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Contribution from the European Women's Lobby to the European Commission's Green Paper on the future Common Asylum System COM(2007) 301 final

The European Women's Lobby (EWL), is the largest alliance of women's nongovernmental organisations in the European Union with **more than 4000 member organisations**. EWL currently comprises 26 national co-ordinations in EU Member States and accession countries and 19 European-wide member organisations. EWL's mission is to work to achieve equality between women and men, to promote women's empowerment in all spheres of public and private life and to eliminate all forms of violence against women.

EWL has been following the issue of women asylum seekers since 2000 when it ran an one-year campaign to draw attention to and lobby for the recognition of women's particular experience of persecution which can be different to that of men and on that basis to ensure that women have equal access to the whole of the asylum system, in particular the determination process. In this context, EWL submitted contributions in the pre-drafting phase of the Qualifications and Procedures Directives, and welcomes that in the final text adopted, acts of sexual violence and of a gender-specific nature constitute acts of persecution¹. Therefore, EWL welcomes the Commission's Green Paper on the future Common European Asylum System and is submitting this contribution to the debate from women's and a gender equality perspective.

Due to its broader framework of women's rights and gender equality, as opposed to a specialised women's asylum organisation, EWL will not comment on all of the questions posed in the Green Paper. EWL is responding to questions: 1-5 (together), 15 and 16.

Preliminary considerations

- The need to place the second phase of the common asylum system within a firm human rights framework - respect for the principles upon which the EU was created

Since the signing of the Treaty of Rome in 1957, European integration was defined by universal principles of liberty and democracy, respect for the rule of law and fundamental freedoms.² These principles also constitute the criteria for EU membership as laid down in the Copenhagen criteria on enlargement.

The Union has also set as one of its objectives to "*maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.*"³

¹ Article 9 (a) and (f) of the Qualification Directive

² Article 6 – Treaty of Amsterdam

³ Article 2, paragraph 4: Consolidated version of the Treaty on European Union

Therefore, these principles must remain central to the common asylum system at every stage of the process from the determination stage to the final outcome, whether the result of the claim is successful or not. In other words, no practice, procedure or treatment should introduce a differentiated approach between safeguarding the human rights of those women and men who are without a status while seeking and/or awaiting the outcome of their asylum claim and citizens of European Member States. The fundamental guiding principles must always remain liberty and democracy, respect for the rule of law and fundamental freedoms, equality between women and men regardless of the status of the person.

Detention of stateless persons on the basis of their status is in total contradiction to these principles. Research shows that women (and their children if detained with them) face deteriorating mental and physical health in detention. Those that have experienced rape prior to seeking asylum state that they face brutality, sexual intimidation and racism in detention.⁴

- Equality between women and men – a pre-requisite to the future common asylum system

Equality between women and men has been enshrined in the EC Treaties since the establishment of the European Economic Community in 1957. It has been implemented in a number of fields through EU legislation over the past 30 years, and developed in extensive case law by the European Court of Justice. The Amsterdam Treaty (1999), affirms the right to equality between women and men within the foundations and objectives of the European Community legal order. Thus all EU Member States are compelled to respect equality between women and men in areas for which the EU is competent, including asylum policies. **Articles 2** (objective), **3** (gender mainstreaming) and **13** (anti-discrimination) of the EU Treaty read in combination, define equality of women and men as an objective **of the Community and the Member States, which obliges Member States to achieve equality in all fields covered by the Treaty and provide a strong legal basis for very broad action at EU level.**

- International human rights instruments with regards to women's human rights of which EU Member States are parties

It is essential to recall that all EU Member States have ratified the **UN Convention on the Elimination of all forms of Discrimination against women (CEDAW)**⁵ and its **Optional Protocol**, in which States parties shall inter alia: *Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. (Article 2 (f):) (..) all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women (Article 6): and..[ensure] the same right freely to choose a spouse and to enter into marriage only with their free and full consent (Article 16 (1) (b)).*

- The **UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.**⁷

⁴ S.Cutler and S.Ceneda, 'They took me away' women's experiences of immigration detention in the UK, London, Asylum Aid, 2004

⁵ General Assembly resolution 34/180 of 18 December 1979

⁶ G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), *entered into force* Dec. 22, 2000

⁷ As of 24 August 2007, four EU Member States have not ratified this: Czech Republic, Greece, Ireland and Luxembourg

- Council of Europe *Convention on Action against Trafficking in Human Beings* (2005)

- The *Rome Statute of the International Criminal Court*, particularly article 7⁸ which recognises torture, rape and sexual slavery as crimes against humanity.

Other relevant European and international instruments are adhered to by EU Member States, notably:

The *UN Declaration of the Elimination of violence against women*⁹ which states “concerned [that] some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence.”

The *UN Security Council Resolution 1325* (2000) on Women, Peace and Security¹⁰, which addresses the impact of war on women and women’s contribution to conflict resolution, and sustainable peace;

The *European Parliament – Resolution on Participation of Women in Peaceful Conflict Resolution*, (November 2000)¹¹

- The *Beijing Platform for Action*,¹² in particular section E, on women and armed conflict; which states: “Women may also be forced to flee [areas of armed conflict] as a result of a well-founded fear of persecution for reasons enumerated in the 1951 Convention (..), including persecution through sexual violence or other gender-related persecution, and they continue to be vulnerable to violence and exploitation while in flight, in countries of asylum and resettlement and during and after repatriation. Women often experience difficulty in some countries of asylum of being recognised as refugees when the claim is based on such persecution.” Calls therefore on governments to “disseminate and implement the UNHCR Guidelines on the Protection Refugee Women and the UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence, or provide similar guidance, in close co-operation with refugee women and in all sectors of refugee programmes.”

It is important to stress that asylum is an individual right and therefore the concept of “safe country” is in total contradiction with this right. This is particularly the case with regards to women as no country can be deemed ‘safe’ given that violence against women occurs in all countries of the world.

- Asylum is not gender neutral - the need for gender disaggregated data

Women and men are not equal in their access to and enjoyment of fundamental rights in Europe in which the right to asylum is included. For example, the directive relative to **Family Reunification**¹³ can be discriminatory against women. While this directive is expressed in gender neutral terms, in reality, it can have a negative impact on women, particularly women who find themselves in vulnerable situations (violence, widowed, divorced, single mothers, disabled women) and who have not reached the five-year residence condition before being able to seek an independent legal status. Therefore, a

⁸ Rome Statute of the International Criminal Court (ICC), 17 July 1998, in particular Article 7 Crimes against humanity, 7 (f) and 7 (e). All EU Member States have ratified the ICC statutes except the Czech Republic

⁹ General Assembly resolution 48/104 of 20 December 1993

¹⁰ Resolution (S/RES/1325)

¹¹ European Parliament resolution on participation of women in peaceful conflict resolution (2000/2025 (INI))

¹² Platform for Action and the Beijing Declaration, Fourth World Conference on Women, Beijing China 4-15 September 1995, paragraphs 136 and 148

¹³ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

neutral approach to the assessment and monitoring of the right to asylum in the broadest sense of the term will make it difficult to fully appreciate and assess the gender inequalities that are implicit in accessing these rights, which impact differently on women and men. Consequently, it is vital to apply a gender analysis from the outset so as to provide a fully comprehensive monitoring framework that represents a true picture of how women asylum seekers are assessing their right to asylum. Such an approach will also assist in identifying gaps, which will undoubtedly emerge when a gender mainstreaming approach is effectively applied.

In order to do this, there is a need for gender disaggregated data including official statistics on: the numbers of women seeking asylum, the reasons; the outcome of their asylum claim and the type of protection accorded (refugee status, subsidiary protection, humanitarian, other).

Current data is very patchy. Estimates indicate that there is an average of 30% women who seek asylum in EU. However, the figures vary considerably in different countries, for example, between 12% in Portugal and 38% in Denmark. Of the 33.960 asylum seekers in the United Kingdom (2004) 27% were women and the number of women seeking asylum in France has risen from 22.3% in 1990 to 32, 9% (2004)¹⁴

- Unaccompanied minors – specific issues for the girl child and young women

EWL believes that while both asylum seeking non-accompanied girls and boys have special needs, the non-accompanied girl child/young woman is highly vulnerable and at risk of sexual exploitation and prey to sophisticated organised criminal organisations. The experience of girls and women in refugee camps shows that minimum protection does not necessarily guarantee their security.¹⁵ It is therefore vital that specific measures are taken for non-accompanied girls/young women asylum seekers.

- Issues of language: ensure that women/girl child are reflected in legal texts

The EWL would also like to point out that the issue of language is important and notes that efforts have been made in recent documents to systematically use the terms “she/he”. EWL calls for the continuation of this practice as it reinforces the reality that women are asylum seekers in their own right and that the laws pertaining to asylum equally address women.

Specific issues for EWL in relation to the Green Paper

EWL stresses the need to ensure continuity between phases one and two of the common asylum system. It is important to build on the previous phase despite the absence of a full evaluation, particularity of the directives adopted during this phase. EWL urges the European Commission to disseminate the results of its evaluation and the way in which these will shape the second phase of the common asylum system.

EWL main recommendation for the second phase relates to the need for gender sensitive asylum guidelines as an overarching tool that will ensure that women, on the basis of their own experience of persecution, have equal access to the determination process failing which effective international protection for women will not be guaranteed.

¹⁴ Claude Lesselier : « Femmes et politiques d’asile en Europe », in « Vivre Clandestines », Université des femmes et Collectif Femmes en noir contre les centres fermés et les expulsions (Colfen)», Collection Agirs Féministes, 2007

¹⁵ See: UNHCR “Sexual and gender-based violence against refugees, returnees and internally displaced persons – Guidelines for prevention and response”, May 2003. Women and girls in refugee camps – in which they have presumably reached a zone of protection- remain vulnerable as they are often coerced into providing sexual “favours” in return of food and other basic necessities.

Guidelines rather than new legislative measures are favoured precisely because protection from gender-based persecution is already provided for in the law more precisely in the qualification directive. EWL urgently calls on the European Commission to establish an ad-hoc expert group on the issue of EU Gender Asylum Guidelines, in accordance with provisions under practical co-operation measures. Currently, two member States have specific gender asylum guidelines, namely Sweden and the United Kingdom. These guidelines, together with UNHCR¹⁶ guidelines have been the basis of EWL's submission to the Green paper. All Member States will benefit from gender guidelines particularly in relation to implementation of the qualifications directives for the areas relating to gender-based persecution.

Specific responses to questions in the Green Paper

Green Paper reference 2. Legislative Instruments

2.1 Processing of asylum applications

- (1) How might a common asylum procedure be achieved? Which aspects should be considered for further law approximation?
- (2) How might the effectiveness of access to the asylum procedure be further enhanced? More generally, what aspects of the asylum process as currently regulated should be improved, in terms of both efficiency and protection guarantees?
- (3) Which, if any, existing notions and procedural devices should be reconsidered?
- (4) How should a mandatory single procedure be designed?
- (5) What might be possible models for the joint processing of asylum applications? Under what circumstances could a mechanism for joint processing be used by Member States?

As the Green Papers highlights, effective access to international protection is crucial in the initial stage of applying for asylum. It is absolutely vital that no procedural and/or evidential barrier can undermine the fairness of decision-making on women's claims. There is, therefore, a need for common gender-sensitive guidelines as an integral part of the common asylum system. This is particularly urgent and necessary for any mechanism of joint processing and at different ports of entry. Every official with a mandate to determine asylum claims should be aware of and trained in gender-related persecution.

Gender guidelines affirm anti-discrimination norms set in basic human rights instruments and enable a fair assessment of claims by women on the basis of gender-related persecution. Consequently, in the context of a single procedure as part of the second phase of the asylum system, it is imperative that competent authorities in every EU Member State examining asylum applications by women fully understand the nature of gender-related claims.

It is important to recognize that it is the socially constructed relationship between women and men, in which socially designed roles are attributed, that leads to the persecution of women by men - individually and collectively - when women are perceived to have crossed the boundaries of the ideological, political, cultural, religious, traditions, practices and mores to which they are expected to subscribe. It can be argued that Article 10 of the Council Directive 2004/83/EC (Qualification Directive) recognises

¹⁶ UNCHR Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, May 2002

this in stating that “*it is immaterial whether the applicant actually possesses the racial, national, social or political characteristic*” – *the decisive factor is whether the actor of persecution attributes this characteristic to the victim.*”¹⁷

EWL welcomes the positive advances currently in the Qualification Directive particularly article 9.2 (f) which recognises acts of a gender-specific nature as constituting persecution. This is the first time that such acts have been recognised as persecution in European law. However, in order to interpret this article appropriately, Member States will need to recognise a range of examples of such acts. Existing gender guidelines from the different sources name previously provide examples of what constitutes gender-specific acts of persecution.

Furthermore, in considering discriminatory laws as referred to in 9.2 (b) of the aforementioned Directive, it is interesting to note that assessing a gender discriminatory law to be persecutory has proven to be material to determining some gender-related claims of women, including those of lesbian and bisexual women as well as transgendered persons. In addition whilst “...‘mere’ discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection.”¹⁸

EWL also welcomes reference to sexual violence, physical and mental violence in 9.2 (a) of the aforementioned Directive. It must be recognised that these forms of violence may be perpetrated by both state and non-state actors and that gender discriminatory measures by state or non-state actors may also form part of mental violence. In addition it must be acknowledged that a particular State may have prohibited a persecutory practice (e.g. female genital mutilation or domestic violence), but nevertheless continues to condone or tolerate the practice, or may not be able to stop it effectively. In such cases, the practice would still amount to persecution.

It is crucial to ensure that various gender-specific acts of persecution are not wrongfully excluded from the concept of persecution therefore, Member States must not be restrictive in their interpretation.

Green Paper reference 2.4 Cross-cutting issues
2.4.1 Appropriate responses to situations of vulnerability
(15) How could the provisions obliging Member States to identify, take into account and respond to the needs of the most vulnerable asylum seekers be improved and become more tailored to their real needs? In what areas should standards be further developed?
(16) What measures should be implemented with a view to increasing national capacities to respond effectively to situations of vulnerability?

Vulnerable asylum seekers

¹⁷ Council Directive 2004/83/EC on *Minimum Standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Article 10

¹⁸ UNCHR Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, May 2002, para II.B.14

It is important to recognise that women constitute a heterogeneous group and therefore among the category “women” there are also vulnerable women but not all women are equally vulnerable. Pregnant women, breastfeeding mothers, women with disabilities and unaccompanied girls and young women constitute vulnerable groups of women asylum seekers. It is crucial to put in place additional mechanisms to ensure adequate support to more vulnerable asylum seekers.

However, as stated previously, the existence of gender guidelines will not only assist in ensuring that women’s claim for asylum is equally assessed and that no discriminatory barriers prevent women from accessing asylum procedures, they will also assist in determining gender-based persecution claims and in so doing, will provide a tool to identify vulnerability – such as victims of rape, sexual violence, torture.

Without these, it will be very difficult to ensure that the gendered nature of persecution of which women are the prime victims is fully understood. Situations in which heterosexual, bisexual and lesbian women fear various forms of gender-based violence and discrimination by the State or by non-state actors, including where they are in danger of being killed or subjected to physical and mental violence by their husband/partner, family or the State, persecuted for opposing gender-discriminatory norms or laws, raped in situations of conflict and war and along with their girl children are subjected to practices that are carried out in the name of ‘culture’, such as female genital mutilation or forced marriages.

Without such guidance there is also a risk that some asylum-seeking women struggling for the human rights of themselves and others will be depoliticised and regarded as passive victims of abuse, instead of being recognised as agents in their own right and as women human rights defenders.

Areas where common standards should be further developed

Submitting a claim

Gender based persecution is often painful to describe and in many cases torture, rape, sexual violence (and other persecutory treatment) can produce a profound shame which may be a major obstacle to disclosure. Therefore, women should not be sanctioned if they do not submit an application on **arrival** or are reluctant to give a full account of their experience on submitting the initial application. This should also be taken into account when assessing appeals and new applications. The latter particularly requires a flexible interpretation of the concept of “**new circumstances**”.

Claims submitted on fear of gender-based persecution, sexual violence, torture and/or discrimination should **never be subjected to accelerated asylum** procedures. The issue of time is a crucial factor and could be undermined in an accelerated process. Second and subsequent interviews may be needed, particularly for victims of sexual violence or other forms of trauma. Trained psycho-social counsellors should be available to assist the claimant before and after the interview(s).

An **individual risk assessment** based on the personal circumstances of a particular woman in relation to the relevant human rights situation in her country of origin must be undertaken taking into account her ethnicity, sexuality, age, class and caste .

Assessment of asylum claims

The complexities of gender-related claims as well as factors such as lack of gender sensitivity among decision-makers and women's difficulties in speaking about sexual violence or sexuality may constitute valid reasons for not immediately presenting all circumstances of an asylum claim. Therefore, it is vital that all officials involved in determination and decision-making receive adequate training.

Some common principles of *training*:

- Gender sensitive; understanding the way in which relations between women and men has led to imbalanced power relations.
- Women's experience of persecution; sensitive to the type of persecution women experience; understanding that the male norm influencing the interpretation of concepts such as torture and politics, may render it difficult for women to reveal their political opinions and activities as well as their experiences and fear of human rights violations.;
- Culturally sensitive; replacing the unequal gender balance in different socio-economic and cultural contexts; for example, the type and level of emotion displayed during the recounting of experiences should not affect the claimant's credibility, as interviewers should understand that cultural differences and trauma play an important and complex role in determining behaviour.
- Sensitive to the needs of unaccompanied minors - particularly girls, as they will not react in the same way as adult women.
- Training should also enable officials to understand their own prejudices, which is a key element in deciding the credibility of a case.

It is crucial that persons raising gender-related refugee claims, and survivors of torture, sexual violence and trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim. Factors such as shame, trauma or fear, may prevent them from identifying the true extent of the persecution suffered or feared.

It is vital that the interviewer should remain neutral, compassionate and objective during the interview and use both "open-ended" and specific gender sensitive questions which may help to reveal gender issues relevant to a refugee claim. The interviewer should take into account

Interviewers should be responsive to the trauma and emotion of claimants and stop an interview where a claimant is becoming emotionally distressed.

It is unnecessary to establish the precise details of the act of rape or sexual assault itself, but the events leading up to, and after, the act and the surrounding circumstances as well as the motivation of the perpetrator may be required. However, the interviewer should also be aware of the fact that a woman may not always be aware of the reasons for her abuse.

Country of origin information relating to women

Information regarding the status of women in their country of origin is crucial in determining an asylum claim even in cases where women do not explicitly state that they fear or have experienced gender-based persecution. Therefore, general information about the country may be insufficient. Information relating to women's position in the country of origin should include the following issues which are based on the aforementioned

UNHCR's guidelines and on the Asylum Gender Guidelines of the United Kingdom¹⁹ as well as additions proposed by EWL.

The *position of women before the law*, including customary/religious law; women's standing in court, divorce and custody laws, the right to one property.

The *political rights of women*; formal rights including the right to vote, to hold office and to belong to a political party.

The *social and economic rights of women*; women's rights in respect of marriage, family and private life to marry the person of her choice or not to marry, to determine her own sexual orientation, access to sexual and reproductive rights and services, the right to an education, a career and a job or remunerated activities, the status of widows and divorcees.

The *cultural and social mores* of the country and consequences for non-adherence; for example norms regarding sexual activity and pregnancy, norms around the institution of marriage including arranged marriages, early/child marriages and divorce.

The prevalence of *harmful traditional practices*; including practices such as but not limited to, female genital mutilation, child marriages, crimes of honour.

The incidences and forms of reported *violence against women* and the form it takes, such as but not limited to, violence in the family, domestic violence, sexual abuse, rape, honour killings, bride burning.

The *protection* available to them and *penalties* imposed on those who perpetuate the violence; acknowledgment that the existence of a strong women's movement and increasing access to women's shelters, hotlines or female police stations may not indicate that all women, regardless of personal circumstances, can get effective and durable state protection from persecution by individuals or other non-state actors, or that it is reasonable for women to try to get assistance from the national authorities.

The *risks* that a woman might face on her *return* to her country of origin after making a claim for refugee status.

Documentary evidence:

There may not be documented or documentary evidence about the status of women in their country of origin. The UNHCR remains a key source of information and it is also vital that information is researched and obtained from a broader range of sources, including but not limited to:

Civil society organisations, including but not limited to:

Women's organisations

Refugee and asylum organisations

Human rights organisations

Lesbian and homosexual organisations

Development and humanitarian organisations

Church organisations

Secular organisations

Research institutes, including women's rights institutes

Medical and psychological evidence

Women should never be compelled to recount the details of rape and/sexual abuse.

¹⁹ Immigration Appellate Authority "Asylum Gender Guidelines", Crown Copyright – November 2000

The UNHCR Guidelines clearly state that rape and other forms of gender-related violence (such as dowry related violence, female genital mutilation) consist in “forms of persecution, whether perpetrated by State or private actors (UNHCR Guidelines, para II B.9).

It should be recognised that in situations of rape and/or sexual violence, medical evidence may not be evident.

Medical and psychological evidence should be considered independently and without prejudice.

Reception

Measures should be taken to ensure the physical safety and privacy of women asylum seekers.

Separate accommodation should be provided from male asylum seekers, except where these are their relatives.

Ensure free access to health care, in particular gynaecological and obstetrical services; psychological services, social services and legal assistance.

Ensure adequate cooking facilities for women, particularly accompanied with children.

Ensure the right to visits and to partake in religious services.

Reference to relevant European and International Conventions

Universal Declaration of Human Rights (1948)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

European Convention on Human Rights (1950)

Convention on the political Rights of Women (1953)

Convention on the nationality of married women (1957)

The 1927 Slavery Convention and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)

The 1949 Refugee Convention on the Laws of Wars and two additional Protocols (1977)

Convention of the Suppression of the Traffic in Persons and the Exploitation of Prostitution of Others (1949)

Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964)

Convention on the Elimination of All Forms of Racial Discrimination (1965)

Convention on the Elimination of All Forms of Discrimination Against Women (1979)

Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment (1984)

Convention on the Rights of the Child (1989)

Declaration on the Elimination of Violence against Women (1993)

Protocol to prevent, suppress and punish trafficking in persons, especially women and children (2000)

Council of Europe Convention on Action against Trafficking in Human Beings (2005)²⁰

Convention on the Rights of Persons with Disabilities (2006)

Other reference documents:

EU Strategy on the rights of the child (2006)

²⁰ As of 24 August 2007, only 4 EU Member States have ratified, namely : Austria, Bulgaria Romania, Slovakia

EWL formally opposes the detention of women, men, girls and boys on the sole basis of their status as asylum seekers. EWL believes that a firm human rights based asylum determination procedure and reception which includes asylum gender guidelines, will provide the guarantee of an efficient asylum system. Increasingly, detention of asylum seekers in Member States is becoming standard practice and less an exceptional measure.