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# ILGA-Europe's contribution to the Green Paper

on the right to family reunification of third-country nationals living in the  
European Union (Directive 2003/86/EC)

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The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) is a European NGO with 360 national and local lesbian, gay, bisexual, trans and intersex (LGBTI) member organisations in 44 European countries, and works for human rights and equality for lesbian, gay, bisexual, trans and intersex people at European level.

ILGA-Europe enjoys consultative status at the Economic and Social Council of the United Nations (ECOSOC), participative status at the Council of Europe and receives financial support from the European Commission and other funders. It is also a member of the Platform of European Social NGOs. ILGA-Europe was established as a separate region of the ILGA in 1996.  
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## INTRODUCTION

ILGA-Europe welcomes the opportunity to contribute towards this *Green Paper consultation*. ILGA-Europe is a membership based organisation representing 360 European level, national and local lesbian, gay, bisexual, trans and intersex (LGBTI) NGOs, and receives requests for assistance and advice from people who experience difficulties or discrimination in their claims for family reunification. On the basis of this expertise, this submission addresses issues specific to LGBTI people and their families in the context of family reunification.

One of the main issues raised with us is the lack of recognition of a right to family reunification with same-sex partners, in more than half of the Member States that took part in the adoption of Directive 2003/86/EC. Non-recognition happens in the case of married same-sex partners, contrary to the principle of non-discrimination that should ensure an equal application of the Directive to all married couples. It also happens in the case of unmarried partners with whom the sponsor is in a duly attested stable long-term relationship, including partners to whom the sponsor is bound by a registered partnership. Even in the Member States that do recognise a right to reunification to unmarried couples, its effective enforcement differs depending on national policies as to the examination of evidence of the family relationship. This situation is similar to the situation of opposite-sex unmarried couples. However, since marriage is not an option for same-sex couples in the countries of origin of the majority of families trying to reunify in Europe, this can be considered as tantamount to indirect discrimination on the ground of sexual orientation.

Another important issue comes as a direct consequence of the above. The optional nature of Directive 2003/86/EC's clauses on unmarried partners and registered partners also apply to their children. This includes their adopted children, and their adult unmarried children who are objectively unable to provide for their own needs on accounts of their state of health.

Other optional clauses of the Directive are relevant in the case of LGBTI families. Some apply to minor children, included adopted children of the sponsor or of his partner, where they have custody and the children are dependent on him or her, and where custody is shared. Ensuring a non-discriminatory transposition and implementation of the relevant provisions shall be a priority.

A question to be considered is family reunification where the sponsor is an L, G, B, T or I person benefiting from international protection because of persecution on the ground of sexual orientation, gender identity or gender expression. The situation in the countries of origin usually makes it particularly difficult to provide evidence of family relationships. This is equally true when the sponsor only benefits from subsidiary protection or other forms of protection other than refugee status.

Finally, some specific issues have to be addressed with regards the situation of trans people trying to exercise their right to family reunification. In particular, their country of citizenship sometimes forces them to divorce after gender reassignment, in order to have their gender identity legally recognised. In such a situation, partners can find themselves in the situation of unmarried partners, despite the fact that they wanted to remain married.

In view of the above, ILGA-Europe sees this Green Paper consultation as an opening in an area where lesbian, gay, bisexual, trans and intersex people suffer discrimination on the basis of their sex, sexual orientation, gender identity, gender expression, family or marital status, and as a result of homophobia and transphobia. The possible concrete follow up initiatives that the Commission may undertake in the future are opportunities to amend some of the non-sensitive and discriminatory aspects of family reunification policies in Europe.

Prior to sending in this response ILGA-Europe has consulted with its EU member organisations and the wider European LGBTI community. This submission also refers widely to the European Union Agency for Fundamental Rights' (FRA) reports on *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity* and builds on the recommendations included in these reports. FRA's publications can be considered as the most reliable and extensive resources when it comes to human rights and issues relating to human rights in policy areas of the competence of the European Union.

*Figures:*      **Data in the Netherlands<sup>1</sup>**

As indicated in the country thematic studies commissioned by the FRA, there are little statistics on the question of family reunification of L, G, B, T and I third country nationals. One of the only countries to partly provide such data is **the Netherlands**.

A study on the period from July 2003 to February 2006 yielded some figures. Over that period of 32 months there were 23,407 successful applications for a provisional residence permit for a spouse or partner, including 15,111 cases where the sponsor was a foreigner. Of these 15,111 cases, 179 successful cases involved same-sex partners.

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<sup>1</sup> H. Muermans and J. Liu (2009) *Gezinsvorming in cijfers*, The Hague: Ministry of Justice, pp. 25, 29, 31 and 175 (01.02.2010).

## **A. ILGA-EUROPE'S RECOMMENDATIONS TO THE EUROPEAN COMMISSION**

### **1. A general requirement: no weakening of the protected fundamental rights of third-country nationals and their family**

At the time of its adoption, Directive 2003/86/EC has been the subject of heated debates in the European institutions, with the European Parliament seeking the annulment of several of its provisions before the CJEU. Numerous critics were also raised by civil society organisations as to its conformity with international and European human rights standards. While the Court did not annul the contested provisions (Articles 4(1), 4(6) and 8), its judgement C/540-03 of 27 June 2006, as mentioned in the Green Paper, provided guidance on the interpretation of these clauses conform to fundamental rights.

In this context, it has to be reminded that the Directive establishes unequal mobility rights for the family members of third country nationals in comparison with the mobility rights granted to the family members of Member States' citizens and of other EU citizens. In addition, a number of optional clauses allow Member States to impose further restrictions to their national family reunification regimes.

For these reasons, ILGA-Europe considers that no reopening of the Directive should happen if that would lead to greater restrictions and harsher conditions to the detriment of migrants seeking reunification. ILGA-Europe is concerned that more restrictive visions have been proposed with the purpose of reducing migration at the cost of increased difficulties for third country nationals legally residing in the EU, in particular in relation to their right to family reunification. ILGA-Europe fully backs the position of other civil society organisations such as the European Network Against Racism (ENAR) on this point.

In the following sections, ILGA-Europe proposes targeted actions to ensure the conformity of the Directive to human rights standards in the case of family reunification of LGBTI applicants. This includes targeted amendments in the light of recent decisions of the European Court of Human Rights (ECtHR) and of opinions and recommendations issued by relevant human rights bodies. However, on most issues of concern for LGBTI people and their family members, ILGA-Europe considers that the actual enforcement of the existing provisions should be seen as the priority, and that sensitive interpretation guidelines should be instrumental in raising human rights standards. When justified on the basis of evidence, the Commission should also launch infringements procedures against Member States that fail to comply with all the obligations of the Directive (including compliance with the Charter of Fundamental Rights of the EU) when transposing and implementing it.

## **2. General recommendations on ensuring equality in the area of family reunification**

The preamble of Directive 2003/86/EC is clear on the fundamental rights principles that must be applied by the Union and the Member States in the area of family reunification. Recital 2 makes clear that all measures:

“should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law”, and that the Directive “respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] and in the Charter of Fundamental Rights of the European Union.”

Recital 5 is also very clear stating that Member States:

“should give effect to the provisions of this Directive without discrimination on the basis of sex [...] or sexual orientation.”

These elements have to be taken into consideration in the implementation of all the Directive’s provisions, including the definition of the family members as provided for in Article 4, and the horizontal clauses of Article 5(5) on the best interests of minor children and of Article 17 on the requirement to “*take due account of the nature and solidity of the person’s family relationship [...].*”

Following the entry into force of the Lisbon treaty, these principles are reinforced by Article 10 TFEU:

“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

They are also included in Article 21 of the Charter of Fundamental Rights that is now legally binding.

More specifically, the EU should aim at facilitating the non-discriminatory implementation of the Directive in the case of family relationships of lesbian, gay, bisexual, trans and intersex people. For that purpose, the fact that such families often do not have access to a legal recognition in their countries of origin should be taken into consideration. As mentioned in paragraph 68 and 69 (Denial of recognition of relationships and related access to State and other benefits) of the recent [\*Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity\*](#):

“the obligation to protect individuals from discrimination on the basis of sexual orientation extends to ensuring that unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried opposite-sex

couples”. “The chance to secure residency for a foreign partner” is among the benefits mentioned by the report.

ILGA-Europe believes that equality in the area of family reunification requires the European Union to adopt interpretative guidelines on a human rights sensitive application of the Directive, with a focus on non-discrimination. These guidelines should in particular assist Member States in the implementation of European legislation in the case of LGBTI families.

These aspects should be extensively mainstreamed, making clear that they are part of the correct implementation of the transversal mandatory clauses of Article 17, including taking due account of the nature and solidity of the person’s family relationships, and of Article 5(5) on the best interest of minor children.

To make sure the guidelines match their objective, the use of gender neutral formulations will help extending rights to all couples without discrimination. However, the Commission should also take into consideration the existing structures of inequality on the grounds of sex, sexual orientation and gender identity and address the specific problems that LGBTI people, same-sex couples and their children experience. In particular, it should take into consideration the absence of legislation regulating such families in the majority of countries of origin.

### **3. Recommendations on same-sex married partners**

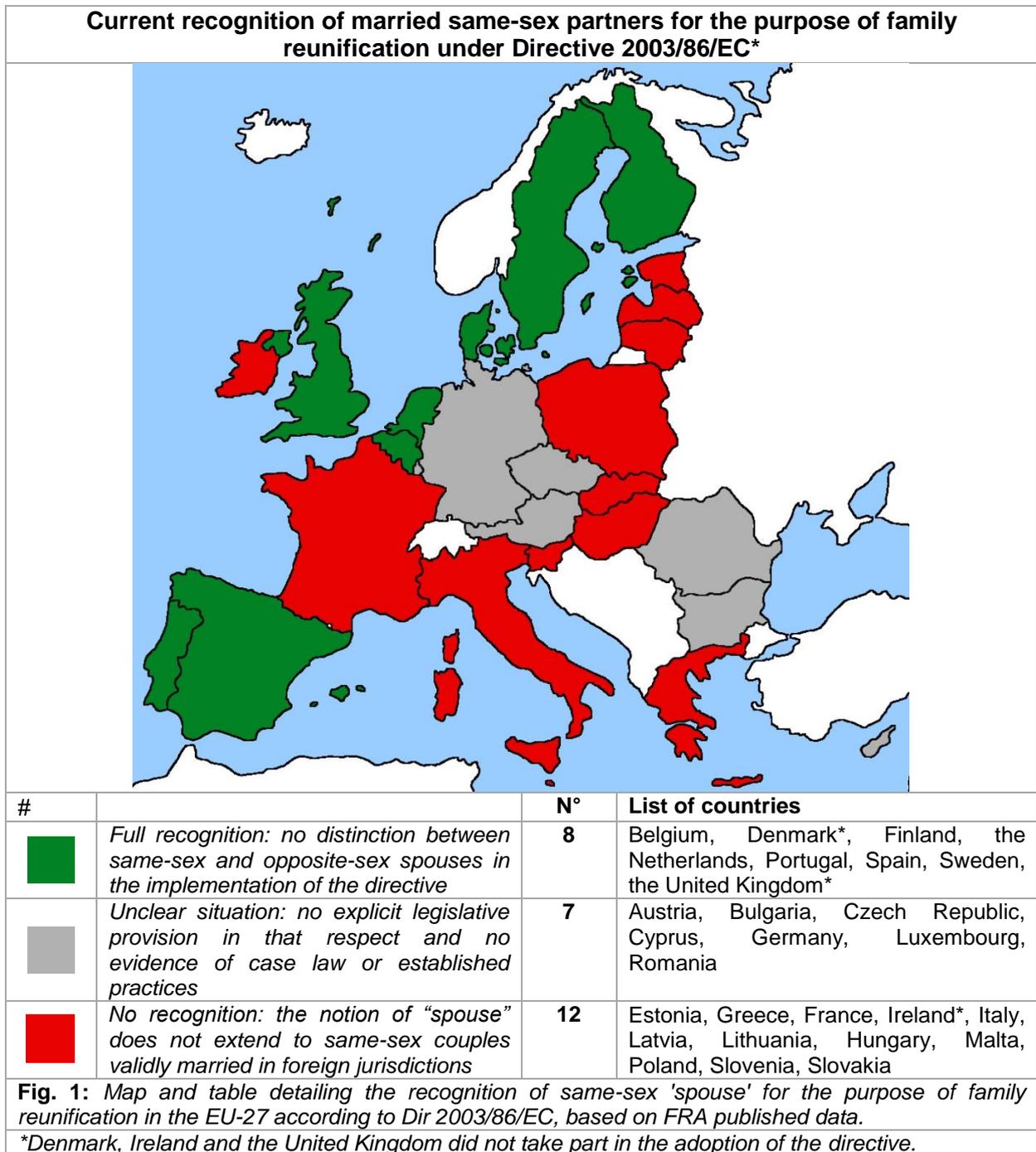
Article 4 (1) (a) of the Directive clearly includes “the sponsor’s spouse” in the list of family members to whom the Member States shall authorise entry and residence. From 2003 on, a growing number of countries opened marriage to same-sex couples. This includes EU Member States: **Belgium, the Netherlands, Portugal, Spain** and **Sweden**. This also includes countries outside the European Union: **Argentina, Canada, Iceland, Norway, South Africa**, as well as some jurisdictions in federal States (**Brazil, Mexico, United States**). In these countries and jurisdiction, there is no such thing as a specific “same-sex marriage”. The legal situation always is that marriage legislation is open equally to different-sex and same-sex couples. As a result, same-sex spouses should be granted the same rights as opposite-sex spouses under Directive 2003/86/EC.

This is the approach recently taken by the tribunal of Reggio Emilia, in **Italy**, in a decision of 13 February 2012. In this decision, the tribunal recognises that under the law transposing Directive 2004/38/EC on freedom of movement, a third country national from Uruguay, married to a European citizen of the same sex, shall be considered as a spouse with the full right to move and reside within the territory of Italy, even though this Member State does not allow same-sex partners to marry. The same reasoning should apply in the area of family reunification.

However, in its *Report on Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal analysis (2008)*, the FRA mentions that:

“whether the national legislations of the EU Member States comply with this obligation is difficult to evaluate, because the reference to the ‘spouse’ in

domestic law does not specify whether this notion should be restricted or not to opposite-sex spouses, and because the courts have not been given an opportunity to rule on this issue.”



In an *updated report published in 2010*, the FRA wrote that:

“only eight Member States would not distinguish between a same-sex or an opposite-sex spouse for the purposes of family reunification (Belgium, Denmark, Finland, the Netherlands, Portugal, Spain, Sweden and the UK)”.

As a result, there are doubts on the way the Directive is implemented in as many as 18 out of the 24 Member States covered by the Directive. Cases of discrimination between same-sex and different-sex married couples can be considered to be in violation of the principle of non-discrimination.

This is of particular concern in a context where various Member States introduced discriminatory provisions in their constitutions or family law to restrict marriage to one man and one woman. This is the case in **Bulgaria** ([Article 46](#) of the Constitution and article 7 of the Family Code), in **Estonia** ([Article 10](#) of the Family Law Act), in **Hungary** ([Article L](#) of the Constitution), in **Latvia** ([Article 110](#) of the Constitution and the Constitution and [Article 35.2](#) of the Civil Code), in **Lithuania** ([Article 38](#) of the Constitution), in **Poland** ([Article 18](#) of the Constitution) and in **Romania** where the Constitution ([Article 48](#)) and Law 287/2009 of the Civil Code ([Articles 258-9](#)) prohibits the recognition of same-sex couples domestically, and even the recognition of marriages and registered partnership of same-sex couples that were registered elsewhere. These provisions contradict, either potentially or explicitly, the principle of a non-discriminatory access to family reunification. It has to be stressed that for the same reasons, they also contradict the principle of a non-discriminatory application of the principle of freedom of movement for EU citizens and their families.

ILGA-Europe believes that the interpretative guidelines referred to in section 2 of this submission should address the implementation of article 4(1) (a), in application of EU treaties' anti-discrimination obligations and of Recital 5 of the Directive. Article 4(1) (a) of the Directive should apply to the family reunification of both opposite-sex and same-sex spouses legally married in a third country, regardless of Member States' domestic law on marriage.

While respecting the principle of subsidiarity and Member States' national legislation on marriage, it has to be acknowledged that in all jurisdictions opening the right for same-sex partners to marry, marriage is one single institution regardless of whether the married couples are opposite-sex or same-sex couples. The trend in Central and Eastern Europe should be taken into account by the Commission and directly addressed when formulating future initiatives in the area of family reunification. Otherwise it is highly probable that some of the Member States in question will use their domestic legislation to refuse to acknowledge existing legal ties of same-sex couples.

#### **4. Recommendations on unmarried partners: make the Directive comply with ECHR case-law on the scope of family definition**

##### 4.1. Current state of play

Article 4(3) of the Directive makes it an optional clause for Member States to:

“authorise the entry and residence [...] of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership [...].”

Currently, only 9 Member States grant family reunification rights to same-sex registered and unmarried partners (**Belgium, Denmark, Finland, Ireland, the Netherlands, Portugal, Spain, Sweden and the United Kingdom**), while 6 Member States grant such rights only to registered partners (**Austria, Hungary, Lithuania and Luxembourg**) or to same-sex registered partners (**Czech Republic and Germany**). All the other Member States, which do not grant family reunification rights to unmarried partners, are parties to the adoption of the Directive.

Even in countries where Article 4(3) has been transposed, the right of unmarried and registered partners to family reunification is sometimes implemented in ways that make access difficult. **The Netherlands** is currently considering a change in its Aliens Decree, following an announcement made by the government to the Parliament in January 2011<sup>2</sup>. Until now, family reunification was a right for unmarried and unregistered partners. In November 2011<sup>3</sup>, the government explained that in the future, only foreign partners who demonstrably cannot enter a marriage or registered partnership in their country of origin because of a legal obstacle (such as the prohibition of marriage of same-sex partners or the absence of legislation on registered partnership) would retain that right. They will be granted the possibility to obtain a short permission to go to **the Netherlands** to marry or enter into a registered partnership, before applying for family reunification. This may make the family reunification process longer and more difficult due to financial constraints. In addition, it will also make it less accessible in the case of opposite-sex unmarried partners who face obstacles in getting married in their country of origin.

To add to this diversity of situations, it has to be mentioned that at least one Member State (**France**), without having transposed Article 4(3), grants temporary private and family life residence permits to third country nationals who are not part of the categories having a right to family reunification, but “*who have personal and familial links of a certain intensity, duration and stability*”<sup>4</sup>, and who comply with determined standards of living conditions and social insertion in **France**. The existence of a French civil partnership (PACS) is one of the elements of evidence that may be considered in the assessment of such personal links, regardless of whether the partners are of the same sex. Such a residence permit does not give to reunified partners the stability provided to beneficiaries of family reunification in the sense of the Directive. The French situation is evidence that the optional nature of Article 4(3) results in unmarried partners in similar situations being treated in very different ways depending on the countries, and that some of them fall in the scope of the Directive while others can be granted more limited rights outside this scope.

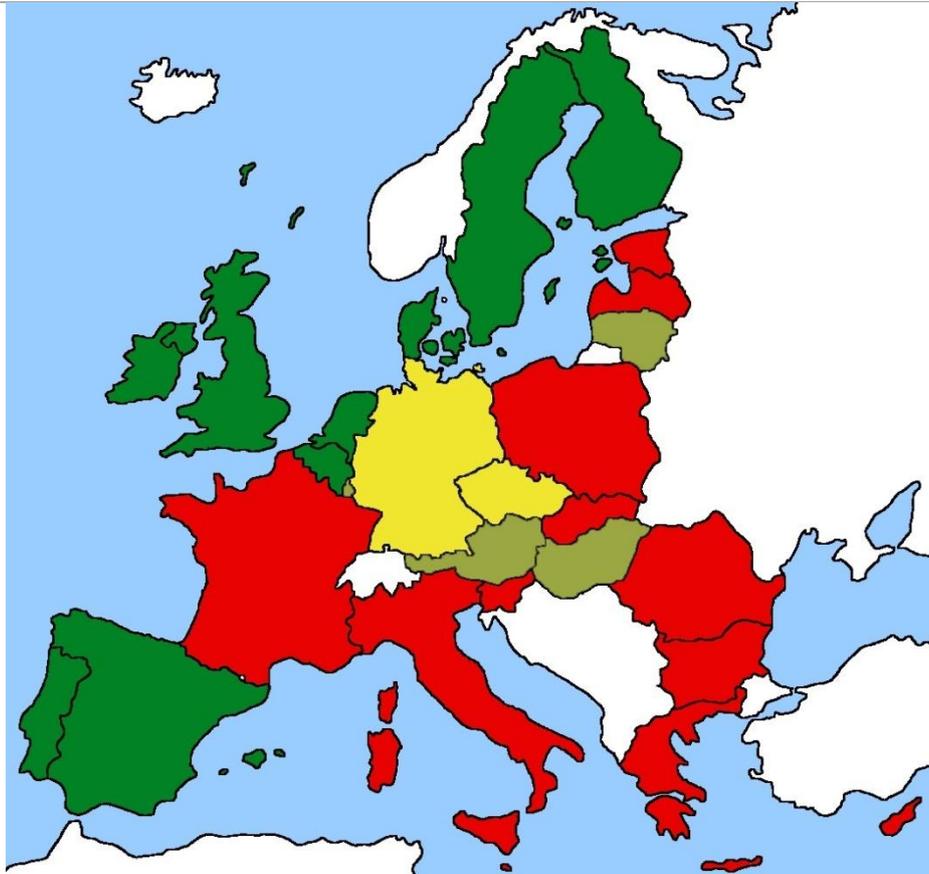
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<sup>2</sup> Letter to Parliament 32175, nr15 of 14 January 2011.

<sup>3</sup> Letter to Parliament 32175, nr19 of 14 November 2011.

<sup>4</sup> According to Article L.313-11, 7° of the CESEDA law.

**Current recognition of unmarried partners for the purpose of family reunification under Directive 2003/86/EC\***



#		N°	List of countries
	<i>Recognition of the partner “with whom the sponsor is in a duly attested stable relationship” and of the partner “who is bound to the sponsor by a registered partnership”</i>	<b>9</b>	Belgium, Denmark*, Finland, Ireland*, the Netherlands, Portugal, Spain, Sweden, the United Kingdom*
	<i>Recognition of the partner “who is bound to the sponsor by a registered partnership” only</i>	<b>4</b>	Austria, Hungary, Lithuania, Luxembourg
	<i>Recognition of the partner “who is bound to the sponsor by a registered partnership”, only in the case of same-sex partnerships</i>	<b>2</b>	Czech Republic, Germany
	<i>No recognition of unmarried partners for the purpose of family reunification under Directive 2003/86/EC</i>	<b>12</b>	Bulgaria, Cyprus, Estonia, France, Greece, Italy, Latvia, Malta, Poland, Romania, Slovenia, Slovakia

**Fig. 1:** Map and table detailing the recognition of unmarried and registered ‘partners’ for the purpose of family reunification in the EU-27 according to Dir 2003/86/EC, based on FRA published data.

\*Denmark, Ireland and the United Kingdom did not take part in the adoption of the directive.

#### 4.2. Non-conformity of Article 4(3)'s optionality to binding fundamental rights standards

ILGA-Europe believes there are serious doubts as regards the conformity of Article 4(3) being no more than an optional clause to recognised principles of European law.

Firstly, the FRA has already mentioned, in the previously quoted reports, that:

“the refusal to allow for ‘family reunification’ with unmarried partners may constitute an interference with the right to respect for private life under Article 8 ECHR, which, if disproportionate, could result in a violation of that provision”.

The FRA also mentioned that it “*remained to be seen whether this is indeed compatible with the requirements of equal treatment*”, noting that the Directive results in family reunification rights being more extended for opposite-sex couples, which may marry in order to be granted such rights, than for same-sex couples who do not have this option in many countries of origin.

According to the FRA, this:

“might generate a form of indirect discrimination” and “it follows that advantages recognised to married couples should be extended to unmarried same-sex couples when [...] the de facto relationship presents a sufficient degree of permanency [...]. This is also relevant for rights and benefits provided for spouses and partners under the EU’s [...] Family Reunification Directive [...]. The treatment of same-sex couples in conformity with international human rights law needs to be ensured and clarified for all these Directives.”

Secondly, [\*Directive 2004/38/EC on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States\*](#) allows EU citizens to reunify with their:

“partners with whom [they have] contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member States treats registered partnerships as equivalent to marriage” (Article 2(2)).

Article 3 (2) of the same Directive also provides that:

“the host Member State shall, in accordance with its national legislation, facilitate entry and residence for [...] the partner with whom the Union citizen has a durable relationship, duly attested”.

As a result, third country nationals legally residing in the EU are put in a situation that is less favourable than EU citizens when it comes to family reunification. The entry and residence of the former’s unmarried partners shall in principle be at least “*facilitated*” by the host Member State, while the inclusion of the latter’s unmarried partners in the scope of family reunification remains at the discretion of the Member States. In addition, this situation is also discriminatory for same-sex partners who cannot access marriage in their country of origin.

Thirdly, while the Directive was initially deemed to respect the fundamental rights and observe the principles recognised in particular in Article 8 of the ECHR (Recital 2), recent case law from the European Court of Human Rights (ECtHR) have made clear that this article also applies to the situation of unmarried same-sex couples. In the case of *Kozak*<sup>5</sup> the ECtHR ruled that ‘*de facto* marital cohabitation’ must be understood to include persons in a same-sex relationship in **Poland**. This ruling affirms that if Member States provides certain rights to cohabiting different-sex partners, the same rights have to be made available equally to same-sex partners. In the case of *Schalk & Kopf*<sup>6</sup> the Court made it clear that same-sex couples fall within the notion of ‘family life’, and considered it ‘artificial’ to maintain a distinction between different-sex and same-sex couples for the purpose of Article 8 of the European Convention on Human Rights. Since all EU Member States are parties to the ECHR, and that the EU itself is in the process of becoming a party, it becomes increasingly clear that allowing Member States to exclude unmarried same-sex couples from the scope of EU family reunification law is most probably contrary to the ECHR.

Finally, the relevance of the ECHR when it comes to implementing Directive 2003/86/EC had been confirmed by the CJEU in its decision of 27 June 2006 on case C-540/03 on the action for annulment. In paragraph 35 and 36 of the judgment, the Court states that:

“Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States collaborated or to which they are signatories. The ECHR has special significance in that respect”.

ILGA-Europe believes that Article 4(3) of Directive must be amended in order to make sure that sponsors’ unmarried partners or registered partners are clearly included in the scope of the family members covered by mandatory provisions.

Member States shall treat registered partners equally as spouses with respect to family reunification. As a result, amending Article 4(3) should include an amendment of its last indent, which currently provides one more optional clause allowing Member States not to treat registered partners equally as spouses with respect to family reunification. This situation amounts to indirect discrimination against same-sex partners.

Such an amendment is necessary to comply with ECtHR case-law on private and family life. It would also be consistent with the fact that a majority of Member States now recognise same-sex couples, either in marriage legislation or in registered partnership legislation. On 1<sup>st</sup> January 2012, a total of 16 Member States provided a form of legal recognition to same-sex couples, while others were considering the introduction of new legislation.

<sup>5</sup> *Kozak v. Poland* (Application no. 13102/02) [Judgement of 2 March 2010](#)

<sup>6</sup> *Schalk and Kopf v. Austria* (Application no. 30141/04) [Judgement 24 June 2010](#)

### 4.3. Examination of evidence of the relationship

In Article 5(2) of Directive 2003/86/EC, in its last indent, mentions that:

“when examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof.”

While the need to assess the existence, the nature and solidity of the family relationships fully makes sense in the context of family reunification, experience shows considerable differences between the practices adopted by those Member States that have implemented the optional clause of Article 4(3).

While article 5(2) suggests several means of proof, Member States do not have a clear obligation to take them into consideration as long as Article 4(3) remains an optional clause. However, several Member States have developed relatively sensitive practices when it comes to assessing evidence of family relationship in the case of unmarried partners. These countries usually try to assess the convergence of various criteria, starting with the ones explicitly listed in the Directive<sup>7</sup>.

For example, **Belgium**<sup>8</sup> considers partnerships registered in a number of other countries, listed by decree, as evidence of a relationship equivalent to marriage. When the application for family reunification emanates from a non-registered partner, the Belgian authorities assess the existence of a duly established stable and long-term relationship lasting for at least one year, taking into consideration any reliable evidence (including common child) and conditions such as common life, exclusivity of relationship. Stability can be assessed in two ways. In case the partners have already lived together, they must have cohabited in **Belgium** or any other country legally and uninterruptedly for at least one year before application. In case the partners have not cohabited yet, they must prove they have known each other for at least two years, kept regular contacts by phone, ordinary mail or email, and met at least three times during the two years preceding the application for a total of at least 45 days. In both cases, the sponsor must sign a commitment to take responsibility of his/her partner for a three years period.

In **Sweden**, three conditions are considered by the authority examining the application<sup>9</sup>. Firstly, partners must have been living together for a period of time of at least six months. In case of a shorter time period, the will to keep on cohabiting as common-law spouses is taken into consideration. Various factors (shared bank accounts, residence contracts, address of national registration) can be taken into consideration to assess the fulfilment of this condition. Secondly, the partners must live as a couple, including having a sexual relationship. Thirdly, they must form a common household where domestic duties and the household economy are in some way shared.

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<sup>7</sup> For more details on the examples below and on the policies followed by other countries, see the [Study on the conformity checking of the transposition by Member States of Directive 2003/86/EC](#) by the Odysseus network.

<sup>8</sup> According to the royal bye-law of 17 May 2007.

<sup>9</sup> According to §1 of the Law (2003:376) complemented by case-law.

In **Finland**, the partners applying for reunification are expected to have lived together for at least two years, like in **Belgium**. However, a shorter period of cohabitation can be accepted for “*weighty reasons*”<sup>10</sup>, for instance where it has been interrupted for reasons independent from their will, proven documentary evidence as well as oral or written depositions can be accepted.

In **the Netherlands** too, in order to prove that their relationship is sustainable and exclusive, partners can be asked to sign a declaration certifying it and stating that they will live together and share a common household after the admission of the partner.

These examples show attempts to take into consideration situations where partners have not been able to effectively cohabit, and some flexibility as regards the duration of the relationship prior to the application for reunification, as well as in terms of the nature of the evidence to be provided. In all the above mentioned cases, it should be noted that this provisions apply to opposite-sex and to same-sex couples.

In other countries, examples can be found of restrictive practices resulting into frequent denial of reunification in the case of unmarried or registered partners. In the case of **Germany**<sup>11</sup> and the **Czech Republic**<sup>12</sup>, the right to family reunification is granted only to same-sex registered partners, excluding non-registered same sex partners but also all unmarried opposite-sex partners. In **Luxembourg**<sup>13</sup>, family reunification in the case of registered partners can only apply to partners registered conform to the substantive requirements mentioned by Article 4 of the national law of 9 July 2004 on the legal effects of certain partnerships. However, this article mentions that such partners must already reside legally in **Luxembourg** in order to get registered. As a result, the recognition by **Luxembourg** of the registered partner’s right to family reunification contains a flaw that makes it impossible in practice. Finally, in **Bulgaria**, it is reported that reunification with unmarried partners is accepted only in the case of refugees and when the sponsor is a member of a foreign diplomatic or consular unit, or a representative of an intergovernmental organisation.

ILGA-Europe, consistently with its position on the transposition and the implementation of Directive 2004/38/EC<sup>14</sup> in the case of partners of EU citizens, considers that national legislation and/or policies should ultimately provide a mechanism through which unmarried partners can request family reunification.

Member States should define transparent and non-discriminatory criteria to determine what evidence is required to demonstrate the existence of a “durable relationship”, and to evaluate the basis on which States will make decisions to grant or deny family reunification.

The interpretative guidelines referred to in section 2 of this submission should address the implementation of Article 5(2), building on existing national practices and

<sup>10</sup> According to subsection 2 of section 37 of the Aliens Act.

<sup>11</sup> According to Sec. 27 para. 2 Residence Act.

<sup>12</sup> According to Section 180f of the Aliens Act.

<sup>13</sup> According to the Law on free movement of persons and immigration, of 29 August 2008.

<sup>14</sup> See *Lesbian, Gay, Bisexual and Transgender Families and the Free Movement Directive: Implementation Guidelines* (January 2009).

identifying those which show the greatest sensitivity to the configuration of unmarried couples, including same-sex couples.

#### 4.4. Specific problems faced by trans people applying for family reunification as partners

In his *Issue Paper on Human Rights and Gender Identity of 29 July 2009*, the Council of Europe's Commissioner for Human Rights mentioned that:

“problems may also arise in the field of family reunification. The country of citizenship sometimes forces the transgender person to divorce after gender reassignment, which can become an obstacle to family reunification and the possibility to go on living with the former spouse in another country. This has a detrimental impact on the children involved in the household as well.”

As a result of the optionality of Article 4(3) on the reunification of unmarried couples, the situation of the trans partner trying to reunify may often be similar to the situation of other unmarried same-sex or opposite-sex couples, regardless of the fact that the partners may have been married prior to one of them undergoing gender reassignment.

ILGA-Europe believes that the amendment of Article 4(3) proposed in section 4.2. of this submission is also essential to allow trans partners to equally benefit from family reunification.

ILGA-Europe considers that the interpretation guidelines referred to in section 2 and 4.3 of this submission, as well as the mechanism proposed in section 4.3 of this submission, should be devised in the most sensitive way possible as regards the situation of reunifying trans partners and their families.

In the same Issue Paper, the Commissioner for Human Rights adds that:

“recognition of the change of gender is not necessarily accepted in the country that a transgender person migrates to.”

It is indeed the case that in many European countries, divorce is a requirement when it comes to legally recognise the change of gender. This is the case in **Cyprus**, the **Czech Republic**, **Finland**, **France**, **Hungary**, **Italy**, **Malta**, **Poland**, **Romania**, **Slovakia**, **Sweden** and **the United Kingdom**. In the case of family reunification, this can translate in reunified partners having to be forced to divorce.

Article 15(3) of the Directive shall normally apply to these cases:

“In the event of [...] divorce [...] an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.” Article 15(4) adds that “the conditions relating to the granting and duration of the autonomous residence permits are established by national law.”

ILGA-Europe believes that the interpretative guidelines referred to in section 2 of this submission should address the application of Article 15 of the Directive and be fully sensitive as regards the case of reunified trans partners, acknowledging the fact that undergoing compulsory divorce is a “*particularly difficult circumstance*”.

## **5. Recommendations on the children of the same-sex partner: ensure a sensitive application of the Directive**

### **5.1. The children of the sponsor and of the same-sex married partner**

According to Article 4(1) (b) of the Directive, the minor children of the sponsor’s spouse are treated equally as the children of the sponsor. This also applies to adopted children of both the sponsor and the spouse, when these children are adopted in accordance with a decision taken by the competent authority of the Member States, or a decision which is automatically enforceable due to international obligations of the Member State or must be recognised in accordance with international legislation.

Conform to the fundamental rights and non-discrimination principles recognised in EU treaties and in the Directive, and to the horizontal clause of Article 5(5) (“*When examining an application, the Member States shall have due regard to the best interests of minor children*”), Article 4 (1) (b) should be implemented without any discrimination on the ground of the parents’ sexual orientation. However, the unclear situation of same-sex spouses in the Directive’s transposition and implementation by many Member States, as described in section 3 of this submission, has direct consequences when it comes to same-sex spouses’ minor children. As a result, Member States refusing the right to family reunification to same-sex spouses’ children, because they do so when it comes to same-sex spouses themselves, can be considered to be in violation of the principle of non-discrimination.

This reasoning also applies to the implementation of the optional clause of Article 4(2) (b) on the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.

ILGA-Europe believes that the interpretative guidelines referred to in section 2 of this submission should address the implementation of Article 4(1) (b) and 4(2) (b), in application of EU treaties’ anti-discrimination obligations and of Recital 5 of the Directive.

Article 4(1) (b) of the Directive should apply equally to the family reunification of the minor children of both opposite-sex and same-sex spouses legally married in a third country, regardless of Member States’ domestic law on marriage and adoption. Article 4(2) (b) of the Directive should also apply equally to the family reunification of the adult unmarried children of both opposite-sex and same-sex spouses legally married in a third country.

## 5.2. The children of the unmarried same-sex partner

In the case of children of the sponsor's unmarried partner, the optional clause of Article 4(3) applies to:

“the unmarried minor children, including adopted children, as well as the adult married children who are objectively unable to provide for their own needs on account of their state of health”.

According to a *Study on the conformity checking of the transposition by Member States of Directive 2003/86/EC (the Family Reunification Directive)*, conducted for the European Commission by the Odysseus academic network for legal studies on immigration and asylum in Europe, the Member States which have granted a right to family reunification to unmarried partners have consistently chosen to authorise reunification for their minor children. Symmetrically, the majority of Member States, which did not provide such a right to unmarried partners, exclude their children from the scope of family reunification.

When it comes to adult unmarried children, there is also a gap between the situation of the children of the sponsor and of a married partner, on the one hand, and the situation of the children of the unmarried partner. According to Odysseus, only three Member States (the **Czech Republic, the Netherlands, Sweden**), among those which provide family reunification rights to the unmarried partner, give such a possibility to their adult unmarried children, while 14 Member States overall have made use of the optional clause of Article 4(2) (b) in the case of children of the sponsor and of his or her spouse.

Because of the impossibility for the majority of third country nationals to marry in their country of origin when they are in a same-sex couple, this situation can lead to indirect discrimination on the ground of sexual orientation. In addition, this is highly detrimental to the respect of the best interest of the child, which is a transversal obligation enshrined in the Directive.

ILGA-Europe believes that Article 4(3) of Directive needs to be amended in a way that will make sure that the minor children of the sponsor's unmarried partner or registered partner are also clearly included in the scope of the family members covered by mandatory provisions.

The children of the unmarried or registered partner shall be treated equally as the children of spouses when it comes to their right to family reunification, in line with the principle of the best interests of children.

ILGA-Europe believes that the mechanism mentioned in section 4.3 of this submission should also address family reunification requests in the case of the children of the unmarried or registered partner, on the basis of transparent and non-discriminatory criteria.

## **6. Recommendations on the minor children in custody: ensure a sensitive application of the Directive**

### **6.1. The minor children in custody, where the sponsor or the married partner have custody**

In the frame of Directive 2003/86/EC, the situation of the minor children of the sponsor and of the minor children of the sponsor's spouse, where they have custody and the children are dependent on him or her, is addressed by indents (c) and (d) of Article 4(1). In both cases, there is an optional clause according to which:

“Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement”.

According to the research conducted by Odysseus, a majority of Member States (**Austria, Belgium, Czech Republic, Estonia, Finland, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia and Sweden**) have transposed this clause, with some others having only slightly different provisions in their national law. In the case of LGBTI families, various concerns can be raised.

Conform to the fundamental rights and non-discrimination principles recognised in EU treaties and in the Directive, and to the horizontal clause of Article 5(5), Article 4 (1), indents (c) and (d) should be implemented without discrimination on the ground of the parents' sexual orientation. As in the case of article 4 (1) (b), the unclear situation of same-sex spouses in the Directive's transposition and implementation by many Member States has direct consequences when it comes to same-sex spouses' minor children of whom custody is shared. As a result, Member States refusing the right to family reunification to same-sex spouses' children of whom custody is shared, because they do so when it comes to same-sex spouses themselves, can be considered to be in violation of the principle of non-discrimination.

ILGA-Europe believes that the interpretative guidelines referred to in section 2 of this submission should provide guidance to the Member States which decide to transpose indents (c) and (d) of Article 4(1), in application of EU treaties' anti-discrimination obligations and of Recital 5 of the Directive.

While respecting the principle of subsidiarity and the national family legislation of Member States, indent (d) in particular should apply equally to minor children of both opposite-sex and same-sex, regardless of the Member States' domestic law on marriage, adoption and custody.

### **6.2. The minor children in custody, where the unmarried partner has custody**

No clause similar to Article 4(1) indents (c) and (d) apply to the children of the unmarried or registered partner of the sponsor, where the partner has custody and children are dependent on him or her. As a result, it is unclear whether and how Member States can adopt legislation to regulate such cases. For example, it is not clear whether the last indent of Article 4(3), which provides that “*Member States may*

*decide that registered partners are to be treated equally as spouses with respect to family reunification,*” can apply in such a situation. In any case, this indent does not mention non-registered unmarried partners, and its transposition is optional.

ILGA-Europe believes that the case of minor children of the unmarried or registered partner of the sponsor, where the partner has custody and children are dependent on him or her, should be addressed by the Directive. This could be addressed consistently with the amendments proposed in section 4 and 5 of this submission as regards Article 4(3).

The children of the unmarried or registered partner shall be treated equally as the children of spouses when it comes to their right to family reunification.

## **7. Recommendations on family reunification in the case of beneficiaries of international protection**

In this section, ILGA-Europe addresses in particular the case of beneficiaries of international protection who have been granted refugee or subsidiary protection status because they were persecuted on the ground of their sexual orientation, gender identity or gender expression. Directive 2011/95/EU (the asylum “Qualification Directive”) recognises that sexual orientation and gender identity are recognised reasons for persecution in the European Union Member States that have been parties to its adoption.

As regards family members, Article 23 (Maintaining family unity) of the same Directive provides as a general rule that Member States shall ensure that family unity can be maintained. The definition of family members included in that Directive (Article 2(j)) makes clear that the Qualification Directive addresses the situation of family members:

“who are present in the same Member State in relation to the application for international protection”.

The same definition is not fully inclusive of LGBTI family members in all configurations<sup>15</sup>. However, Article 23 also opens the possibility for Member States to:

“decide that [maintaining family unity] also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.”

In the frame of the Qualification Directive’s recasting process, ILGA-Europe has had the opportunity to provide suggestions<sup>16</sup> on how this instrument should be made more inclusive.

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<sup>15</sup> Article 2(j) mentions “*the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals*” as well as “*the minor children of the couples referred to in the [previously mentioned] indent or of the beneficiary of international protections [...]*”.

<sup>16</sup> See ILGA-Europe’s *Policy paper on the recast of the EU legislation on asylum – January 2011*.

As for Directive 2003/86/EC, it includes a chapter on family reunification of already recognised refugees and applies to family members who were not present in the Member State at the time of the examination of their application for international protection. However, the Directive does not mention the case of family reunification for family members of beneficiaries of subsidiary protection.

In such a context, various items are of specific concerns when it comes to family reunification in the case of beneficiaries of international protection.

### 7.1. Family members of beneficiaries of international protection

Firstly, the countries of origin of persecuted LGBTI people do not officially recognise their relationships, as it is made clear by the *State-Sponsored Homophobia Report* published by ILGA in 2011<sup>17</sup>. Since, according to Article 10 (1) of Directive 2003/86/EC, its Article (4) on the definition of family members applies to family reunification of refugees, this is one more reason to amend this definition to make it inclusive of unmarried partners as well as their children, consistently with the Directive's provisions on married partners and their children, as proposed by ILGA-Europe in sections 4, 5 and 6 of this submission.

### 7.2. Lack of official documentary evidence of family relationships

Secondly, persecution on the ground of sexual orientation and gender identity usually forces persecuted LGBTI people to hide their family relationships. As a result, there are obvious reasons to acknowledge that providing official documentary evidence of family relationships can be particularly difficult, if not impossible, in the case of LGBTI families. Article 11(2) of the Directive mentions that:

“where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in concordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.”

The application of this provision is particularly justified and useful in the case of the family members of LGBTI beneficiaries of international protection. However, there is evidence that national administration, both when it comes to the asylum system<sup>18</sup> and to the family reunification system, often fails to show sensitivity to such family relationship when it comes to assessing their nature and solidity.

ILGA-Europe believes that the interpretative guidelines referred to in section 2 of this submission should provide guidance on the assessment of family relationships of beneficiaries of international protection who have been persecuted on the ground of

<sup>17</sup> See ILGA's 2011 *Map on persecution of lesbians and gays and on the recognition of their relationships in the world*.

<sup>18</sup> See in particular the report *No Going Back* published by Stonewall in 2010 on the situation of LGBTI asylum seekers and refugees and the UK Borders Agency (UKBA), and the report *Fleeing Homophobia* published in 2011 by the VU University Amsterdam:

their sexual orientation, gender identity or gender expression, and who, for that reason, cannot provide official documentary evidence of their relationships.

### 7.3. Beneficiaries of international protection's family relationships not predating their entry in the Member State

Thirdly, Article 9(2) of Directive 2003/86/EC gives Member States the possibility to:

“confine the application of this Chapter [including the more favourable provisions of the Directive as regards refugees] to refugees whose family relationships predate their entry.”

In the case of LGBTI beneficiaries of international protection, this provision is potentially problematic, in particular where they establish couple relationship, after their entry, with a person coming from the country of origin. In fact, since the beneficiaries of international protection have been recognised as victims of persecution on the basis of sexual orientation or gender identity, their partners are likely to potentially face the same situation. At the very least, they will face the same problems as family members whose relationships predate the entry the beneficiaries of international protection in the Member State.

ILGA-Europe believes that Member States should not continue to have the possibility to limit the application of the more favourable provisions of the Directive to refugees whose family relationships predate their entry to the territory of a Member States.

### 7.4. Deadline for submitting family reunification applications and requirements for the exercise of the right to family reunification

Fourthly, Article 12 (1), last indent, of Directive 2003/86/EC gives the possibility to Member States to:

“require the refugee to meet the conditions referred to in article 7(1) [on accommodation, sickness insurance and resources] if the application for family reunification is not submitted within a period of three months after the granting of refugee status.”

Although ILGA-Europe understands that the exemptions granted to beneficiaries of international protection relating to requirements for the exercise of the right to family reunification cannot be unlimited, a three months limit can be problematic. The nature of persecution on the ground of sexual orientation and gender identity often results in family relationships, and in particular couple relationships, to be lived in an atmosphere of social taboo. In the case of the partner who became a beneficiary of international protection in a Member State, re-establishing communication with the partner and preparing an application for family reunification can be a time-consuming process, particularly given that evidence cannot be provided in the form of official documentary evidence

ILGA-Europe believes that beneficiaries of international protection should not be required to provide evidence that they fulfil the requirements regarding accommodation, sickness insurance and resources if the application for family

reunification is not submitted within a period of three months after granting international protection. This deadline should be made flexible to take into consideration the special needs of applicants. The EU should provide for interpretation guidelines in that respect.

### 7.5. Beneficiaries of subsidiary protection

Lastly, the fact that Directive 2003/86/EC does not cover all beneficiaries of international protection, and in particular beneficiaries of subsidiary protection, is a real concern.

There is evidence that, when it comes to beneficiaries of international protection recognised as victims of persecution on the ground of sexual orientation and gender identity, the proportion of beneficiaries of subsidiary protection is significant. Although no global figure is available at EU level, a research on *Fleeing Homophobia. Asylum claims related to sexual orientation and gender identity in Europe*, published in 2011 by a consortium made of the VU University Amsterdam and four civil society organisations, shows that in various countries, there are relatively consistent trends of granting subsidiary protection status to LGBTI asylum seekers. In such countries, subsidiary protection can be granted when the examining asylum authority finds a lesser amount of evidence on the nature of the persecution specifically suffered by the applicant, but still recognises that the risk of persecution on the ground of sexual orientation or gender identity is serious. This is in particular the case in **Austria, France, Germany, Lithuania, the Netherlands** (on the grounds of Article 3 ECHR), **Portugal, Spain and Sweden**<sup>19</sup>. As an example, it seems that Spanish authorities would opt for subsidiary protection when the asylum seeker is at risk of persecution because of his or her sexual orientation or gender identity, without being openly acting as an LGBTI rights activist. In the **Czech Republic**, whereas no case of beneficiary of subsidiary protection was found, case-law<sup>20</sup> has it that subsidiary protection could be granted to gay applicants if they would face inhuman or degrading treatment in prison.

According to Directive 2004/83/EC and to the recast Directive 2011/95/EU (Article 24), beneficiaries of subsidiary protection are granted residence permit valid for at least one year, and, in case of renewal, for at least two years. Refugees are granted residence permits valid for at least three years and renewable. No difference is made between the two cases in EU law as regards the conditions for renewal to be granted. As a result, both cases equally qualify when it comes to matching the requirements of Article 3(1) of Directive 2003/86/EC:

“This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence [...]”.

In addition, the above mentioned research shows that, in the case of LGBTI refugees, there is no evidence that Member States' authorities find more reasons not to renew residence permits granted to beneficiaries of subsidiary protection, as the nature of the persecution in the country of origin does not prove more likely to

<sup>19</sup> See the *Country questionnaires* of the “Fleeing Homophobia” project.

<sup>20</sup> Judgment of the SAC of 29 May 2009, No. 6 Azs 41/2008

change. It should also be reminded that according to Article 13(3) of Directive 2003/86/EC:

“the duration of the residence permits granted to the family member(s) shall in principle not go beyond the date of expiry of the residence permit held by the sponsor.”

This provision ensures that the human right to family reunification granted to beneficiaries of subsidiary protection can be regulated in the frame of the existing Directive.

The exclusion of beneficiaries of subsidiary protection from the scope of Chapter V of Directive 2003/86/EC is consequently very problematic since LGBTI beneficiaries of subsidiary protection are facing the same specific problems that LGBTI refugees when it comes to providing evidence of family relationships, or to reunify with family members whose family relationship predate their entry in the Member State.

ILGA-Europe believes that the family reunification of third country nationals who are beneficiaries of subsidiary protection should be subject to the rules of the family reunification Directive. ILGA-Europe also considers that beneficiaries of subsidiary protection should benefit from some rules currently applicable to refugees according to Chapter V of the Directive. In particular, they should benefit from the provisions of Article 10 on the definition of family members, and Article 11 on the submission of evidence of family relationships.

## **B. RESPONSE TO THE SPECIFIC QUESTIONS OF THE CONSULTATION**

**Question 1:** *Are these criteria (reasonable prospect for the right of permanent residence at the time of application as regulated in Article 3 and a waiting period until reunification can actually take place as regulated in Article 8) the correct approach and the best way to qualify the sponsors?*

ILGA-Europe believes that the definition of “reasonable prospects of obtaining the right of permanent residence” needs to be particularly clear, in order not to let open a margin of interpretation that could result in denying any third country national the option to be a sponsor. Considering that the Directive allows Member States to impose on sponsors the condition that they should have resided in the country for two years, the current provision already makes a long division of families possible, both in time and space, before reunification can take place.

In view of guaranteeing the right to private and family life established in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ILGA-Europe believes that the European Union should adopt interpretative guidelines on a human rights sensitive implementation of the Directive, with a focus on non-discrimination. Such guidelines should aim at avoiding any transposition or implementation that would put the access to the right to family reunification at threat. They should also emphasize the importance of the principle of non-discrimination between third country nationals and EU citizens, and refer to Article 10 TFEU on mainstreaming the combat against all discriminations based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In addition, the guidelines should clearly refer to article 3(4) and 3(5) of the Directive on more favourable provisions.

**Question 2:** *Is it legitimate to have a minimum age for the spouse which differs from the age of majority in a Member State? Are there other ways of preventing forced marriages within the context of family reunification and if yes, which?*

*Do you have clear evidence of the problem of forced marriages? If yes how big is this problem (statistics) and is it related to the rules on family reunification (to fix a different minimum age than the age of majority)?*

ILGA-Europe neither has evidence on the occurrence of forced marriages nor on the effects on forced marriages of the current provision. In ILGA-Europe’s constituency (lesbian, gay, bisexual, trans and intersex people and their fundamental rights), no case of forced marriages with a same-sex partner have been reported so far.

**Question 3:** *Do you see an interest in maintaining those standstill clauses which are not used by Member States, such as the one concerning children older than 15?*

ILGA-Europe considers that the two clauses standstill clauses of Article 4(1) and 4(6) potentially limit the right to family reunification of sponsors with their minor children over 12 and 15 years of age. In the first case, the Directive allows Member States to “verify whether [a child aged over 12] meets a condition for integration”. There is a clear risk of discrimination between children of sponsors who became residents in the Member State before their children reached the age of 12, and the others. Integration conditions cannot justify a denial of the right to private and family life. In the second case, the Directive allows Member States to request that applications concerning family reunification of

minor children have to be submitted before the age of 15 – otherwise entry and residence of children should be examined “*on grounds other than family reunification*”. For the same reasons, and as these article apply to minors, there is a risk of discrimination and a potentially non-justified breach of the right to private and family life.

Article 4(1) and 4(6) of the Directive are part of the provisions that the European Parliament sought the annulment of before the ECJ. In its decision of 27 June 2006, the Court refused to annul them, but provided interpretation guidelines delimitating the margin of manoeuvre let to the Member States.

ILGA-Europe believes that there is no interest in maintaining the clauses in the Directive. Should there be no modification of the Directive, ILGA-Europe considers that the European Union should at the very least address this question as part of interpretative guidelines on the directive’s human rights sensitive implementation. These guidelines should refer to the Court’s decision and to protected fundamental rights as well as to the Directive’s transversal clauses on the best interest of minor children (Article 5(5)) and on the nature and solidity of the person’s family relationships (Article 17).

**Question 4:** *Are the rules on eligible family members adequate and broad enough to take into account the different definitions of family existing other than the nuclear family?*

Article 4(3) of the Directive makes it an optional clause for Member States to:

“authorise the entry and residence [...] of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership [...].”

Currently, only 7 Member States parties to the adoption of the Directive (**Austria, Belgium, Finland, the Netherlands, Portugal, Spain and Sweden**) grant family reunification rights to registered and unmarried partners, while 4 Member States grant such rights only to registered partners (**Lithuania and Luxembourg**) or to same-sex registered partners (**Czech Republic and Germany**). 13 Member States which are parties to the adoption of the Directive do not grant family reunification rights to unmarried partners. To add this diversity of situations, it has to be mentioned that at least one of them (**France**), without having transposed Article 4(3), grants temporary private and family life residence permits to third country nationals who are not part of the categories having a right to family reunification, but “*who have personal and familial links of a certain intensity, duration and stability*”<sup>21</sup>. The registration of a French civil partnership (PACS) can be considered as an element of evidence of the existence of such “*personal links*”, regardless of whether the partners are of same or different sexes. Such temporary residence permits do not grant the same rights as residence permits granted under the family reunification regime.

ILGA-Europe believes there are serious doubts as regards the conformity to recognised principles of European law of Article 4(3) being no more than an optional clause, for the reasons explained in more details in section 4 of this submission:

- The optional nature of Article 4(3) results in unmarried partners in the same situation being treated in different ways depending on the countries. In addition,

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<sup>21</sup> According to Article L.313-11, 7° of the CESEDA law.

some of them fall in the scope of the Directive while others can be granted more limited rights outside this scope.

- According to the EU's Fundamental Rights Agency (FRA) *"the refusal to allow for 'family reunification' with unmarried partners may constitute an interference with the right to respect for private life under Article 8 ECHR, which, if disproportionate, could result in a violation of that provision"*. The FRA also questions *"whether this is indeed compatible with the requirements of equal treatment"* and whether this *"might generate a form of indirect discrimination"*, since opposite-sex couples may marry in order to be granted such rights, while same-sex couples do not have this option in many countries of origin.
- *Directive 2004/38/EC on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States* allows EU citizens to reunify with their *"partners with whom [they have] contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member States treats registered partnerships as equivalent to marriage"* (Article 2(2)). It also provides that *"the host Member State shall, in accordance with its national legislation, facilitate entry and residence for [...] the partner with whom the Union citizen has a durable relationship, duly attested"* (Article 3 (2)). Third country nationals legally residing in the EU are put in a situation that is less favourable than EU citizens when it comes to family reunification. This also discriminates same-sex partners unable to access marriage in their country of origin.
- While the Directive was initially supposed to respect Article 8 ECHR, recent case law from the European Court of Human Rights (ECtHR) have made clear that the ECHR article also applied to the situation of unmarried same-sex couples. Indeed, following the cases of *Kozak*<sup>22</sup> and of *Schalk & Kopf*<sup>23</sup> the Court made it clear that same-sex couples fall within the notion of 'family life', and considered it 'artificial' to maintain a distinction between different-sex and same-sex couples for the purpose of Article 8 of the European Convention on Human Rights.

Since all EU Member States are parties to the ECHR, and that the EU itself is in the process of becoming a party, it becomes increasingly evident that allowing Member States to exclude unmarried same-sex couples from the scope of EU family reunification law is very likely to be contrary to the ECHR. The relevance of the ECHR has been confirmed by the European Court of Justice in its decision of 27 June 2006 on case C-540/03.

As a result, ILGA-Europe believes that the European Union, to comply with European human rights standards, should:

- Amend Article 4(3) of the Directive in order to make sure that sponsors' unmarried partners or registered partners are clearly included in the scope of the family members covered by mandatory provisions. This provision should be implemented equally in the case of opposite-sex and same-sex partners.
- Make sure that the amendment of Article 4(3) of the Directive consistently include the minor children of the sponsor's unmarried partner or registered partner in the scope of the family members covered by mandatory provisions.
- Make sure that the case of the minor children of the unmarried or registered partner of the sponsor, where the partner has custody and children are dependent

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<sup>22</sup> *Kozak v. Poland* (Application no. 13102/02).

<sup>23</sup> *Schalk and Kopf v. Austria* (Application no. 30141/04).

on him or her, is addressed by the Directive in a way that is consistent with the provisions applying to the children of the spouse in a similar situation.

In addition, there is evidence of persistent inconsistencies in the implementation of Article 4(1) (a) of the Directive in the case of reunification of same-sex married couples, as described in more details in section 3 of this submission. As a result, ILGA-Europe believes that the European Union, in the frame of interpretative guidelines on a human rights sensitive implementation of the Directive, should provide guidance to:

- Make clear that in application of EU treaties' anti-discrimination obligations and of Recital 5 of the Directive, Article 4(1) (a) of the Directive applies to the family reunification of both opposite-sex and same-sex spouses legally married in a third country, regardless of Member States' domestic law on marriage. While respecting the principle of subsidiarity and Member States' national legislation on marriage, it has to be acknowledged that marriage is one single institution regardless of whether the married couples are opposite-sex or same-sex couples in all jurisdictions opening the right for same-sex partners to marry.
- Ensure that a consistent interpretation is given to Article 4(1) (b) of the Directive on the minor children of the sponsor and of his/her spouse.
- Ensure that a consistent interpretation is given to Article 4(2) (b) of the Directive on the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.
- Ensure that a consistent interpretation is given to Article 4(1) (c) and (d) on the minor children of the sponsor and of the spouse where they have custody, including reunification of children of whom custody is shared provided the other party sharing custody has given his or her agreement.
- Ensure that the particular situation of reunifying trans partners and their families is taken into consideration with sensitivity.

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**Question 5:** *Do these measures efficiently serve the purpose of integration? How can this be assessed in practice? Which integration measures are most effective in that respect?*

*Would you consider it useful to further define these measures at EU level?*

*Would you recommend pre-entry measures? If so, how can safeguards be introduced in order to ensure that they do not de facto lead to undue barriers for family reunification (such as disproportionate fees or requirements) and take into account individual abilities such as age, illiteracy, disability, educational level?*

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Integration measures have increasingly been used by Member States as preconditions for admission. Such measures include courses and/or tests on language and on knowledge of the destination country, sometimes even before leaving the country of origin.

As mentioned by the Commission in the evaluation report and in the Green Paper, “the admissibility of integration measures should depend on whether [the measures] serve the purpose of facilitating integration and whether they respect the principles of proportionality and subsidiarity. Decisions on the application for family reunification in relation to passing tests should take into account whether they are accessible”. As a result, and in order to prevent discrimination, imposing high costs should be considered

as going against the Directive. Courses and tests should also be adapted to the different personal circumstances of each individual, including the circumstances mentioned in this question (age, illiteracy, disability, educational level).

These requirements should be made explicit in the frame of human rights sensitive guidelines on the implementation of the Directive. These guidelines should also make clear that decisions on family reunification should always respect the protected fundamental rights to private and family life. The use of integration measures should always be balanced with the respect of the Directive's transversal clauses on the best interest of minor children (Article 5(5)) and on the nature and solidity of the person's family relationships (Article 17).

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**Question 6:** *In view of its application, is it necessary and justified to keep such a derogation in the Directive to provide for a three year waiting period as from the submission of the application?*

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ILGA-Europe considers that the second indent of Article 8 potentially limits the right to family reunification of sponsors in case the legislation of a Member State *"takes into account its reception capacity"*. This derogation applies only to **Austria** where such legislation was in force on the date of adoption of the Directive. However, in the absence of a clear definition of "reception capacity", there is a risk that this provision justifies a denial of the right to private and family life.

Article 8 of the Directive is part of the provisions that the European Parliament sought the annulment of before the ECJ. In its decision of 27 June 2006 on case C-540/03, the Court refused to annul it, but provided interpretation guidelines delimitating the margin of manoeuvre let to the Member States.

ILGA-Europe believes that there is no interest in keeping such derogation in the Directive. Should there be no modification of the Directive, ILGA-Europe considers that the European Union should at the very least address this question in the frame of interpretative guidelines on a human rights sensitive implementation of the Directive, based on the Court's decision and referring to protected fundamental rights as well as to the Directive's transversal clauses on the best interest of minor children (Article 5(5)) and on the nature and solidity of the person's family relationships (Article 17).

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**Question 7:** *Should specific rules foresee the situation when the remaining validity of the sponsor's residence permit is less than one year, but to be renewed?*

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This question is justified by the potential conflict between Article 13(2), according to which family members must be granted a first residence permit of at least one year, and Article 13(3), according to which the duration of that residence permit should not go beyond the date of expiry of the sponsor's residence permit.

However, in application of Article 3(1) of the Directive, the Directive does not apply where the sponsor is not holding a residence permit of one year or more with reasonable prospects of obtaining the right of permanent residence. Therefore, when Member States decide to accept an application for family reunification, they do it because they consider that the sponsor's residence permit will be renewed, if not become permanent.

As a result, ILGA-Europe believes that any solution chosen to solve the conflict between Article 13(2) and Article 13 (3) should make the former prevail on the latter, or provide for automatic renewal of the family member's residence permit when the sponsor's is renewed. Other solutions would potentially lessen the current standards in terms of access to the right to family reunification.

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**Question 8:** *Should family reunification of third country nationals who are beneficiaries of subsidiary protection be subject to the rules of the family reunification Directive?*

*Should beneficiaries of subsidiary protection benefit from the more favourable rules of the family reunification Directive which exempt refugees from meeting certain requirements (accommodation, sickness insurance, stable and regular resources)?*

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The fact that Directive 2003/86/EC does not currently cover all beneficiaries of international protection, and in particular beneficiaries of subsidiary protection, is a real concern.

According to Directive 2004/83/EC and to the recast Directive 2011/95/EU (Article 24), beneficiaries of subsidiary protection are granted residence permit valid for at least one year, and in case of renewal, for at least two years. Refugees are granted residence permits valid for at least three years and renewable. In EU law, no difference is made between the two cases as regards the conditions for renewal to be granted. As a result, both cases equally qualify when it comes to matching the requirements of Article 3(1) of Directive 2003/86/EC:

“This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence [...]”.

It should also be reminded that according to Article 13(3) of Directive 2003/86/EC:

“the duration of the residence permits granted to the family member(s) shall in principle not go beyond the date of expiry of the residence permit held by the sponsor.”

This provision ensures that the human right to family reunification granted to beneficiaries of subsidiary protection can be regulated in the frame of the existing Directive.

When it comes to beneficiaries of international protection recognised as victims of persecution on the ground of sexual orientation and gender identity (conform to Article 10 of Directive 2011/95/EU on reasons for persecution), the proportion of beneficiaries of subsidiary protection is significant. Although no global figure is available at EU level, a research on *Fleeing Homophobia. Asylum claims related so sexual orientation and gender identity in Europe*, published in 2011 by a consortium made of the VU University Amsterdam and four civil society organisations, shows that in various countries, there are relatively consistent trends of granting subsidiary protection status to LGBTI asylum seekers. In such countries, subsidiary protection can be granted when the examining asylum authority finds a lesser amount of evidence on the nature of the persecution specifically suffered by the applicant, but still recognises that the risk of persecution on the ground of sexual orientation or gender identity is serious. This is in particular the

case in **Austria, France, Germany, Lithuania, the Netherlands** (on the grounds of Article 3 ECHR), **Portugal, Spain and Sweden**<sup>24</sup>. As an example, it seems that Spanish authorities would opt for subsidiary protection when the asylum seeker is at risk of persecution because of his or her sexual orientation or gender identity, without being openly acting as an LGBTI rights activist. In the **Czech Republic**, whereas no case of beneficiary of subsidiary protection was found, case-law<sup>25</sup> has it that subsidiary protection could be granted to gay men applicants if they would face inhuman or degrading treatment in prison.

The above mentioned research shows that, in the case of LGBTI refugees, there is no evidence that Member States' authorities find more reasons not to renew residence permits granted to beneficiaries of subsidiary protection, as the nature of the persecution in the country of origin does not prove more likely to change.

As a result, ILGA-Europe believes that, to comply with European human rights standards, the European Union should:

- Make sure that the family reunification of third country nationals who are beneficiaries of subsidiary protection be subjected to the rules of the family reunification Directive.
- Make sure that the beneficiaries of subsidiary protection benefit from the provisions of Article 11 on the submission of evidence of family relationships, equally refugees, considering that when granted international protection on the ground of the same reasons for persecution, the former face the same difficulties as the latter in submitting evidence of family relationships,
- Considering that they face the same situation as refugees when it comes to integration and resources, make sure that beneficiaries of subsidiary protection benefit from the same more favourable rules in that respect (Article 12(1)).

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**Question 9:** *Should Member States continue to have the possibility to limit the application of the more favourable provisions of the Directive to refugees whose family relationships predate their entry to the territory of a Member States?*

*Should family reunification be ensured for wider categories of family members who are dependent on the refugees, if so to which degree?*

*Should refugees continue to be required to provide evidence that they fulfil the requirements regarding accommodation, sickness insurance and resources if the application for family reunification is not submitted within a period of three months after granting the refugee status?*

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It is a given fact that the countries of origin where LGBTI people are persecuted do legally recognise neither their couple relationships<sup>26</sup>, nor all their relationships with their children when these children are not biological children.

As a result, consistently with our answer to Question 4, ILGA-Europe considers that since, according to Article 10 (1) of Directive 2003/86/EC, its Article (4) on the definition

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<sup>24</sup> See the [Country questionnaires](#) of the "Fleeing Homophobia" project.

<sup>25</sup> Judgment of the SAC of 29 May 2009, No. 6 Azs 41/2008

<sup>26</sup> See ILGA's 2011 [Map on persecution of lesbians and gays and on the recognition of their relationships in the world](#).

of family members applies to family reunification of refugees, this article should be amended. More precisely:

- Article 4(3) should be amended to make the definition of family members fully inclusive of unmarried or registered partners.
- Such an amendment should consistently include the minor children of the sponsor's unmarried partner or registered.
- The amendment should also make sure that the case of the minor children of the unmarried or registered partner of the sponsor, where the partner has custody and children are dependent on him or her, is addressed by the Directive in a way that is consistent with the provisions applying to the children of the spouse in a similar situation.
- In addition, interpretative guidelines on Article 11 should address, with sensitivity, the assessment of family relationships of beneficiaries of international protection who have been persecuted on the ground of their sexual orientation or gender identity, and who, for that reason, cannot provide official documentary evidence of their relationships.

Another part of the question asked by the Commission in its Green Paper addresses the implementation of Article 9(2) of Directive 2003/86/EC, which gives Member States the possibility to:

“confine the application of this Chapter [including the more favourable provisions of the Directive as regards refugees] to refugees whose family relationships predate their entry.”

In the case of LGBTI beneficiaries of international protection, this provision is potentially problematic, in particular where they establish couple relationship, after their entry, with a person coming from the country of origin. In fact, since the beneficiaries of international protection have been recognised as victims of persecution on the basis of sexual orientation or gender identity, their partners are likely to face the same situation. At the very least, they will face the same problems as family members whose relationships predate the entry the beneficiaries of international protection in the Member State. As a result, ILGA-Europe believes that the European Union:

- Should not continue to allow for Member States to have the possibility to limit the application of the more favourable provisions of the Directive to refugees whose family relationships predate their entry to the territory of a Member States, in particular as regards the provisions of Article 11.

Lastly, the Commission asks whether Article 12(1), last indent, should continue to open the option for Member States to:

“require the refugee to meet the conditions referred to in article 7(1) [on accommodation, sickness insurance and resources] if the application for family reunification is not submitted within a period of three months after the granting of refugee status.”

ILGA-Europe understands that the particular exemptions granted to beneficiaries of international protection relating to requirements for the exercise of the right to family reunification cannot be unlimited. However, a three months limit can be problematic. In the case of LGBTI beneficiaries of international protection, who have been persecuted on

the ground of sexual orientation or gender identity, family relationships, and in particular couple relationships, are often lived in an atmosphere of social taboo. For the partner who became a beneficiary of international protection in a Member State, re-establishing communication with the partner and preparing an application for family reunification is likely to be a time-consuming process, particularly given that evidence cannot be provided in the form of official documentary evidence. As a result, ILGA-Europe believes that the three months deadline should be made more flexible to take into consideration the special needs of applicants. The European Commission should provide for interpretation guidelines in that respect.

**Question 10:** *Do you have clear evidence of problems of fraud? How big is the problem (statistics)? Do you think rules on interviews and investigations, including DNA testing, can be instrumental to solve them? Would you consider it useful to regulate more specifically these interviews or investigations at EU level? If so, which type of rules would you consider?*

The scope of this question is Article 5(2) of the Directive on documentary evidence of the family relationships and of compliance with the conditions laid down in other articles of the Directive including Article 4. Article 5(2) provides in particular for the possibility to carry out interviews and to conduct other investigations if deemed necessary (second indent). It also addresses the case of the unmarried partner of the sponsor and provides for the possibility to consider:

“as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof.”

ILGA-Europe fully agrees that the need to assess the existence, the nature and solidity of the family relationships is necessary in the context of family reunification. However, when it comes to the reunification of LGBTI families, experience shows considerable differences between the practices adopted by those Member States that have implemented the optional clause of Article 4(3). The same applies to the reunification of opposite-sex unmarried or registered partners and of their children. This is partly due to the fact that, since Article 4(3) is only an optional clause, Member States do not have a clear obligation to take into consideration the means of proof mentioned in Article 5(2) in such cases.

While article 5(2) suggests several means of proof, Member States do not have a clear obligation to take them into consideration. In addition, they are never provided with indications as to whether and how these various means of proof can be prioritised and placed in order of importance.

ILGA-Europe has identified different practices in different countries, some of them showing a greater sensitivity to the families of unmarried or registered partners and LGBTI families, other showing disturbing inconsistencies. These examples are listed in more details in section 4.3 of this submission. On the basis, of these examples, ILGA-Europe believes that:

- The European Union, in the frame of interpretative guidelines on a human rights sensitive implementation of the Directive, should provide for guidance on the handling of submission and examination of the application, and in particular

submission of evidence of family relationships. Such guidelines should build on the good practices identified in section 4.3 of this submission.

- In application of these guidelines, national legislation and/or policies shall ultimately provide for a mechanism through which family reunification request in the cases of unmarried or registered partners and their children could be processed. This mechanism should define transparent and non-discriminatory criteria to determine what evidence is required to demonstrate the existence of a “durable relationship”, and to evaluate the basis on which States will make decisions to grant or deny family reunification.
- These guidelines should refer to the respect of the Directive’s transversal clauses on the best interest of minor children (Article 5(5)) and on the nature and solidity of the person’s family relationships (Article 17). Generally, the guidelines should address an inclusive implementation of these clauses and take into consideration the diversity of families.

To answer the other specific aspects of the question, ILGA-Europe is not aware of any clear evidence of problems of fraud.

As regards DNA testing, ILGA-Europe believes that where they are used, they should always be provided on a non-discriminatory basis and in full respect of all human rights obligations. For that purpose, ILGA-Europe considers that the above mentioned EU guidelines should make sure that:

- DNA tests do not imply an increased cost burden on the applicants.
- DNA tests are never considered as the only means of proof available and that sensitive alternatives are provided, especially in cases of family reunification that do not fit the traditional family model.

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**Question 11:** *Do you have clear evidence of problems of marriages of convenience? Do you have statistics of such marriages (if detected)? Are they related to the rules of the Directive? Could the provisions in the Directive for checks and inspections be more effectively implemented, and if so, how?*

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ILGA-Europe has no evidence of problems of marriages of convenience. In ILGA-Europe’s area of expertise (the fundamental rights of lesbian, gay, bisexual, trans and intersex people), no case of such marriages have been reported to us so far.

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**Question 12:** *Should administrative fees payable in the procedure be regulated? If so, should it be in a form of safeguards or should more precise indications be given?*

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Although there is no statistical data on the consequences of administrative fees in family reunification procedures in ILGA-Europe’s area of expertise, the policies on such fees should clearly be regulated to make sure that they cannot be discriminatory on the ground of the applicants’ wealth or social status or on any other ground, including those mentioned in Recital 5 of the Directive: sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disability, age or sexual orientation.

The Directive already provides, in its Article 7, for requirements related to the sponsor’s capacities in terms of accommodation, sickness insurance and stable and regular resources. Additional conditions directly related to the applicant’s income are potentially highly discriminatory. Parents could for instance face situations in which they would have

to decide to reunify with only one or some of their children. Accurate indications have to be provided to avoid breaches of the protected fundamental rights to private and family life, and to ensure the respect of the Directive's transversal clauses on the best interest of minor children (Article 5(5)) and on the nature and solidity of the person's family relationships (Article 17).

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**Question 13:** *Is the administrative deadline laid down by the Directive for examination of the application justified?*

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There is no statistical data on the consequences of the administrative deadline or of its possible extension in family reunification procedures in ILGA-Europe's area of expertise.

However, ILGA-Europe considers that the possibility of an extension of the nine months deadline, justified by exceptional circumstances linked to the complexity of the examination of the application (Article 5 (4), second indent), could lead to unjustified delays in processing cases, in the absence of a precise definition of the concept of "exceptional circumstances".

The time between the entry of the sponsor in the Member State and the possibility to apply for reunification (up to 2 years according to Article 8), cumulated with the time between the application and the notification of the decision (9 months) is already long considering that the right to family reunification is part of the protected fundamental right to private and family life.

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**Question 14:** *How could the application of these horizontal clauses [Article 5(5) and Article 17] be facilitated and ensured in practice?*

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The Directive includes two horizontal mandatory clauses of Article 5(5) on the best interest of minor children and of Article 17 on taking due account of the nature and solidity of the person's family relationships and the duration of his or her residence in the Member State and of the existence of the family as well as cultural and social ties with his/her country of origin. According to the evaluation report<sup>27</sup>, the application of these clauses is problematic in a number of Member States.

It has to be noted that in its decision of 27 June 2006 on case C-540/03, the CJEU considered that a mere reference to Article 8 CEDH in the national legislation does not seem to be sufficient to correctly implement the clauses. As a result, ILGA-Europe believes that the European Commission should seek a correct transposition by all Member States and make use of all the available means, including infringement procedures where needed.

In addition, building on Section 2 of this submission (ILGA-Europe's general recommendations on ensuring equality in the area of family reunification) and on the specific recommendations enclosed on the following sections, as well as on our answers to questions 4 and 10 of the Green Paper, ILGA-Europe believes that it is essential that the two clauses are implemented in a way that allows them to be part of the decision-making on each and every single decision.

For that reason, the reference to Article 5(5) and Article 17 of the Directive should be fully mainstreamed in interpretative guidelines on a human rights sensitive

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<sup>27</sup> COM(2008)610 final

implementation of the Directive, which ILGA-Europe considers as necessary for a correct transposition and application of the Directive. The reference to these articles should always be explained in conjunction with fundamental rights principles, including the non-discrimination principle enshrined in Recital 2 and 5 of the Directive (Member States “*should give effect to the provisions of this Directive without discrimination on the basis of sex [...] or sexual orientation.*”) and with the non-discrimination provisions of the EU treaties (including Article 10 TFEU and Article 21 of the Charter).

ILGA-Europe considers that such guidelines would be instrumental in facilitating the recognition of the right to reunification of LGBTI families, in the framework provided by the Directive. They would provide Member States with sensitive guidance to take into consideration the cases where such families do not have access to legal recognition in their countries of origin.

Among the points where these guidelines should show sensitivity towards the situation of LGBTI families as part of a correct implementation of the transversal clauses, ILGA-Europe would like to specifically mention:

- The application of Article 4(1) (a) of the Directive the family reunification of both opposite-sex and same-sex spouses legally married in a third country, regardless of Member States’ domestic law on marriage (see also the answer to question 4).
- The consistent interpretation to be given to Article 4(1) (b) of the Directive on the minor children of the sponsor and of his/her spouse (see also the answer to question 4).
- The consistent interpretation to be given to Article 4(2) (b) of the Directive on the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health (see also the answer to question 4).
- The consistent interpretation to be given to Article 4(1) (c) and (d) on the minor children of the sponsor and of the spouse where they have custody, including reunification of children of whom custody is shared provided the other party sharing custody has given his or her agreement (see also the answer to question 4).
- The handling of submission and examination of the application, and in particular submission of evidence of family relationships, building on the good practices identified in section 4.3 of this submission (see also answer to question 10).
- The establishment in national legislation and/or policies of a mechanism through which family reunification request in the cases of unmarried or registered partners, including trans partners, as well as their children, could be processed. This mechanism should define transparent and non-discriminatory criteria to determine what evidence is required to demonstrate the existence of a “durable relationship” (see also answer to question 10).
- A sensitive assessment of family relationships of beneficiaries of international protection who have been persecuted on the ground of their sexual orientation or gender identity, and who, for that reason, cannot provide official documentary evidence of their relationships (see also the answers to question 8 and 9).
- A fully sensitive application of Article 15 (3) and (4) in the case of reunified trans partners who need to undergo a compulsory divorce because one of them is undergoing gender reassignment, recognising the fact that this is “*particularly difficult circumstance*”.

## ANNEXES

### Annex A Extracts from European law

#### A.1 Council of Europe

##### **European Convention for the Protection of Human Rights and Fundamental Freedoms**

###### **Article 8 – Right to respect for private and family life**

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

###### **Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

##### ***Schalk and Kopf v. Austria* (Application no. 30141/04) Judgement of 25 June 2010**

#### **B. Comparative law**

##### *1. European Union law*

24. Article 9 of the Charter of Fundamental Rights of the European Union, which was signed on 7 December 2000 and entered into force on 1 December 2009, reads as follows:

“The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

25. The relevant part of the Commentary of the Charter states as follows:

“Modern trends and developments in the domestic laws in a number of countries toward greater openness and acceptance of same-sex couples notwithstanding, a few states still have public policies and/or regulations that explicitly forbid the notion that same-sex couples have the right to marry. At present there is very limited legal recognition of same-sex relationships in the sense that marriage is not available to same-sex couples. The domestic laws of the majority of states presuppose, in other words, that the intending spouses are of different sexes. Nevertheless, in a few countries, e.g., in the Netherlands and in Belgium, marriage between people of the same sex is legally recognized. Others, like the Nordic countries, have endorsed a registered partnership legislation, which implies, among other things, that most provisions concerning marriage, i.e. its legal consequences such as property distribution, rights of inheritance, etc., are also applicable to these unions. At the same time it is important to point out that the name ‘registered partnership’ has intentionally been chosen not to confuse it with marriage and it has been established as an alternative method of recognizing personal relationships. This new institution is, consequently, as a rule only accessible to couples who cannot marry, and the same-sex partnership does not have the same status and the same benefits as marriage. (...)”

In order to take into account the diversity of domestic regulations on marriage, Article 9 of the Charter refers to domestic legislation. As it appears from its formulation, the provision

is broader in its scope than the corresponding articles in other international instruments. Since there is no explicit reference to 'men and women' as the case is in other human rights instruments, it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples. (...)"

26. A number of Directives are also of interest in the present case:

European Council Directive 2003/86/EC of 22 September 2003, on the right to family reunification, deals with the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

Its Article 4, which carries the heading "family members", provides:

"(3) The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), ..."

Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Its Article 2 contains the following definition:

"(2) 'Family member' means:

(a) the spouse

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State.

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)

(d) the dependent direct relative in the ascending line and those of the spouse or partner as defined in point (b)."

## 2. *The state of relevant legislation in Council of Europe member States*

27. Currently six out of forty-seven member States grant same-sex couples equal access to marriage, namely Belgium, the Netherlands, Norway, Portugal, Spain and Sweden.

28. In addition there are thirteen member States, which do not grant same-sex couples access to marriage, but have passed some kind of legislation permitting same-sex couples to register their relationships: Andorra, Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Switzerland and the United Kingdom. In sum, there are nineteen member States in which same sex couples either have the possibility to marry or to enter into a registered partnership (see also the overview in *Burden v. the United Kingdom* [GC], no. 13378/05, § 26, ECHR 2008).

29. In two States, namely in Ireland and Liechtenstein reforms intending to give same-sex couples access to some form of registered partnership are pending or planned. In addition Croatia has a Law on Same-Sex Civil Unions which recognises cohabiting same-sex couples for limited purposes, but does not offer them the possibility of registration.

30. According to the information available to the Court, the vast majority of the States concerned have introduced the relevant legislation in the last decade.

31. The legal consequences of registered partnership vary from almost equivalent to marriage to giving relatively limited rights. Among the legal consequences of registered

partnerships, three main categories can be distinguished: material consequences, parental consequences and other consequences.

32. Material consequences cover the impact of registered partnership on different kinds of tax, health insurance, social security payments and pensions. In most of the States concerned registered partners obtain a status similar to marriage. This also applies to other material consequences, such as regulations on joint property and debt, application of rules of alimony upon break-up, entitlement to compensation on wrongful death of partner and inheritance rights.

## **B. Merits**

90. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of "private life" within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate.

93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of "family" (see paragraph 26 above).

94. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

95. The Court therefore concludes that the facts of the present case fall within the notion of "private life" as well as "family life" within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 applies.

## **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**

### **IV. Right to respect for private and family life**

20. Prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.

21. Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.

22. Member states should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognised in accordance with paragraphs 20 and 21 above, the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed.

23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights.

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

26. Taking into account that the child's best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a child, member states should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity.

27. Taking into account that the child's best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity.

28. Where national law permits assisted reproductive treatment for single women, member states should seek to ensure access to such treatment without discrimination on grounds of sexual orientation.

## **A.2 European Union**

### **The Treaty on the Functioning of the European Union**

#### **Part Two Non-Discrimination and Citizenship of the Union**

##### **Article 10**

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

##### **Article 19 (1)**

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

#### **Part Three Union policies and internal actions**

##### **Title V Area of freedom, security and justice**

##### **Chapter 2 Policies on border checks, asylum and immigration**

##### **Article 79 (1) and (2)**

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;

## **Charter of Fundamental Rights of the European Union**

### **Article 7 Respect for private and family life**

Everyone has the right to respect for his or her private and family life, home and communications.

### **Article 21 (1) Non-discrimination**

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

### **Article 45 Freedom of movement and of residence**

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

## **Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification**

### **Recital 2**

Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union.

### **Recital 5**

Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

## **CHAPTER II Family members**

### **Article 4 (3)**

The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.

Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification.

## **CHAPTER III Submission and examination of the application**

### **Article 5(2) last indent**

When examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof.

## **Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States**

### **Article 2 Definitions**

For the purposes of this Directive:

1. 'Union citizen' means any person having the nationality of a Member State;
2. 'family member' means:
  - (a) the spouse;
  - (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
  - (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
  - (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
3. 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

## **Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime COM(2011)275 final**

### **Article 2 Definitions**

For the purposes of this Directive:

- (b) 'family members' means the spouse, non-marital cohabitee, registered partner, the relatives in direct line, the brothers and sisters, and the dependants of the victim;
- (c) 'non-marital cohabitee' means a person who is living with the victim on a stable and continuous basis without that relationship being registered with an authority;
- (d) 'registered partner' means the partner with whom the victim has entered into a registered partnership, on the basis of the legislation of a Member State;

## **Annex B Parliamentary Assembly of the Council of Europe resolutions**

### **Resolution 1728 (2010)**

#### **Discrimination on the basis of sexual orientation and gender identity**

10. The denial of rights to de facto "LGBT families" in many member states must also be addressed, including through the legal recognition and protection of these families.

16.9. ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000, by providing for:

- 16.9.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;
- 16.9.2. "next of kin" status;
- 16.9.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;
- 16.9.4. recognition of provisions with similar effects adopted by other member states;
- 16.10. provide the possibility for joint parental responsibility of each partner's children, bearing in mind the interests of the children;
- 16.11. address the specific discrimination and human rights violations faced by transgender persons and, in particular, ensure in legislation and in practice their right to:
  - 16.11.1. safety;
  - 16.11.2. official documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy;
  - 16.11.3. access to gender reassignment treatment and equal treatment in health care areas;
  - 16.11.4. equal access to work, goods, services, housing and other facilities, without prejudice;
  - 16.11.5. relationship recognition, in accordance with the case law of the European Court of Human Rights;

## **Annex C Recommendations and opinions by European human rights institutions**

### **C.1 Recommendations by the Commissioner for Human Rights**

**Commissioner for Human Rights. (2009). *Human Rights and Gender Identity*. Strasbourg: Council of Europe.**

#### **III. Specific human rights issues**

##### **3.6. Transgender refugees and migrants**

[...]

Besides asylum, migration and travel is another problem for transgender people. The problems faced in obtaining new identity documents with the appropriate name and sex change can prevent transgender people from travelling to a neighbouring country, even on a simple family weekend visit. There is the fear of abuse by border control guards when their physical appearance does not correspond with the name or sex indicated on their identity papers. Freedom of movement can, thus, be severely hampered.

Problems may also arise in the field of family reunification. The country of citizenship sometimes forces the transgender person to divorce after gender reassignment, which can become an obstacle to family reunification and the possibility to go on living with the former spouse in another country. This has a detrimental impact on the children involved in the household as well. Finally, recognition of the change of gender is not necessarily accepted in the country that a transgender person migrates to.

### **C.2 Opinions of the European Agency for Fundamental Rights**

**European Union Agency for Fundamental Rights. (2009). *Homophobia and Discrimination on the grounds of Sexual Orientation in the EU Member States: Part***

**1 - Legal Analysis.** Luxembourg: Publications Office of the European Union. p.165-166

## **11.2. Same sex couples are not always treated equally with opposite sex couples**

Rights and advantages reserved for married couples should be extended to unmarried same-sex couples either when these couples form a registered partnership in the absence of a possibility to marry, or when, in the absence of a registered partnership, the de facto relationship presents a sufficient degree of permanency in order to ensure equal treatment of LGBT persons. International human rights law requires that same-sex couples either have access to an institution such as registered partnership which provides them with the same advantages as those they would be recognised if they had access to marriage; or that, failing such official recognition, the de facto durable relationships they enter into leads to extending to them such advantages. Indeed, where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate choice not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows a contrario that advantages recognised to married couples should be extended to unmarried same-sex couples either when, in the absence of such an institution, the de facto relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

This is also relevant for rights and benefits provided for spouses and partners under the EU's Free Movement Directive, the Family Reunification Directive and the Qualification Directive. The treatment of same sex couples in conformity with international human rights law needs to be ensured and clarified for all these directives.

**European Union Agency for Fundamental Rights. (2010). *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - 2010 Update: Comparative Legal Analysis*. Luxembourg: Publications Office of the European Union. p. 9-10**

### **'Family member' and mutual recognition of civil status in EU law**

In relevant areas of EU law, in particular employment related partner benefits, free movement of EU citizens, and family reunification of refugees and third country nationals, EU institutions and Member States should consider explicitly incorporating same-sex partners, whether married, registered, or in a de facto union, within the definitions of 'family member'. In particular in the context of free movement, this could be achieved by explicitly adopting the 'country of origin' principle already firmly established in other areas of EU law.

In relevant areas of EU action concerning mutual recognition of the effects of certain civil status documents and on dispensing with the formalities for the legalisation of documents between the Member States, EU institutions and Member States should ensure that practical problems faced by same-sex couples are addressed, for instance, by considering the conflicts of laws principle of the law of the place where the act was formed, in combination with the prohibition of 'double regulation'.

In addition, with respect to the initiatives foreseen in the European Commission's Action Plan implementing the Stockholm Programme on matrimonial property regimes and patrimonial aspects of registered partnerships, it is important that: legal certainty for same-sex registered partners and unmarried couples is enhanced; citizens' practical needs are addressed; and that the family life of those individuals involved in such unions is acknowledged and recognised.

## **Annex D Extracts from UN Human Rights Council reports**

**Human Rights Council. (2011). *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. Report of the United Nations High Commissioner for Human Rights.***

### **V. Discriminatory practices**

#### **F. Denial of recognition of relationships and related access to State and other benefits**

68. The Human Rights Committee has held that States are not required, under international law, to allow same-sex couples to marry. Yet, the obligation to protect individuals from discrimination on the basis of sexual orientation extends to ensuring that unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried opposite-sex couples.

69. In some countries, the State provides benefits for married and unmarried heterosexual couples but denies these benefits to unmarried homosexual couples. Examples include pension entitlements, the ability to leave property to a surviving partner, the opportunity to remain in public housing following a partner's death, or the chance to secure residency for a foreign partner. Lack of official recognition of same-sex relationships and absence of legal prohibition on discrimination can also result in same-sex partners being discriminated against by private actors, including health-care providers and insurance companies.

70. The Human Rights Committee has welcomed measures to address discrimination in this context. In its concluding observations on Ireland, the Committee urged the State party to ensure that proposed legislation establishing civil partnerships not be "discriminatory of non-traditional forms of partnership, including taxation and welfare benefits."

**Annex E Extracts from European Commission reports recognising the need to enforce existing family reunification conform to ECtHR case-law on the right to family life**

European Commission, (2011), [\*2010 Report on the Application of the EU Charter of Fundamental Rights\*](#), Luxembourg: Publications Office of the European Union, p. 44

The Commission is keen to see the principle of non-discrimination on the basis of sexual orientation, as enshrined in the Charter, applied systematically in the preparation, adoption and implementation of EU law.

**What does the prohibition of discrimination on ground of sexual orientation mean in practice?**

EU citizens have the right to move and reside freely in another Member State, together with their families. The benefits of EU rules guaranteeing **free movement and residence apply also to same-sex couples.**

In its judgment *Schalk and Kopf v. Austria*<sup>37</sup>, the European Court of Human Rights (which is not an institution of the European Union) made **a reference to the Charter and to provisions of two EU Directives (on family reunification and free movement) to strengthen the right to respect for private and family life** under the European Convention on Human Rights by extending the notion of “family life” to same-sex couples. The European Court of Human Rights considered it “artificial” to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8 of the European Convention.