http://eur-lex.europa.eu/smart/api/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&type_doc=Directive&an_doc=2005&u_doc=85&lg=en

Article 2 (d): "applicant in need of special procedural guarantees" means an applicant who due to age, gender, sexual orientation, gender identity, disability, serious physical illness, mental illness, post traumatic disorders or consequences of torture, rape or other serious forms of psychological, physical or sexual violence is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive;

On the basis of this definition, it becomes clear that applicants in need of special guarantees due to their sexual orientation or gender identity are covered by the new article 24 of the directive, as proposed by the Commission:

1. Member States shall ensure that applicants in need of special procedural guarantees are identified in due time. To that end, Member States may use the mechanism provided for in Article 22 of Directive [...]/.../EU [the Reception Conditions Directive].

Member States shall ensure that this Article also applies if it becomes apparent at a later stage in the procedure that an applicant is in need of special procedural guarantees.

2. Member States shall take appropriate measures to ensure that applicants in need of special procedural guarantees are granted sufficient time and relevant support to present the elements of their application as completely as possible and with all available evidence.

ILGA-Europe's position

ILGA-Europe fully supports the above amendments as proposed by the Commission.

In addition, ILGA-Europe considers that the preamble of the directive, where the Commission proposes new recitals on applicants in need of special procedural guarantees (Recital 23), on the identification of victims of torture and serious acts of physical or mental violence (Recital 24) and on gender sensitivity (Recital 25), should be made explicit as regards all the strands mentioned in article 2 (d). As a result, a new Recital could be added for that purpose, which could refer to the [UNHCR's Guidance note on refugee claims related to sexual orientation and gender identity](#) and be explicit on the special procedural guarantees needed by many LGBT asylum seekers. In its earlier position paper, ILGA-Europe had proposed the following recital:

New Recital: “With a view to ensuring fair and adequate procedures, and in line with the UNHCR Guidance Note on refugee claims related to sexual orientation and gender identity of 2008, special needs arising from past experiences in cases involving sexual orientation or gender identity based persecution should be taken into consideration. The responsible authorities should ensure that personal interviews and examination procedures are organised accordingly. The complexity of sexual orientation and gender identity related claims should be properly taken into account in procedures based on the safe third country concept, the safe country of origin concept or the notion of subsequent applications, as well as in the case of accelerated procedures.”

However, this proposal could be modified, given that the UNHCR is currently working on the redaction of new Guidelines on asylum claims relating to sexual orientation and gender identity (see also section 3.2 of this policy paper). It would also be useful to address the question of the application of accelerated fast track procedures in cases involving sexual orientation or gender identity.

1.2. Identification of applicants in need of special procedural guarantees / specificity of claims relating to sexual orientation or gender identity

Once special provisions address the special procedural guarantees needs of asylum seekers, the identification of these applicants remains a crucial issue.

In the case of LGBTI applicants, the situation can be particularly complex. It is well established that many LGBTI asylum seekers do not know that sexual orientation or gender identity can constitute a protected reason for persecution in the EU. As a result, they can at first be reluctant to talk about intimate matters, particularly when their sexual orientation or gender identity is a cause of taboo and shame in the country of origin. Because of this initial lack of confidence, the [UNHCR's Guidance note on refugee claims related to sexual orientation and gender identity](#) established that “*even where the initial submission for asylum contains false statements, or where the application is not submitted until some time has passed after the arrival to the country of asylum, the applicant can still be able to establish a credible claim.*”

To take these problems into consideration, the European Parliament, in its position of 6 April 2011, had introduced the following amendment:

Article 20 (2): In cases where the determining authority consider that an applicant has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence as described in Article 21 of

*Directive [...]/EC [the Reception Conditions Directive], the applicant shall be granted sufficient time and relevant support to prepare for a personal interview on the substance of his/her application. **Particular attention shall be given to those applicants who did not mention their sexual orientation at the outset.***

The European Commission, in its June 2011 recasting proposal, did not retain this amendment as such. However, the Commission significantly altered the redaction of the article on applicants in need of special procedural guarantees (now article 24). In particular, article 24 (1) now provides that Member States shall ensure that applicants in need of special procedural guarantees are identified in due time, and that relevant provisions also apply “if it becomes apparent at a later stage of the procedure that an applicant is in need of special procedural guarantee”. This language refers to the explicitly LGBTI-inclusive definition provided in article 2 (d). So does article 24 (2), according to which Member States shall ensure that applicants in need of special procedural guarantees are “granted sufficient time and relevant support to present the elements of their application as completely as possible and with all available evidence”.

In addition, the current Commission’s proposal also mentions that Member States “may use” an identification mechanism – the mechanism provided for in article 22 of the Reception Conditions Directive. However, it must be noted that article 22 of the Reception Conditions Directive is also part of a recasting proposal of the Commission (see section 2 of this policy paper), and has not been adopted yet. Another, bigger problem is that the identification mechanism it describes assesses “whether the applicant is a vulnerable person and, if so, has special reception needs, also indicating the nature of such needs”. In other words, it deals with a different type of special needs, and does not refer to procedural needs.

ILGA-Europe’s position

On the basis of the European Commission’s 2011 recasting proposal, ILGA-Europe believes that the special procedural guarantees needs that asylum seekers may experience due to their sexual orientation or gender identity could be properly addressed if the Procedure Directive’s articles 2 (d) and 24 were adopted as proposed by the Commission, and correctly transposed and implemented by Member States.

However, ILGA-Europe is concerned about the fact that the identification mechanism proposed to identify applicants in need of special procedural guarantees is only optional, and that it is defined in an article of the Reception Condition Directive which refers only to the identification of special reception needs.

As a result, ILGA-Europe proposes two options:

Option 1

Amendment of article 24 (1) to introduce of a specific identification mechanism in the Procedure Directive, inspired by the proposed article 22 of the Reception Conditions Directive:

Article 24 (1):

*1. Member States shall ensure that applicants in need of special procedural guarantees are identified in due time. To that end, Member States may use the mechanism provided for in Article 22 of Directive [...]/EU [the Reception Conditions Directive]. **Member States shall establish mechanisms with a view to identifying whether the applicant is in need of special procedural guarantees, also indicating the nature of such needs. Those mechanisms shall be initiated within a reasonable time after an application for international protection is made.***

Member States shall ensure that this Article also applies if it becomes apparent at a later stage in the procedure that an applicant is in need of special procedural guarantees.

Option 2

Modification of article 22 of the Reception Conditions Directive and modification of article 24 of the Commission's proposal on the Procedure directive, as follows:

*Article 24 (1): Member States shall ensure that applicants in need of special procedural guarantees are identified in due time. To that end, Member States ~~may~~ **shall** use the mechanism provided for in Article 22 of Directive [...]/EU [the Reception Conditions Directive].*

The modification of article 22 of the Commission's proposal on the Reception Conditions Directive should then make it explicitly refer to the identification of special procedural guarantees needs. ILGA-Europe's proposal in that respect is included in section 2.1 of the present policy paper.

1.3. *Training programmes for the personnel examining the applications*

In its 2011 proposal, the Commission has added a new paragraph to article 4 of the directive, in order to better define the training programmes that Member States should provide to the personnel examining the applications:

Article 4 (3): Member States shall ensure that the personnel of the determining authority are properly trained. To that end, Member States shall provide for initial and, where relevant, follow-up training which shall include the elements listed in Article 6(4) (a) to (e) of Regulation (EU) No 439/2010. Member States shall also take into account the training established and developed by the European Asylum Support Office.

On the basis of the 2009 proposal of the Commission that did not refer to the European Asylum Support Office (EASO), which had not been established yet, the European Parliament had proposed the following amendments:

Article 4 (2): [...] training [...] shall include, in particular:

[...]

(aa) applicants with special needs, as defined in Article 2(d);

(b) gender, sexual orientation, trauma and age awareness, with particular attention being paid to unaccompanied minors;

ILGA-Europe fully supported the position of the European Parliament. However, it should be noted that Article 6(4) of the EASO regulation, which is referred to in the new proposal of the Commission, includes the following training requirement:

(a) international human rights and the asylum acquis of the Union, including specific legal and case-law issues;

(b) issues related to the handling of asylum applications from minors and vulnerable persons with specific needs;

(f) reception conditions, including special attention given to vulnerable groups and victims of torture.

As a result, the Commission’s new proposal already covers “vulnerable persons with specific needs”, and it can be argued that this would include LGBTI asylum seekers with special procedural needs, provided that article 2 (d) of the directive is adopted with no change. However, this is not obvious enough, since the formulation of article 6 (4) of the EASO regulation is not exactly similar to the expression used in article 2 (d) of the proposed Procedure Directive.

ILGA-Europe’s position

ILGA-Europe believes that clarity requires a more explicit mention that training programmes include all the cases where asylum seekers can be considered as “applicants in need of special procedural guarantees”. As a result, while accepting the logic of the Commission’s proposal, we propose an explicit reference to article 2 (d) of the directive:

*Article 4 (3): Member States shall ensure that the personnel of the determining authority are properly trained. To that end, Member States shall provide for initial and, where relevant, follow-up training which shall include the elements listed in Article 6(4) (a) to (e) of Regulation (EU) No 439/2010 **and the situation of applicants in need of special procedural guarantees as defined in article 2 (d) of the present directive.** Member States shall also take into account the training established and developed by the European Asylum Support Office.*

1.4. Requirements for examination of applications / advice from experts

In the Commission proposals of 2009 and 2011, the article on “requirements for the examination of application” has been amended. In particular, a new indent has been added to the paragraph describing the means of an appropriate examination. In the 2011 proposal, this paragraph reads as follows:

Article 10 (3): Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that:

[...]

(d) the personnel examining applications and taking decisions are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues.

On the basis of the 2009 proposal of the Commission, the European Parliament's 2011 position amended the proposal as follows, adding sexual orientation and religious issues which were not mentioned in the Commission's initial text:

(d) the personnel examining applications and taking decisions are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, child, gender, religious or sexual orientation issues.

ILGA-Europe's position

ILGA-Europe believes that the European Parliament's 2011 amendment should be fully taken into consideration, and that gender identity should not be forgotten – which is consistent with other articles of the directive in the Commission's proposal. As a result, we propose the following amendment:

Article 10 (3):

*(d) the personnel examining applications and taking decisions are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related, ~~or~~ gender, **sexual orientation or gender identity** issues*

1.5. *Disclosure of particular circumstances of a person to members of his/her family*

The Commission proposes to add a new paragraph 4 to article 10 of the directive, in order to list cases where Member States should not take one single decision covering all dependants (in the case of an application made by an applicant on behalf of his/her dependants). In its second proposal (2011), the Commission retained an amendment made by the European Parliament to make sure that sexual orientation and gender identity would be listed among the particular circumstances addressed by the article.

*Article 11 (3): **For the purposes of Article 7(2), and whenever the application is based on the same grounds, Member States may take one single decision, covering all dependants, unless this would lead to the disclosure of particular circumstances of an applicant which could jeopardize his/her interests, in particular in cases involving gender, sexual orientation, gender identity and/or age based persecution.***

ILGA-Europe's position

ILGA-Europe fully supports the above amendment as proposed by the Commission.

1.6. *Competence of the person conducting the personal interview*

The Commission proposes a modification of article 15 (3) a of the directive, in order to specify cases where there is a need to take into consideration the personal or general circumstances of an asylum application, to choose the person in charge of conducting the personal interview. In its second recasting proposal (2011), the Commission retained an amendment made by the European Parliament to make sure that sexual orientation and gender identity would be listed among the particular circumstances addressed by the article.

Article 15 (3) (a): ensure that the person who conducts the interview is sufficiently 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 within the meaning of Article 22 of Directive [...]/.../EU] [the Reception Condition Directive];

ILGA-Europe's position

ILGA-Europe fully supports the above amendment as proposed by the Commission.

2. The recasting process of the “Reception Conditions Directive” (2003/9/CE)³

Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers was adopted on 27 January 2003. Its recasting negotiation has been launched following the publication of the European Commission's proposal in December 2008, and the European Parliament adopted its first reading report on 7 May 2009. The current directive includes no consideration about the specific situation of LGBTI asylum seekers. The Commission's initial proposal amended by the [Parliament's report](#) does not modify this.

However, it appeared, even earlier in the procedure, that no agreement would be reached between Member States and the European Parliament. To solve that deadlock, the European Commission had announced that a new proposal would be published. [This proposal \(COM\(2011\)320\)](#) was issued on 1st June 2011.

Since there is evidence that the situation of LGBTI asylum seekers is sometimes highly problematic, for instance in reception centres, ILGA-Europe believes that some issues could be usefully addressed by the directive.

2.1. An inclusive definition of “applicants with special reception needs” and an adequate identification mechanism

³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers: http://eur-lex.europa.eu/smart/api/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&type_doc=Directive&an_doc=2005&nu_doc=85&lg=en

The current version of the directive contains a chapter IV on “provisions for persons with special needs”, but does not provide a definition of such persons. This chapter includes articles on minors, unaccompanied minors and victims of torture and violence, as well as an article called “general principle”, which provides an open definition of “vulnerable persons”:

Article 17 (1): Member 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 and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.

In the current proposal of the European Commission, an effort has been made to broaden this general definition and to make it more explicit. At the same time, the Commission has proposed a new identification mechanism – which was clearly lacking in the current directive. Three articles and one annex are relevant in the proposal:

Article 2 (k) – new: “applicant with special reception needs” means a vulnerable applicant, in line with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.

Article 21 (General principle, former article 17): Member 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 trafficking, persons with serious physical illnesses, mental illnesses, or post-traumatic disorders, and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing this Directive.

Article 22 – new (Identification of the special reception needs of vulnerable persons):

1. Member States shall establish mechanisms with a view to identifying whether the applicant is a vulnerable person and, if so, has special reception needs, also indicating the nature of such needs. Those mechanisms shall be initiated within a reasonable time after an application for international protection is made. Member States shall ensure that these 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.

Member States shall ensure adequate support for persons with special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.

2. The identification mechanisms provided for in paragraph 1 shall be without prejudice to the assessment of international protection needs pursuant to Directive [...]/.../EU] [the Qualification Directive].

ANNEX I – new is a Reporting form on the information to be submitted by Member States, as required under article 28(2) of the directive. Its first item reads as follows:

1. On the basis of Articles 2(k) and 22 of Directive [...]/.../EU], please explain the different steps for the identification of persons with special reception needs, including the moment it is triggered and its consequences in relation to addressing such needs, in particular for unaccompanied minors, victims of torture, rape or other serious forms of psychological, physical or sexual violence and victims of trafficking.

The proposal of the Commission is a real improvement if compared to the current directive. At the same time, there is a number of consistency issues that should be better addressed. Although the definitions proposed are open and do not limit the reasons that can make an applicant vulnerable and justify special reception needs, the examples mentioned in article 21 and in Annex I are not fully consistent. At the same time, the distinction between “vulnerable” applicants and “applicants with special reception needs” is not totally clear, although it seems that being vulnerable is a necessary condition to claim special reception needs.

ILGA-Europe believes that the redaction of the directive should be further improved on that point. In the case of LGBTI asylum seekers, many of them should be considered as vulnerable, due to the nature of the acts of persecution suffered, which often include categories mentioned in article 21 of the Commission’s proposal: torture, rape, serious psychological, physical or sexual violence, possibly leading to post-traumatic disorders. At the same time, LGBTI asylum seekers may face a high level of discrimination and taboo during the time their application is examined, including sometimes in settings related to their reception conditions (e.g. reception centre). Other victims of bias based persecution, and in particular gender based persecution, are in the same situation. For this reason, all these asylum seekers can often have special reception needs.

However, it is equally true that neither all LGBTI asylum seekers nor all victims of bias based persecution are always vulnerable in the sense of the directive⁴ and in need of special reception conditions – contrary to the categories mentioned in article 21 (such as minors, elderly people, disabled people, persons with physical or mental illnesses, etc.).

These remarks provide arguments to improve the requirements of the directive as regards the mechanisms chosen by the Member States for the identification of persons with special reception needs.

ILGA-Europe's position

ILGA-Europe believes that the following amendment should be made, to ensure that the definition of vulnerable applicants in need of special reception guarantees is made more inclusive:

Annex I:

*1. On the basis of Articles 2(k) and 22 of Directive [...]/EU], please explain the different steps for the identification of persons with special reception needs, including the moment it is triggered and its consequences in relation to addressing such needs, in particular for unaccompanied minors, victims of torture, rape or other serious forms of psychological, physical or sexual violence—and, victims of trafficking. **Specific explanations should be provided about the different steps for the identification of vulnerable victims of persecution based on gender, sexual orientation and gender identity, and their special reception needs.***

In addition, as mentioned in section 1.2 of this policy paper, the identification mechanism of article 22 is referred to by article 24 of the proposed Procedure Directive, which addresses the situation of applicants in need of special procedural guarantees. Despite this fact, article 22 does not refer to this category of special needs. This should be corrected.

ILGA-Europe's position

Consistently with the options mentioned in section 1.2 of this policy paper, ILGA-Europe considers that two alternatives are possible.

Option 1

⁴ It can be argued that all asylum seekers in general are vulnerable persons, since they are trying to escape persecution. The current policy paper uses the phrase “vulnerable persons” in the sense of the directive, to name persons who, due to an increased vulnerability, must be offered special reception conditions.

Amendment of article 24 (1) of the Procedure Directive, to introduce of a specific identification mechanism in this instrument:

In that case, it is not necessary to amend article 22 of the Reception Conditions Directive.

Option 2

Modification of article 24 of the Commission's proposal on the Procedure directive, and modification of article 22 of the Reception Conditions Directive to make it explicitly address the identification of special procedural guarantees needs, as follows:

Article 22 (1):

*1. Member States shall establish mechanisms with a view to identifying whether the applicant is a vulnerable person and, if so, has special reception needs, also indicating the nature of such needs. **Those mechanisms should also ensure the identification of applicants in need of special procedural guarantees, as provided for in articles 2 (d) and 24 of Directive [...]/EU] 5the Procedure Directive].** ~~They~~ ~~These mechanisms~~ shall be initiated within a reasonable time after an application for international protection is made. Member States shall ensure that these 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.*

Member States shall ensure adequate support for persons with special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.

ILGA-Europe's proposal as regards the modification of article 24 of the Commission's proposal on the Procedure Directive is included in section 1.2 of the present policy paper.

2.2. Prevention of violence in premises and accommodation centres

The current version of the Reception Conditions Directive includes the following paragraph in its article 14 on modalities for material reception conditions. The premises and accommodation centres referred to are the "premises used for the purpose of housing applicants during the examination of an application for asylum lodged at the border" and the "accommodation centres which guarantee an adequate standard of living", where housing is provided in kind.

Article 14 (2)

[...]

Member States shall pay particular attention to the prevention of assault within the premises and accommodation centres referred to in paragraph 1(a) and (b).

The recasting proposal of the European Commission makes this provision more explicit, in particular as regards gender-related issues and gender based violence:

Article 18 (3): Member 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 referred to in paragraph 1(a) and (b).

Article 18 (4): Member States shall take appropriate measures to prevent assault and gender based violence including sexual assault, within the premises and accommodation centres referred to in paragraph 1(a) and (b).

ILGA-Europe considers that these proposals are welcome and are addressing a particularly important issue. However, the Commission's proposal is not inclusive enough, as there are many reports of homophobic and transphobic incidents in accommodation centres. The same could be said about other bias violence incidents (e.g. racist incidents).

ILGA-Europe's position

ILGA-Europe supports the following amendments, to make sure that the above mentioned paragraphs are made more inclusive.

Article 18 (3):

Member States shall take into consideration gender, *sexual orientation, gender identity* and age specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b).

Article 18 (4):

Member States shall take appropriate measures to prevent *all forms of assault and gender based violence, including violence based on ethnicity, gender, sexual orientation, gender identity, disability, religion or belief, age, including sexual assault,* within the premises and accommodation centres referred to in paragraph 1(a) and (b).

3. Transversal issues

3.1. The definition of “family members”

In its current version, the “Reception Directive” includes a definition of the “family members” of asylum seekers in its article 2 (d). This question is transversal, since similar definitions are used in the Qualification Directive and in the Dublin II regulation. In all three instruments, this concept is important as it is used in other provisions of the directives and of the regulation to maintain family unity.

To date, the definition used is only implicitly and partially referring to LGBTI families. The current language makes clear that an unmarried partner should be considered as a “family member”, but only where the legislation of the Member State examining the application treats unmarried couples in a way comparable to married couples, and where this comparable treatment occurs in areas of law related to non-nationals. ILGA-Europe considers that this definition should be improved consistently in all three instruments concerned.

In its recasting proposals published between 2008 and 2011, the European Commission proposes to modify the definition of “family members” as regards married minor family members of applicants, as well as fathers, mothers and siblings of unmarried or married minor applicants. However, the European Commission does not propose to significantly modify the indent that defines the “spouse” of the asylum seekers, which is the most important as regards the specific situation of LGBTI applicants. According to the Commission’s proposals, this definition would read as follows:

Reception Conditions Directive – Article 2(c):

“family members” means, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for international protection:

(i) when the applicant is an adult:

- the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation 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;

Because of the nature of the recasting process, the European Parliament and the Council only have a limited margin for action to amend parts of the directive that the

Commission does not propose to modify. As a result, the European Parliament, in the orientation vote of its competent committee on the Qualification Directive, only proposed an amendment to take into consideration the members of the family regardless of whether the family already existed in the country of origin:

Qualification Directive – Article 2 (j)

"family members" means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection:

ILGA-Europe's position

ILGA-Europe supports the European Parliament's Committee amendment and believes it should be extended to all the relevant instruments of the asylum package (Reception Conditions Directive, Qualification Directive and Dublin II Regulation).

In addition, in spite of the limits of the recasting process, ILGA-Europe supports an additional transversal amendment to make sure that a maximum of LGBT applicants' family members are recognised by EU asylum legislation:

Reception Conditions Directive – Article 2 (c) (i) – first indent:

- the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation 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;

Qualification Directive – Article 2 (j) – first indent:

the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;

Dublin II Regulation – Article 2 (i) (i):

the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;

ILGA-Europe believes it is time to better address this issue, as there now is a majority of EU States providing a form of recognition to same-sex couples. On 1st July 2011, 5 Member States out of 27 provided marriage equality, and a total of 16

Member States provided a form of recognition to same-sex couples (including civil partnerships). Other Member States were about to introduce new legislation.

In addition, recent decisions of the ECtHR (*Kozak v. Poland*, on 2nd March 2010, and *Schalk and Kopf v. Austria* on 24 June 2010) made clear, from the point of view of European law standards, that the States need to take into consideration the Convention rights of sexual minorities, as well as developments in society including the fact that there is not just one way of leading one's private life. The Court does not accept anymore a blanket exclusion of persons living in a homosexual relationship from certain rights, even where there is no legal recognition of same sex partnerships. For instance, in *Schalk and Kopf v. Austria*, the ECtHR referred to same sex unions as families for the purpose of Article 8 (right for respect for private and family life) of the European Convention of Human Rights, saying that “a *cohabiting same-sex couple living in a stable partnership, fell within the notion of ‘family life’.*”

3.2. UNHCR guidelines

The UNHCR is the UN agency mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide, and its primary purpose is to safeguard the rights and well-being of refugees.

In 2008, the UNHCR published a first [Guidance note on refugee claims related to sexual orientation and gender identity](#). In 2010, the UNHCR has decided to update and revise the Guidance Note into the Guidelines on International Protection. When this work is made public, it will become an important reference.

ILGA-Europe's position

ILGA-Europe believes that appropriate references should be made to the UNHCR Guidelines in the preamble of all EU asylum law instruments, in case the date of the publication of these guidelines makes it possible.