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“Safe countries of origin”: A safe concept?

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Introduction

The concept of “safe countries of origin” has been a controversial part of the debate on the European Union (EU)’s common policy on asylum since it has become part of the EU asylum *acquis*. Though the 1951 Refugee Convention lays down a duty on states to treat refugees without discrimination based on their country of origin,¹ the Asylum Procedures Directive² and its recast³ have allowed EU countries to divide asylum seekers into different categories, with nationals of certain third countries warranting less favourable procedural treatment than others. This may raise critical tensions with the duty to respect the Convention as the cornerstone of refugee protection in the EU⁴ and to refrain from any interpretation of the EU asylum *acquis* which would undermine it.

The designation of third countries as “safe countries of origin” has significant political and legal implications. It is for reasons of “political importance” that the 2005 Asylum Procedures Directive entrusted the Council with the establishment of a minimum common EU list of “safe countries of origin”,⁵ in a provision that was later annulled by the Court of Justice of the European Union (CJEU)⁶ on procedural grounds and did not reappear in the 2013 recast Directive. For similar reasons, the EU is now debating an amendment to the recast Asylum Procedures Directive with the aim of providing a legal basis for such an EU-wide list, in an effort to harmonise Member States’ determinations of safety in respect of specific third countries.⁷ According to the European Commission, 15 out of 28 EU Member States apply the “safe country of origin” concept in their asylum procedures, while another 7 have made provision for it in their national law following the transposition of the Asylum Procedures Directive.⁸ Similarly to the original provision in the 2005 Directive for a minimum list, which would not exhaust Member States’ power to nationally designate additional countries of origin as safe, the Commission proposal for a Regulation establishing a common EU list of “safe countries of origin” aims at setting out a common threshold of EU-wide listed countries, whilst allowing Member States to maintain or introduce national lists with additional countries.⁹

At the same time, this concept has crucial legal effect on the rights and guarantees available to asylum seekers throughout the refugee status determination procedure. The “safe country of origin” concept is used by Member States as a ground for accelerating the examination of asylum claims as ostensibly unfounded.¹⁰ The procedural consequences of “safe country of origin” designations and their impact on applicants’ rights have been well documented, as have the persisting discrepancies between Member States’ designations of safe countries in their respective national lists.¹¹ The creation and update of these lists entails a delicate process of assessment of the situation prevailing in the countries of origin concerned, which may be contested before domestic courts. In fact, judicial authorities have often disagreed with and sanctioned designations made by governments,¹² thereby signalling that “safe country of origin” presumptions remain legally questionable and reviewable.

¹ United Nations Convention relating to the Status of Refugees, Geneva, 28 July 1951, UN Treaty Series vol. 189, 137, Article 3.

² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ* 2005 L326/13.

³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ* 2013 L180/60.

⁴ Article 78(1) Treaty on the Functioning of the European Union, *OJ* 2012 C326/1.

⁵ Recital 19 Asylum Procedures Directive.

⁶ CJEU, Case C-133/06 *European Parliament v Council*, Judgment of 6 May 2008.

⁷ See e.g. European Council, *Conclusions 25-26 June 2015*, EUCO 22/15, available at: <http://bit.ly/1lf4bz4>, para 5(f); Council of the European Union, *Council Conclusions on safe countries of origin*, 11097/15, 20 July 2015.

⁸ European Commission, *Information Note on the follow-up to the European Council Conclusions of 26 June 2015 on “safe countries of origin”*, July 2015, available at: <http://bit.ly/1MCLLb3>, 11.

⁹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU and amending Directive 2013/32/EU*, COM(2015) 452, 9 September 2015, Article 4(2) and Recital 4.

¹⁰ Article 31(8)(b) recast Asylum Procedures Directive.

¹¹ See AIDA, *Mind the Gap: An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System*, Annual Report 2013/2014, available at: <http://bit.ly/1GxadWk>, Chapter III, Section 2; AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, available at: <http://bit.ly/1ighgPs>, 78.

¹² See e.g. Belgian Conseil d’Etat, Decision No 231.157, 7 May 2015, available at: <http://bit.ly/1Fjp3AE>, striking out the inclusion of Albania in Belgium’s list of “safe countries of origin”; French Conseil d’Etat,

The impetus for a common EU list has emerged against that backdrop of divergent national determinations, as a means of harmonising practice with regard to the criteria for determining a country as safe, and to the countries which would fall under that rubric. The upcoming debates between Council and European Parliament on the establishment of a common approach to “safe countries of origin” will discuss the inclusion of Albania, Bosnia-Herzegovina, the Former Yugoslav Republic of Macedonia (FYROM), Kosovo, Montenegro, Serbia and Turkey in an EU list.¹³ However, such debates should not be distanced from fundamental questions around the content and value of the “safe country of origin” concept.

This briefing examines the “safe country of origin” concept through a critical reading of the criteria for presuming third countries as safe, as well as a sketch of methodological approaches employed by Member States with regard to the assessment of the situation in countries of origin. The briefing then discusses the relevance of recognition rates as a criterion for designating “safe countries of origin” through the lens of two specific countries proposed for inclusion in the common EU list of safe countries of origin: Albania and Turkey, whose inclusion is already heavily debated.

What is a “safe country of origin”? The criteria for presuming claims as unfounded

Currently, Member States may designate third countries as “safe countries of origin” in national lists, while adhering to EU-wide common criteria for such a designation.¹⁴ According to Annex I to the recast Asylum Procedures Directive,

“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* no persecution as defined in [the recast Qualification Directive],¹⁵ 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.” (Emphasis added).

For the assessment of such a general and consistent absence of persecution or serious harm, the Directive lists a non-exhaustive set of specific criteria determining “the extent to which protection is provided against persecution or mistreatment”. These include:

- (a) The relevant laws and regulations of the country and the manner in which they are applied;
- (b) Observance of human rights, notably the rights that are non-derogable;
- (c) Respect for the *non-refoulement* principle; and
- (d) Provision for a system of effective remedies against violations of those rights and freedoms.

The Directive concedes that “[b]y its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in that country.”¹⁶

Yet the “safety test” elaborated in the recast Asylum Procedures Directive should be unpacked further. The “safe country of origin” concept is defined with express reference to the notion of persecution and serious harm, in accordance with the recast Qualification Directive.¹⁷ The definition of both refugee status and subsidiary protection reflects the need for an individualised assessment of international protection claims, given that the personal circumstances of an applicant “such as

Decision Nos 375474 and 375920, 10 October 2014, available at: <http://bit.ly/1JCEIS5>, striking out Kosovo from the French list.

¹³ Annex to Proposal for a Regulation establishing an EU common list of safe countries of origin.

¹⁴ Article 37(1) recast Asylum Procedures Directive.

¹⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L337/9.

¹⁶ Recital 42 recast Asylum Procedures Directive.

¹⁷ Articles 9 and 15 recast Qualification Directive.

background, gender and age” have crucial bearing on whether an act against him or her constitutes persecution or serious harm.¹⁸

In fact, refugee status is a form of protection designed to safeguard displaced persons who face persecution for reasons of their peculiar characteristics: race, religion, nationality, membership of a particular social group, or political opinion.¹⁹ As it is aimed at tracking risks stemming from “fundamental social marginalisation”,²⁰ the Refugee Convention warrants states to have particular regard to those categories – often minorities – of persons who due to their specific features may be at risk upon return to the country of origin.

The spirit of the Convention is thus difficult to reconcile with an assessment of whether a country as a whole is “generally and consistently” free of persecution or serious harm, as per the recast Asylum Procedures Directive. While a context of widespread conflict or violence may facilitate the identification of persecution or harm risks, it often so happens that in certain countries of origin where nationals “generally” enjoy state protection, certain minorities – be they ethnic, religious, sexual or other – find themselves exposed to ill-treatment. It is in respect of those categories of refugees, to which the Convention extends its protection, that the “safe country of origin” concept creates high risks of unfairness.

Moreover, the above criteria for designating a country of origin as “safe” have not been uniformly transposed in Member States. While France only aligned its definition following its asylum reform of July 2015,²¹ Belgium was criticised by a judgment of its Council of State in May 2015 for incorrectly transposing the definition in its domestic law.²² Moreover, the concept of “general and systematic” absence of persecution or serious harm has been interpreted differently by national legislatures.²³ By way of example, France states that the absence of persecution or serious harm must be established “generally and uniformly for men and women”,²⁴ while this is not the case in the UK.²⁵ Accordingly, certain countries of origin such as Nigeria, Ghana or Kenya have been designated by the UK as safe only for men.²⁶

Determining the situation prevailing in countries of origin: a safe assessment?

The assessment of the safety criteria by Member States is to be conducted by reference to a range of sources, including information provided by the European Asylum Support Office (EASO), the United Nations High Commissioner for Refugees (UNHCR), the Council of Europe and other relevant organisations.²⁷ To that end, EU Member States benefit from a common Country of Origin Information (COI) Portal hosted by EASO, access to which is currently reserved to national asylum administrations.²⁸ While not all Member States have dedicated COI units in their asylum authorities, a number of countries rely on specialised units for the provision of information on the situation prevailing in countries of origin of asylum seekers.²⁹ In AIDA countries, this includes Austria, Belgium, Bulgaria,

¹⁸ Article 4(3)(c) recast Qualification Directive.

¹⁹ Article 1A(2) Refugee Convention; Article 2(c) recast Qualification Directive.

²⁰ J Hathaway, ‘Is Refugee Status Really Elitist? An Answer to the Ethical Challenge’ in JY Carlier and D Vanheule (eds), *Europe and Refugees: A Challenge?* (Kluwer Law International, 1997).

²¹ Article L722-1 Code on entry and residence of foreigners and asylum (Ceseda), as amended by Article 9 Law n. 2015-925 of 29 July 2015 on asylum reform.

²² Belgian Conseil d’Etat, Decision No 231.157, 7 May 2015, available at: <http://bit.ly/1Fjp3AE>. The term «jamais» in the French translation of Directive 2005/85/EC («il n’y est jamais recouru à la persécution») has not been transposed in Article 57/6/1 Aliens Act, while an amendment to expressly include it in the draft Law of 19 January 2012 was eventually rejected.

²³ For an overview, see European Migration Network (EMN), *Ad-Hoc Query on Safe Countries of origin and safe third countries*, 22 December 2014, available at: <http://bit.ly/1KHc161>.

²⁴ Article L722-1 Ceseda.

²⁵ Section 94(4) Nationality, Immigration and Asylum Act 2002.

²⁶ See AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, 80.

²⁷ Article 37(3) recast Asylum Procedures Directive.

²⁸ See EASO, *COI Portal*, available at: <https://easo.europa.eu/coiportalnotice/>. EASO has dedicated a total €817,000 for its COI activities in 2015: EASO, *Annual Work Programme 2015*, March 2015, 11.

²⁹ For an overview, see EMN, *Ad-Hoc Query on searching of COI for asylum procedures*, 22 September 2014, available at: <http://bit.ly/1PLkW5Z>.

Germany, France, Greece, Hungary, Ireland, the Netherlands, Poland, Sweden, the UK and Switzerland. However, despite ongoing efforts for convergence in COI collection across the EU through EASO, the 28 Member States hold widely different positions as to the general situation prevailing in countries of origin. By way of example, the UK has recently diverged from other Member States in its assessment of Eritrea by relying on COI reports, the methodology of which has been questioned.³⁰ Since then, the UK only granted protection to 34% of Eritrean applicants during the second quarter of 2015, as opposed to 73% during the first quarter.³¹

Moreover, as far as convergence between national “safe country of origin” lists is concerned in relation to the countries proposed for the EU list, Albania is listed in 7 Member States’ lists, Bosnia-Herzegovina in 8, FYROM in 7, Kosovo in 6, Montenegro in 8, Serbia in 8 and Turkey in none.³² In that respect, there is little to suggest that consensus on the safety of these countries is to be found in Member States’ current asylum practice.

Beyond these criteria, for the purpose of its proposal for a common EU list of “safe countries of origin”, the Commission has drawn upon additional – and arguably questionable – indicators of safety, peculiar to the context of Council of Europe membership and/or EU accession for the aforementioned 7 countries. With the exception of Kosovo, due to lack of consensus on its international status of statehood, all countries are members of the Council of Europe and parties to the European Convention on Human Rights (ECHR), thereby adhering to the jurisdiction of the European Court of Human Rights (ECtHR). On that basis, the proposal for a Regulation mentions the number of violations found by the ECtHR in its 2014 rulings as a relevant criterion for assessing safety: 4 cases out of 150 applications against Albania (2.6%);³³ 5 out of 1,196 against Bosnia-Herzegovina (0.4%);³⁴ 6 out of 502 against FYROM (1.2%);³⁵ 1 out of 447 against Montenegro (0.2%);³⁶ 16 out of 11,490 against Serbia (0.1%);³⁷ and 94 out of 2,899 against Turkey (3.2%).³⁸ However, the number of Strasbourg cases concerning those countries leaves considerable ambiguity. The proposal fails to specify a number of relevant elements, including: what proportion of the applications before the Court actually resulted in decisions on the merits (thereby scrutinising the observance of human rights in the respective countries); at what time the alleged violation took place, as some cases decided by the Court relate to complaints made several years before; how many cases concerned those countries’ nationals; or even on what grounds the applications were based and violations were found. In that respect, a superficial look at the ECtHR’s caseload without due regard to the context and content of those cases could be a misleading criterion of safety.

A second criterion introduced in the Recitals to the Regulation proposal relates to the state of play of accession negotiations between the EU and the five candidate countries: Albania, FYROM, Montenegro, Serbia and Turkey.³⁹ For all candidate countries, the Commission notes that the Copenhagen European Council accession criteria relating to democracy, rule of law and human rights have been met.⁴⁰ However, this finding seems an inaccurate generalisation of the progress reports issued as part of the EU enlargement process, which consistently highlight critical deficiencies and

³⁰ AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, 21.

³¹ British Refugee Council, ‘UK paves way to return asylum seekers to Eritrea’, 27 August 2015, available at: <http://bit.ly/1JARafq>.

³² Recitals 10-16 Proposal for a Regulation establishing a common EU list of safe countries of origin contain different figures as the Commission also includes Bulgaria: European Commission, *Information Note on the follow-up to the European Council Conclusions of 26 June 2015 on “safe countries of origin”*. However, since 2007 Bulgaria no longer has a national list of “safe countries of origin”: AIDA Country Report Bulgaria: Third Update, January 2015, available at: <http://bit.ly/1lmyJil>, 36.

³³ Recital 10 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁴ Recital 11 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁵ Recital 12 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁶ Recital 14 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁷ Recital 15 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁸ Recital 16 Proposal for a Regulation establishing a common EU list of safe countries of origin.

³⁹ Bosnia-Herzegovina and Kosovo are potential candidate countries. See European Commission, *European Neighbourhood Policy and Enlargement Negotiations*, available at: <http://bit.ly/1no4JZA>.

⁴⁰ Recitals 10, 12, 14-16 Proposal for a Regulation establishing a common EU list of safe countries of origin.

weaknesses in these areas.⁴¹ Further concerns are raised, for instance, by the recent attacks and restrictive measures taken against Kurds in Turkey.⁴² More worryingly, the warning in the same Recitals that these countries “will have to continue to fulfil these criteria for becoming a member” of the Union implies again that the “safe country of origin” determination made by the Commission rests more on political rather than legal reasoning.

Safe for how many? Recognition rates as a criterion of safety

The relevance of recognition rates for nationals of a specific country in determining whether that country can be designated as safe remains another contentious criterion. It has been pointed out that the rate of positive decisions regarding a specific nationality does not figure among the criteria for designating a country as safe in Annex I to the recast Asylum Procedures Directive. This argument was raised among others by the Belgian Commissioner-General for Refugees and Stateless Persons (CGRS) in order to reintroduce Albania in the list of safe countries of origin in May 2015, following its removal by the Council of State.⁴³ According to the CGRS, a high recognition rate may depend on a number of factors, which are not necessarily conducive to indicating general risks of persecution in the country of origin.

Yet this reasoning is resisted in practice. The EU and its Member States espouse the relevance of statistics and award particular importance to recognition rates when determining which countries should be considered safe. The Council Conclusions of 20 July 2015 on “safe countries of origin” mention the fact that “the EU-wide average asylum recognition rate for the Western Balkan countries was only 4% in 2014” to substantiate the conclusion that these states should be designated as safe.⁴⁴ This reference echoes the Commission’s emphasis on the low recognition rates for Western Balkan asylum seekers in its Information Note on “safe countries of origin”.⁴⁵ At the same time, UNHCR also points out that protection rates are relevant to the assessment of safety, as it highlights that any country “from which a significant number of its nationals or habitual residents require protection should not be considered as safe.”⁴⁶

Domestic courts have taken different approaches to this when assessing the legality of lists of “safe countries of origin”. While the French Council of State made no reference to recognition rates when reviewing the designation of Albania, Georgia and Kosovo as safe, instead focusing on the human rights situation in these countries and to access to effective protection in Kosovo specifically,⁴⁷ the Belgian Council of State explained in its ruling of 7 May 2015 – before Albania was reintroduced as a “safe country” in the national list – that the number of decisions granting protection to the nationals of a country does indicate, through individualised assessments, that the particular claimants would be at risk if returned to that country.⁴⁸

Statistics on positive decisions are in fact a useful way of determining *post hoc* whether a “safe country of origin” determination is indeed reflected in the outcome of asylum procedures for that country’s nationals. In this regard, a number of countries included in the proposed common EU list raise particular concerns. The cases of Albania and Turkey are illustrative. While both Commission and Council have politically endorsed the view that Albania should be deemed a “safe country of

⁴¹ See e.g. European Commission, *Turkey Progress Report*, October 2014, available at: <http://bit.ly/1vPqXqp>, where the Commission expresses concerns around the country’s stance *inter alia* on corruption and the rule of law, barriers to freedom of expression, as well as domestic violence.

⁴² See e.g. Reuters, ‘Turkish nationalists attack pro-Kurdish party HQ’, 9 September 2015, available at: <http://bit.ly/1g8y88C>; BBC, ‘Turkey restores curfew in restive Kurdish city of Cizre’, 13 September 2015, available at: <http://bbc.in/1EXI40W>.

⁴³ See Royal Decree of 11 May 2015 implementing Article 57/6/1/(4) of Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners, establishing the list of safe countries of origin, Report to the King, available at: <http://bit.ly/1JN5amh>.

⁴⁴ Council of the European Union, *Council Conclusions on safe countries of origin*, 20 July 2015, 4.

⁴⁵ European Commission, *Information Note on the follow-up to the European Council Conclusions of 26 June 2015 on “safe countries of origin”*, 7-10.

⁴⁶ UNHCR, *UNHCR’s proposals in light of the EU response to the refugee crisis and the EU package of 9 September 2015*, 10 September 2015, available at: <http://bit.ly/1UPy8YS>, 3.

⁴⁷ French Conseil d’Etat, Decision Nos 375474 and 375920, 10 October 2014, available at: <http://bit.ly/1JCEIS5>. See also

⁴⁸ Belgian Conseil d’Etat, Decision No 231.157, 7 May 2015.

origin”, along with other Western Balkan countries, recognition rates for Albanian nationals are far from convergent towards a low protection rate in practice. By way of example, during the first half of 2015, out of a total 8,710 decisions in EU and Schengen Associated States, AIDA countries recorded the following protection rates:

Table 1: First instance recognition rates for Albanian nationals: First and second quarter 2015

AIDA Country	Listed as safe	Total decisions (2015 Q1)	Recognition rate (2015 Q1)	Total decisions (2015 Q2)	Recognition rate (2015 Q2)
Austria					
Belgium		150	16.6%	105	9.5%
Bulgaria		0	-	0	-
Cyprus		0	-	0	-
Germany		625	1.6%	3,655	0.2%
France		890	12.9%	750	10.6%
Greece		110	4.3%	75	0%
Croatia		0	-	0	-
Hungary		0	-	0	-
Ireland		30	0%	15	0%
Italy		55	54%	50	30%
Malta		0	-	0	-
Netherlands		35	0%	30	0%
Sweden		260	1.9%	425	3.5%
UK		660	17.4%	322	30.7%
Switzerland		15	33.3%	35	14.2%
Total (EU and Schengen Associated States)		2,960	10.4%	5,750	4.2%

Source: Eurostat, *First instance decisions on applications by citizenship, age and sex Quarterly data (rounded)*, migr_asycdfstq. Data for Austria is not available for either quarter.

These figures allow for a number of important observations. On one hand, out of the 32 EU Member States and Schengen Associated States, almost 80% of first instance decisions on Albanian applicants were taken by 3 countries alone: France, the UK and Germany. Yet the recognition rates between those countries vary considerably. During the first quarter of 2015, the UK and France granted protection to 17.4% and 12.9% of cases respectively, while Germany only issued positive decisions for 1.6%. Germany’s low recognition rate for Albanian nationals dropped significantly to 0.2% during the second quarter of 2015, with only 10 positive decisions out of a total 3,655 first instance decisions.⁴⁹ This could suggest that the assessment of risks of persecution or serious harm in light of the situation in the country is not conducted uniformly across EU Member States. Further contrasts may be made between countries such as the Netherlands or Ireland, which rejected all claims by Albanian nationals during the first quarter of 2015, as opposed to Italy and Switzerland which recorded protection rates of 54% and 33.3% respectively.

On the other hand, the latest available statistics seem to dispel the assumption that Albanian nationals are generally deemed not to qualify for international protection in the EU.⁵⁰ More importantly, Member States which have listed Albania as a “safe country of origin”, such as Belgium, France, the UK but also Switzerland, all have far from minimal recognition rates for Albanian applicants.

The proposed inclusion of Turkey in the list raises even more difficult questions. While no Member State has deemed Turkey a “safe country of origin” in its national list, the EU-wide recognition rate for

⁴⁹ Eurostat, *First instance decisions on applications by citizenship, age and sex Quarterly data (rounded)*, migr_asycdfstq. Note that 63.5% of the total number of decisions on Albanian applicants during the second quarter of 2015 in EU and Schengen Associated States was issued by Germany alone.

⁵⁰ See also AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, 79.

Turkish asylum seekers in 2014 was 23.1%, and as high as 85.8% for Switzerland.⁵¹ Out of a total 1,935 decisions in EU and Schengen Associated States, protection rates for Turkish applicants in AIDA countries during the first and second quarter of 2015 only confirm that persons originating from Turkey are hardly deemed generally free from persecution or serious harm:

Table 2: First instance recognition rates for Turkish nationals: First and second quarter 2015

AIDA Country	Listed as safe	Total decisions (2015 Q1)	Recognition rate (2015 Q1)	Total decisions (2015 Q2)	Recognition rate (2015 Q2)
Austria					
Belgium		55	18.2%	45	11.1%
Bulgaria		0	-	0	-
Cyprus		5	0%	15	33.3%
Germany		145	24.1%	95	21%
France		410	14.6%	385	14.2%
Greece		10	50%	5	0%
Croatia		0	-	5	0%
Hungary		0	-	0	-
Ireland		0	-	0	-
Italy		100	75%	90	72.2%
Malta		0	-	0	-
Netherlands		10	0%	10	50%
Sweden		20	0%	20	0%
UK		130	22.3%	33	30%
Switzerland		110	72.7%	110	68.2%
Total (EU and Schengen Associated States)		1,065	28.1%	870	29.3%

Source: Eurostat, *First instance decisions on applications by citizenship, age and sex Quarterly data (rounded)*, migr_asycdfstq. Data for Austria is not available for either quarter.

Data on protection rates therefore seem to question the validity of the proposed safety presumption in respect of both countries. Such a close examination of protection grants is all the more important given the Commission's intention to expand the proposed EU list after its adoption, with priority awarded to countries such as Bangladesh, Pakistan and Senegal.⁵² Recognition rates for these countries would also challenge the appropriateness of applying the "safe country of origin" concept, given that the EU average first instance protection rate in 2014 was 10.3% for Bangladesh, 26.8% for Pakistan and 34.3% for Senegal.⁵³

These figures also seem to cast greater doubt on the appropriateness of the presumption of safety itself. As mentioned above, the refugee definition and the notions of persecution and serious harm require an individualised assessment of specific personal characteristics which may place a person at risk of ill-treatment in his or her home country. The fact that Member States *do* eventually recognise the existence of such risks for a significant number of persons originating from countries which are designated as "generally and consistently" free from persecution therefore calls into question the very rationale behind designating them as safe.

Does the "safe country of origin" concept matter? Implications for asylum seekers

The cases of Albania and Turkey are illustrative examples of the difficulties surrounding determinations of safety, particularly in respect of countries for which a significant number of nationals

⁵¹ ECRE, *ECRE Memorandum to the Extraordinary Justice and Home Affairs Council Meeting of 14 September 2015*, 10 September 2015, available at: <http://bit.ly/1O3nSxc>, 4.

⁵² European Commission, *Proposal for a Regulation establishing an EU common list of safe countries of origin*, Explanatory Memorandum, 6.

⁵³ Eurostat, *First instance decisions on applications by citizenship, sex and age Annual aggregated data (rounded)*, migr_asycdfsta.

is granted international protection. The existence of significant recognition rates for nationals coming from listed countries has been portrayed as evidence that the “safe country of origin” concept does not prevent asylum authorities from conducting a thorough assessment of individual claims. As the Belgian CGRS stated in his report ahead of the adoption of the latest national list of “safe countries of origin” in May 2015,

“The fact that in 2014, despite the system of safe countries of origin, 12.9% of asylum applications lodged by Albanians led to a protection status, also shows that the CGRS always conducts an in-depth individual assessment of each case and then grants a protection status to those cases which warrant it.”⁵⁴

In fact, the aforementioned statistics on decisions concerning Albanian nationals could be taken as demonstrating that the designation of Albania as a “safe country of origin” in some Member States – namely Belgium, France, the UK and Switzerland – does not prevent them from granting international protection to those applicants who prove that the country is not safe vis-à-vis their individual circumstances. In that light, it may be tempting to use the above recognition rates as evidence for the position that a “safe country of origin” designation, and the corollary applicability of the accelerated procedure, does not preclude asylum seekers’ access to an adequate and complete examination of their claim.⁵⁵

This general defence of the “safe country of origin” concept would raise issues of procedural necessity and practicality. If Member States designate certain countries as safe, yet end up undertaking a rigorous assessment of all applicants’ individual circumstances to assess protection needs which may arise despite a “safe country” presumption, what is the value of the “safe countries of origin” designation?

To understand the implications of the concept in the asylum procedure, it is crucial to recall how the existence of a list of “safe countries of origin” affects the individual asylum seeker in practice. The “safe country of origin” concept, based on which the examination of a claim may be accelerated,⁵⁶ is only triggered where the country’s national or habitual resident “has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances”.⁵⁷ Accordingly, for a claim to be expedited as ostensibly unfounded, both the listing of a country as safe and a failure to establish personal circumstances rebutting the presumption are required in the individual case. This, however, entails a higher burden of proof to be discharged by nationals of listed countries as opposed to other asylum seekers, as opposed to the shared burden of proof normally applicable in asylum procedures.⁵⁸ By way of example, in Belgium, a well-founded fear of persecution in the country of origin must “appear clearly” from the applicant’s declarations for the “safe country of origin” presumption to be rebutted.⁵⁹

It may therefore be the case that a number of applicants succeed in reversing the safety presumption so as to prevent the application of the “safe country of origin” concept in their individual case. This could potentially account for the number of positive decisions in respect of nationals from listed countries such as Albania across the EU.⁶⁰ However, this onerous burden of proof must often be discharged within highly demanding time-limits, such as 5 working days in Belgium or even 3 calendar

⁵⁴ See Royal Decree of 11 May 2015 implementing Article 57/6/1(4) of Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners, establishing the list of safe countries of origin, Report to the King: «Le fait qu’en 2014, malgré le système de pays d’origine sûrs, 12,9% des demandes d’asile introduites par des Albanais ont débouché sur un statut de protection, montre également que le Commissariat général aux Réfugiés et aux Apatrides effectue toujours une analyse individuelle en profondeur de chaque dossier et confère ensuite un statut de protection aux cas qui le justifient.» (Unofficial translation by ECRE).

⁵⁵ See Recital 20 recast Asylum Procedures Directive.

⁵⁶ Article 31(8)(b) recast Asylum Procedures Directive.

⁵⁷ Article 36(1) recast Asylum Procedures Directive.

⁵⁸ Article 4(1) recast Qualification Directive.

⁵⁹ AIDA Country Report Belgium: Third Update, February 2015, available at: <http://bit.ly/1S14Qaf>, 52. See also AIDA, *Mind the Gap: An NGO perspective on challenges to accessing protection in the Common European Asylum System*, Annual Report 2013/2014, 50.

⁶⁰ There is no available data on the number and outcome of claims processed in the accelerated procedure, as neither Eurostat nor EASO provide country-specific statistics disaggregating first instance decisions between regular and accelerated procedure.

days in Hungary.⁶¹ To rebut such a presumption, an asylum seeker is expected to have access to accurate and reliable COI, let alone quality legal assistance, so as to provide convincing reasons for not applying the concept in his or her particular case. Given the extremely short time-frames within which this needs to be done, effective access to quality legal assistance is essential, but in practice often absent.⁶²

Presumptions of safety are thus not an easy hurdle to overcome, as the treatment of claimants from listed countries reveals in practice. Where the “safe country of origin” concept is applied in an individual asylum procedure, thereby leading to the application of the accelerated procedure, the likelihood of a grant of international protection is worryingly low. According to scarce data from EASO, 89.3% of applications examined under the accelerated procedure in the EU between March and December 2014 led to a negative decision.⁶³ In France, 91.5% of applications from “safe countries of origin” were processed in the accelerated procedure in 2013,⁶⁴ while 90% were accelerated in 2014.⁶⁵

Conclusion

The “safe country of origin” notion presents substantial conceptual and procedural risks. The criteria and definition thereof in the Asylum Procedures Directive should be cautiously read, given that their reference to a “general and systematic” lack of persecution or serious harm seems to contradict the Refugee Convention’s purpose of protecting those who may face individual risks in their home countries for reasons related to their particular personal characteristics.

Moreover, the way in which Member States conduct safety assessments with regard to countries of origin is far from homogenous in practice. Against that backdrop, the Commission proposal for a common EU list runs the risk of triggering a ‘race to the bottom’ in restrictive rules in the asylum procedure. Criteria such as the general ECtHR figures on rulings finding violations, the Copenhagen conditions for EU accession, or even the number of national lists comprising a particular country, in no way constitute evidence that the safety criteria in Annex I to the recast Asylum Procedures Directive are met. Finally, recognition rates for ostensible “safe countries of origin” such as Albania and Turkey reveal a concerning discord between general presumptions of safety and the protection needs identified for the nationals of the countries concerned in practice.

Given its conceptual ambiguity and far-reaching adverse procedural consequences for the individual asylum seeker, this remains an unsafe concept in asylum procedures.

⁶¹ AIDA Country Report Belgium: Third Update, 51; Article 51(11) Hungarian Asylum Act, as amended in July 2015.

⁶² For a discussion, see AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, 95 et seq.

⁶³ EASO, *Annual Report on the Situation of Asylum in the European Union 2014*, July 2015, 91.

⁶⁴ AIDA Country Report France: Third Update, January 2015, available at: <http://bit.ly/1SwhezD>, 55.

⁶⁵ French Office for the Protection of Refugees and Stateless Persons (OFPRA), *Activity Report 2014*, available at: <http://bit.ly/1MfW605>, 62.