

CM1515

Note on an EU list of safe countries of origin Recommendations and amendments

5 October 2015

Summary of recommendations

As part of the response to the unfolding refugee crisis in Europe, the European Commission recently proposed a Regulation establishing a common EU list of safe countries of origin.¹ In this note the Meijers Committee submits a number of observations and recommendations to the Union legislator. In particular, the Meijers Committee

- i) welcomes the Commission's decision to opt for legislation rather than intergovernmental cooperation;
- ii) expresses doubts whether a common list of safe countries of origin will have the desired effect of arriving at common procedural practices;
- iii) advises that designations of countries as safe should as a rule take into account the position of vulnerable minority groups within the country;
- iv) recommends to apply the concept of safe country of origin only after an individual examination involving a personal interview and a right to legal assistance;
- v) recommends to obtain external expert advice before adopting or amending the list, for example from UNHCR;
- vi) advises to codify the right to appeal against negative decisions for reason of a person coming from a safe country with automatic suspensive effect, as guaranteed by the EU Charter on Fundamental Rights and the ECHR.

At the end of this note, the Meijers Committee proposes to insert three amendments into the Regulation to bring the level of legal protection in conformity with relevant human rights law. The amendments concern

- i) the right to an individual interview;
- ii) suspensive effect of appeals with regard to removal;
- iii) Position of minorities in the designation criteria.

Legislation as the chosen instrument

The European Commission introduced a Regulation which directly creates a list of safe countries of origin. Any changes to the list can be made through a legislative act only. The regulation also amends articles in the Procedures Directive pertaining to the safe country of origin concept. The Meijers Committee welcomes that the Commission proposes to establish this list through a Regulation. Establishing the list in an informal, intergovernmental manner would have left out co-decision of the European Parliament and judicial oversight of the Court of Justice.² Given the serious ramifications of a common list of safe countries of origin, it is important that it is adopted in a transparent and democratic accountable manner.

¹ COM(2015) 452 final, 9 September 2015.

² Information note on the follow-up to the European Council Conclusions of 26 June 2015 on "safe countries of origin", <<http://www.statewatch.org/news/2015/jul/eu-com-safe-countries.pdf>>

The safe country of origin concept

The safe country of origin concept is most commonly used as a procedural instrument to quickly process asylum applications made by persons from countries with generally high application numbers but low recognition rates. The Asylum procedures directive (2013/32/EU) allows for asylum claims made by nationals from countries designated as a safe country of origin to be dealt with in an accelerated procedure or in a procedure at the border.³ Further, no automatic right to remain in the Member State during an appeal applies if the application was rejected on the basis of the applicant coming from a safe country of origin.⁴ This may also imply withdrawal of reception facilities pending the appeal.

Divergent Member State practices

There is no common practice among EU Member States in applying the concept of safe country of origin. Twenty-two Member States include the concept in their legislation, fifteen Member States apply it in practice, and ten Member States have designated national lists of safe countries of origin. The other five apply it on a case-by-case basis.⁵ The countries which do apply the concept have different practices in respect of: a) the criteria for designating a country as safe country of origin; b) the legal consequences attached to the concept; c) the competent body to designate countries as safe country of origin; d) the possibility of judicial review of designations of safe countries of origin; e) the procedure for reviewing designations.⁶ There is not a single country which has been designated as safe country of origin by all the Member States making use of a national list.

Legal consequences of the safe country of origin concept

The Meijers Committee doubts whether adopting a common list will have the desired effects if the legal consequences of the concept are not harmonized. The proposal obliges Member States to regard countries on the common list as safe countries of origin, but the Procedures Directive leaves it to the Member States (“may provide”) to decide whether they process applications of persons from such countries in a border procedure or accelerated procedure (Art. 31(8)). This results in a rather odd state of affairs where Member States are obliged to apply the list, but not to give effect to it in individual procedures. Further, the Procedures Directive specifies only in limited detail what an accelerated or border procedure entails. Some Member States have rather short accelerated asylum procedures with a maximum duration of only a few days (such as Malta, Bulgaria and the United Kingdom), but it may take longer in other Member States such as France (15 days), Poland (30 days) and Sweden and Greece (three months).⁷ The standard procedure in the Netherlands takes eight days, but this is not considered to be an accelerated procedure. And some EU Member States, like Italy and Hungary, have no accelerated asylum procedure. Divergences are also apparent in respect of border procedures, the non-automatic suspensive effect of appeals and the number of levels of appeal.

In view of these differences, the Meijers Committee has serious doubts whether, even if the legal consequences of the concept are aligned in a binding manner, a common practice will be achieved. In all probability, full harmonization of the safe country of origin concept requires federalization of asylum procedures.

³ Art. 31(8)(b) and 43(1)(b) Directive 2013/32/EU.

⁴ Art. 46(6)(a), 32(2) and 31(8)(b) Directive 2013/32/EU.

⁵ Information note of the European Commission, *supra* note 2.

⁶ See also Engelmann’s comparative study into national safe country of origin-policies and the impact of EU law: C. Engelmann, *Common standards via the backdoor. The domestic impact of asylum policy coordination in the European Union*, dissertation Maastricht 2015.

⁷ Aida, Asylum information database, < <http://www.asylumineurope.org/> >.

The designation criteria, position of minorities

The Meijers Committee questions the evidence relied on by the European Commission for considering a country of origin as safe. Annex I of the Procedures Directive specifies that it must concern countries where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In designating countries as safe, the European Commission has recourse to 1) whether a country has ratified the major human rights conventions, 2) whether the country legally protects against persecution, 3) the number of violations found against the country by the European Court of Human Rights and 4) the recognition rate of asylum applicants from the country in the EU. This is a mainly quantitative analysis which looks exclusively at the safety of the population as a whole. According to a recent judgment of the United Kingdom Supreme Court, however, the condition that “there is generally and consistently no persecution” implies not only that persecution is rare in a particular state but also that there may not be systematic persecution of any minority groups.⁸ Having regard to the risk attaching to all LGBT persons in Jamaica, the Supreme Court considered illegal the designation of Jamaica as safe country of origin. The Meijers Committee is worried by the omission of the European Commission to look into the position of minority groups in the countries it proposes to designate as safe. Despite their general safety, it is well known that a number of the proposed countries do host vulnerable groups, such as Serbians in Kosovo, Roma in Serbia, Kurds in Turkey and LGBT persons in several Balkan countries.

The Meijers Committee recommends therefore to 1) specify in the Procedures Directive that a country of origin may only be considered safe if minority groups within that country can also be considered to be generally safe from persecution and 2) to reconsider on that basis the countries of origin designated as safe by the European Commission in the current proposal.

The Meijers Committee notes that the original Procedures Directive allowed Member States to designate only part of a country as safe, or a country as safe only for a specified group of persons.⁹ This could be an alternative approach: to allow for the possibility in the Procedures Directive to designate countries on the common list (and national lists) as safe with the exception of one or more specified groups.

The presumption of safety and right to individual examination

The Meijers Committee is concerned that the safe country of origin concept will be used for fast-tracking applications without seriously considering an individual claim. Recently, the Prime Minister of Hungary announced that his country would reject any asylum claim made by persons transiting through Serbia, since Serbia is a safe country.¹⁰ Even though his remarks concerned the safe third country- as opposed to the safe country of origin concept, some Member States may be inclined to make use of the common EU list of safe countries of origin in a similar manner, i.e. to reject claims without meaningful individual scrutiny.

⁸ *R (on the application of Jamar Brown (Jamaica)) v Secretary of State for the Home Department* [2015] UKSC 8.

⁹ Article 30(1) and (3) Directive 2005/85/EC.

¹⁰ *The Guardian* 15 Sep. 2015, ‘Hungary rejects all asylum requests made at border’.

It is important to note that the Procedures Directive does not allow for such practices, because the safe country of origin concept may only create a presumption of safety. The accelerated procedure must still respect all the procedural guarantees of Chapter II of the Procedures Directive. Further, Article 36(1) lays down that Member States may only apply the concept after an individual examination and if the applicant has not submitted serious grounds for considering the country not to be safe in the circumstances of the applicant.

The Directive does however not specify what such a preliminary examination (with a view to deciding whether specific procedural rules may be applied in respect of the applicant) should entail and whether it should include a personal interview and a right to legal assistance. The Meijers Committee considers the guarantee of not examining a claim in a special procedure if the applicant has submitted serious grounds that his country is not safe in his circumstances only meaningful if it involves a personal interview and if the applicant can invoke legal assistance.

The Meijers Committee recommends therefore to specify in the Procedures Directive that the preliminary examination leading to application of the safe country of origin concept must always involve a personal interview and that applicants have the right to legal assistance.

Reviewing and challenging designations

In some Member States, national courts are competent to challenge national designations of countries as safe country of origin. For example, the Belgian Council of State on 7 May 2015, in an action brought by NGOs, removed Albania from the national list of safe countries of origin in view of the relatively high recognition rate of Albanian asylum applications.¹¹ In France, NGOs successfully challenged designations of Kosovo and Albania as safe countries on the basis of the political instability in both countries.¹² In the United Kingdom too, designations are open to challenge by judicial review, leading to the removal of Bangladesh and Jamaica from the list.¹³

The Meijers Committee considers the possibility of judicial review of safe country designations an important check on the Union legislator. Obviously, the CJEU may be called to review the validity of the Regulation in the light of primary Union law, especially the Charter, in accordance with the procedures of Articles 263 and 267 TFEU. It is not self-evident however, that the CJEU may review countries put on the list by the Union legislator against the specific designation criteria of Annex I of the Procedures Directive, as there is no formal hierarchy between that Directive and the proposed Regulation. It is unlikely, further, that individual asylum seekers (or interest groups) may directly challenge safe country designations before the CJEU, because the Regulation is not a regulatory but legislative act and because they have no individual concern in the meaning of relevant case law, thereby failing to meet the conditions for natural or legal persons to bring a direct action (Art. 263, fourth paragraph, TFEU).¹⁴

This results in a situation where the legislator both sets the criteria and decides whether they are met, without a court being able to intervene. If adopted, the proposal will limit existing possibilities at the national level to challenge designations of safe countries of origin before a court, without full compensation at the EU level.

¹¹ Conseil d'État, decision no. 231.157 of 7 May 2015.

¹² Conseil d'État, decision nos. 349174, 349356, 349377, 349653, 350189 of 26 March 2012; Conseil d'État, decision no. 375474 of 10 October 2014.

¹³ *R (on the application of Husan) v Secretary of State for the Home Department*, [2005] EWHC 189 (Admin); *R (on the application of Jamar Brown (Jamaica)) v Secretary of State for the Home Department* [2015] UKSC 8.

¹⁴ Case 25/62 (*Plaumann*); Case C-538/11 P (*Inuit*).

Against this background, the Meijers Committee considers it all the more important to ensure that the adoption as well as any future amendments of the Regulation take due account of the views of external stakeholders and expertise. The European Commission mentions in the Explanatory memorandum that it has taken into account country of origin information of the European Asylum Support Office (EASO), the European External Action Service, the Council of Europe and the United Nations High Commissioner for Refugees (UNHCR), in line with Articles 10(3)(b) and 37(3) of the Procedures Directive.

The Meijers Committee would welcome a more formalized role of expert institutions in the designation procedure in the form of an explicit and public advice on whether a particular country can be considered safe. EASO and UNHCR are suitable candidates for fulfilling that role.

In view of the fact that expert advice has not now been sought by the European Commission, the Meijers Committee recommends the European Parliament, before voting on the proposal, to acquire expert advice on whether the countries proposed by the Commission meet the designation criteria.

A fair and effective procedure

The procedural consequences of applying the safe country of origin concept are necessarily limited by the rule that each individual asylum seeker is entitled to a fair assessment of his claim. This means, in the first place, that no additional evidentiary burdens may be placed on an applicant coming from a safe country of origin. It transpires from the case law of the European Court of Human Rights that in respect of all asylum applications, the same burden of proof applies and that this burden may not shift entirely to the applicant.¹⁵ Obviously, this does not mean that the general safety of the country of origin cannot constitute an important means of evidence. But it cannot be solely decisive and Member States are under a duty to actively collect and appreciate evidence also when the applicant originates from a country designated as safe.

Second, the right to an effective remedy must also be respected in respect of claims made by persons from a safe country of origin. It cannot be excluded that such asylum claims are ‘arguable’ and therefore entail, according to the case law of the ECtHR, the right to an effective remedy with suspensive effect. This was demonstrated in the recent case of *V.M. v Belgium*, concerning a Roma asylum applicant from Serbia, and where Belgium was found in violation of Article 13 ECHR (the right to an effective remedy) for not suspending the expulsion pending the appeals procedure.¹⁶ In January 2014, the Belgian Constitutional Court annulled the Belgian law on safe countries of origin because it did not guarantee suspensive effect of appeals.¹⁷

The Belgian court further noted that the aim of accelerated procedures could also be achieved by shortening time limits to bring an appeal. It also follows from Article 47 of the Charter that the remedy should enable suspension of expulsion.¹⁸ The Meijers Committee is not convinced that a

¹⁵ Eg ECtHR 28 Feb. 2008, *Saadi v Italy*, no. 37201/06, para 129; Directive 2013/32/EU, Preamble pt 42.

¹⁶ ECtHR 7 July 2015, *V.M. v Belgium*, no. 60125/11.

¹⁷ Belgian Constitutional Court 16 January 2014, no. 1/2014.

¹⁸ Case C-562/13 (*Abdida*).

system in which suspensive effect must first be requested from a judge as allowed for in Article 46(6)(a) in safe country of origin situations, can be considered to be sufficiently effective.¹⁹

To ensure that in all situations the right to full and meaningful review is granted to asylum applicants from a country designated as safe, the Meijers Committee recommends to amend Article 4 of the proposed Regulation (on amendments to the Procedures Directive) as below (Meijers Committee additional amendments between brackets and in bold).

Article 4
Amendments to Directive 2013/32/EU

Directive 2013/32/ EU is amended as follows:

MEIJERS COMMITTEE AMENDMENT 1

(1) In Article 36 paragraph 1 is replaced by the following:

1. A third country designated as a safe country of origin in accordance with this Directive by national law or that is on the EU common list of safe countries of origin established by Regulation (EU) No XXXX/2015 of the European Parliament and of the Council* [this Regulation] may, after an individual examination of the application, **[including a personal interview within the meaning of Article 14 and without derogating from Article 22]**, be considered as a safe country of origin for a particular applicant only if:

(a) he or she has the nationality of that country; or

(b) he or she is a stateless person and was formerly habitually resident in that country,

and he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with Directive 2011/95/EU.

2. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.

Justification

The right to submit serious grounds for considering the country of origin not safe given the particular circumstances of the applicant, is only meaningful when it involves a personal interview and if the applicant can avail himself of legal assistance.

¹⁹ Cf. *V.M. v Belgium*, para 214 and ECtHR 5 Feb. 2002, *Čonka v Belgium*, no. 51564/99, para 82: 'it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.'

MEIJERS COMMITTEE AMENDMENT 2

(2b) Article 46, paragraph 6 (a) is replaced by the following:

6. In the case of a decision:

- (a) considering an application to be manifestly unfounded in accordance with Article 32(2) or unfounded after examination in accordance with Article 31(8), except for cases where these decisions are based on the circumstances referred to in Article 31(8)[**(b) and**] (h);

Justification

This amendment brings the provision concerning suspensive effect of appeals in safe country of origin cases in conformity with case-law concerning Article 47 of the Charter and Article 13 ECHR.

MEIJERS COMMITTEE AMENDMENT 3

(3b) In Annex I the text is replaced by the following:

ANNEX I

Designation of safe countries of origin for the purposes of Article 37(1)

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently, **[in respect of the population as a whole as well as specific groups of persons within the country,]** no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- (c) respect for the *non-refoulement* principle in accordance with the Geneva Convention;
- (d) provision for a system of effective remedies against violations of those rights and freedoms.



Justification

Special account of the position of minorities needs to be taken before a country of origin is designated as safe.

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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