'Safe country of origin' concept in EU asylum law

SUMMARY

EU Member States have a shared responsibility to give protection to asylum-seekers, and to ensure they receive fair treatment and that their cases are examined in accordance with uniform standards. The common European asylum system (CEAS) establishes common standards for Member States in their procedures for granting and withdrawing international protection. A critical aspect of a common approach to international protection is application of the 'safe country of origin' concept.

In the context of refugees, the term 'safe country of origin' (SCO) has been used to refer to countries whose citizens should not, in theory, be granted international protection, since those countries are widely regarded as safe. The concept can refer to the automatic exclusion from refugee status of nationals originating from SCOs, or it can raise a presumption of safety that those nationals must rebut.

Several international and regional human rights bodies have either raised concerns about the use of the SCO concept or proposed appropriate safeguards to ensure that fundamental rights of persons in genuine need of international protection, but who originate from SCOs, are respected.

At EU level, the concept has gradually developed as part of the CEAS, culminating in the adoption of the provisions on the common EU list of SCOs. Many Member States have already established national SCO lists. With the new asylum legislation, transposition of the SCO concept will be mandatory for all Member States, which will also be able to retain or introduce national SCO lists other than those designated at EU level.

IN THIS BRIEFING

- Introduction
- 'Safe country of origin' concept
- SCOs in EU asylum law
- Member States' SCO lists
Introduction

The EU is an area of protection for people fleeing persecution or serious harm in their country of origin. Asylum is a fundamental right and an international obligation for countries, as recognised in the 1951 Convention relating to the Status of Refugees (Geneva Convention) whose parties also include all EU Member States.

In the EU, the common European asylum system (CEAS) establishes common standards for Member States in their procedures for granting and withdrawing international protection. Member States have a shared responsibility to welcome asylum-seekers in a dignified manner, making sure they are treated fairly and their case is examined following uniform standards. This ensures that, no matter where an applicant applies, the outcome will be similar. Procedures must be fair, effective throughout the EU, and resistant to abuse. The Qualification Directive and the Asylum Procedures Directive set out an EU framework for national authorities assessing applications for international protection: (i) protection given by a State on its territory to a person who is unable to seek protection in their own country for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion (refugee status); or (ii) in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin, or – in the case of a stateless person – to their country of former habitual residence, would face a real risk of suffering serious harm (subsidiary protection status).

A critical aspect of a common approach to international protection concerns the use of the ‘safe country of origin’ concept, which – as former President of the European Commission Jean-Claude Juncker said in his 2015 State of the Union speech – helps ‘separate better those who are in clear need of international protection and are therefore very likely to apply for asylum successfully; and those who are leaving their country for other reasons which do not fall under the right of asylum’.

'Safe country of origin' concept

Simply put, the term ‘safe country of origin’ (SCO) has been applied, in the refugee context, to countries whose people should not, in principle, receive international protection, since those countries are generally considered safe. Nationals originating in countries designated as safe can be automatically excluded from refugee status, or the receiving country can raise against their claim a presumption of safety that those nationals must rebut. The SCO rule goes to the heart of the definition of refugee, as it concerns the asylum-seeker’s treatment in the country of origin and for that reason, determines the merits of an application for international protection, rendering it as manifestly unfounded or not.

Stakeholder views

Several international and regional human rights bodies have raised concerns about the use of the SCO concept or proposed appropriate safeguards to ensure the respect of the fundamental rights of those in genuine need of international protection originating from the SCO.

The United Nations Refugee Agency (UNHCR) does not oppose the SCO concept, as long as it is used as a procedural tool to prioritise and/or accelerate examination of an application in very carefully circumscribed situations. The UNHCR is aware of the inherent difficulties in evaluating overall safety. In many countries, circumstances surrounding displacement and general conditions can be unpredictable. Moreover, states' assessments are also influenced by factors relating to foreign policy, politics and economy. The UNHCR considers it critical to ensure that: (i) each application is examined fully and individually on its merits in accordance with certain procedural safeguards; (ii) each applicant is given an effective opportunity to rebut the presumption of safety of their country of origin in his or her individual circumstances; (iii) the burden of proof on the applicant is not increased; and (iv) applicants have the right to an effective remedy in the case of a negative decision.
Insofar as application of the concept would automatically deny refugee status to an entire group of asylum-seekers, in the UNHCR’s view, this would go against both the text and the spirit of the 1951 Geneva Convention. Where, however, states have put in place an eligibility procedure and use the concept in a procedural sense to channel certain applications to expedited or accelerated procedures (e.g. for manifestly unfounded applications), the SCO concept could help prevent or reduce backlogs and identify cases for expedited treatment.

In these cases, the UNHCR lists several safeguards that need to be included in procedures for manifestly unfounded claims.

- All applicants should receive preliminary counselling in the appropriate language.
- The applicant should have a comprehensive in-person interview with a fully qualified official and, when feasible, with an official of the authority competent to determine refugee status.
- The authority normally competent to determine refugee status should establish the manifestly unfounded or abusive character of an application.
- In the case of a rejected application, an applicant should be able to have a review of a negative decision by an authority different from and, if possible, independent of the one making the initial decision. The appeal should have suspensive effect, allowing the applicant to remain in the country pending the review of his or her case.

According to the UNHCR, states can raise doubts over evidence presented by specific categories of applicants by reference to country of origin; however, such doubts must be supported by verifiable, up-to-date assessments of factual circumstances and must be rebuttable. States must also provide for individual, exceptional cases.

The European Union Agency for Fundamental Rights (FRA), in its opinion presented to the European Parliament’s Civil Liberties, Justice and Home Affairs Committee (LIBE), points out that designation of SCOs can be a valid tool to help with the processing of applications from persons whose claims for international protection are likely to be unfounded. By enabling national asylum systems to focus on other individuals whose applications are more likely to be well founded, handling these claims effectively can have a positive impact on fundamental rights and help shorten processing times (during which applicants are left in limbo) for all applicants for international protection. However, a common EU list of SCOs would require adequate safeguards to ensure, in particular, that it does not violate fundamental rights of those in genuine need of international protection originating from the countries in question. Those fundamental rights are: (i) ensuring the right to seek asylum, non-refoulement and the prohibition of collective expulsion; (ii) the right to an effective remedy; (iii) non-discrimination; and (iv) ensuring rights of children, determining the best interest of unaccompanied minors and the prevention of arbitrary detention of children.

According to the l’Association Européenne des Droits de l’Homme (AEDH), EuroMed Rights and the International Federation for Human Rights (FIDH), nobody can guarantee that a country is safe for all its citizens. They argue that, while ‘the use of a common list may put an end to discrimination between asylum-seekers on the basis of their country of arrival in the EU, it would not bring to an end the inequality of rights between applicants based on their origin’.
SCOs in EU asylum law

The safe country concept originated in Europe. It was first used in the Danish Aliens Act of 1986 in order to decrease the number of refugees entering this country from Germany. However, safe country practices quickly spread as other European countries soon adopted similar solutions. Subsequently, the domestic safe country legislation was brought to the EU level.

At EU level, the first formal reference to the SCO concept was in the Council Resolution of 30 November 1992 on manifestly unfounded applications for asylum and in the Council conclusions of 30 November 1992 on countries in which there is generally no serious risk of persecution of the same date, where the Council established that individuals coming from countries classified as SCOs would qualify for accelerated procedures. Subsequently, the concept has gradually developed as part of the common European asylum system (CEAS).

First-phase and second-phase CEAS

In the first phase of the CEAS (1999-2005), the Asylum Procedure Directive 2005/85/EC established a minimum degree of harmonisation, specifying that an SCO was a country where there was 'generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, 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'.

The Asylum Procedure Directive further specifies that, in making this assessment, account must be taken, among other things, of the extent to which protection is provided against persecution or mistreatment by:

- the relevant laws and regulations of the country and the manner in which they are applied;
- 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 Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- respect of the non-refoulement principle according to the Geneva Convention;
- provision for a system of effective remedies against violations of these rights and freedoms.

According to the directive, the presumption of safety could only apply if the asylum-seeker 'has not submitted any serious grounds for considering the country not to be an SCO in his/her particular circumstances and in terms of his/her qualification as a refugee in accordance with Directive 2004/83/EC'.

Member States could also declare part of a country as safe, or uphold earlier national rules, which had a lower standard. The directive also specified that, to apply an SCO criterion, Member States had to take into consideration the legal situation, the application of the law and the general political circumstances in the third country concerned. Their assessment of whether a country is an SCO had to be based on 'a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations'.

Member States could (but were not required to) fast-track SCO applications. In that case, while all the basic procedural rights still applied in principle, Member States had an option to omit a personal interview.

The directive also allowed for the possibility of adopting a common EU list of SCOs. In 2008, the European Parliament challenged that provision successfully before the Court of Justice of the European Union (CJEU). The CJEU annulled the provision, because any such common list could only be adopted by means of a legislative or 'comitology' procedure in accordance with Article 67(5) of...
the Treaty establishing the European Community. The Commission submitted a proposal for a common EU list of SCOs in 2015, which, however, was not adopted by the co-legislators (see box below).

In the second-phase of the CEAS (2006-2013), during the adoption of the Recast Asylum Procedure Directive 2013/32/EU, there was no desire to revisit the idea of a common EU list. While the basic criteria for designating an SCO remained the same, it was no longer possible to maintain pre-existing lower standards, or to designate part of a country as safe. The safeguards for individuals to rebut the presumption were kept. Member States could still fast-track an SCO application, but could no longer omit the personal interview. Finally, although the second-phase directive allowed applicants in principle to remain, pending the outcome of an appeal, it was also possible for Member States to derogate from this rule in SCO cases, provided the applicant had the opportunity to contest his or her removal through a court proceeding first.

Proposal for a common EU list of SCOs
As part of the European agenda on migration and in response to the unprecedented migrant flows arriving in the EU, the Commission on 9 September 2015 proposed a regulation to establish a common EU list of SCOs, initially comprising Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Türkiye. The aim was to fast-track asylum applications from citizens of these countries, considered ‘safe’ in full compliance with the criteria set out in Directive 2013/32/EU and the principle of non-refoulement. While the co-legislators have agreed on the common list approach, no decision was taken as to which countries should be on the list. On 12 April 2017, the Council announced the suspension of negotiations on the file. On 21 June 2020, the Commission withdrew its proposal, including the provisions for an EU SCO list in the revised proposal for an asylum procedure regulation.

Regulation on a common procedure for international protection
In 2020, as part of the pact on migration and asylum, the European Commission presented a revised proposal for a regulation on a common procedure for international protection. According to the Commission, mixed flows of refugees and migrants have meant 'increased complexity and an intensified need for coordination and solidarity mechanisms'. In the Commission's view, it is therefore important to develop new procedures, which will 'allow asylum and migration authorities to more efficiently assess well-founded claims, deliver faster decisions and thereby contribute to a better and more credible functioning of asylum and return policies'.

The Common Procedure Regulation (EU) 2024/1348, which enters into force in June 2024 and will apply two years later, aims to establish 'common criteria for designating third countries as safe countries of origin', in view of the need to strengthen the application of the safe country of origin concept as an essential tool to support the swift examination of applications that are likely to be unfounded. The SCO designation at EU level should address some of the existing divergences between Member States' national lists of safe countries and thereby prevent secondary movements of applicants for international protection. It should also improve the efficiency of the European asylum system by discouraging abusive applications, while facilitating and speeding up returns of asylum-seekers refused for manifestly unfounded applications.

According to the regulation, a third country may only be designated as an SCO where it can be shown that no persecution and no real risk of serious harm exist, as defined in the Qualification Regulation (EU) 2024/1347, which enters into force in June 2024 and will apply two years later. The criteria for the assessment of whether a third country is an SCO are, in substance, very similar to the definition present in the 2013 Asylum Procedure Directive. The main difference concerns the description of the exact acts that cannot be carried out by the states under consideration, instead of only referring to the principle of non-refoulement. A request for a preliminary ruling, currently
pending before the CJEU, concerns the application of the SCO concept to countries that have temporarily suspended their obligations under the European Convention on Human Rights.

That country’s designation as safe, both at EU and national level, may be made with exceptions for specific parts of its territory or clearly identifiable categories of persons.

Applying the SCO concept requires an individual assessment and may only be considered in cases where applicants are nationals of a designated SCO, or, in the case of stateless persons, had their habitual residence there. Furthermore, the concept may only be applied when the applicant has not submitted any serious grounds for considering the country not to be safe in his or her particular circumstances. When an applicant fails to submit overriding reasons as to why their country of origin or former habitual residence is not safe for them, the application may be rejected as (manifestly) unfounded.

In the case A. v Migrationsverket, the CJEU ruled that, when a Member State has not implemented the SCO concept in their domestic legal order, the application cannot be rejected as manifestly unfounded on the grounds that the applicant is from an SCO. For a claim to be expedited as 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. According to the European Council on Refugees and Exiles (ECRE) network of non-governmental organisations, compared with other asylum applicants, nationals of listed countries will have a higher burden of proof to meet, as opposed to the shared burden of proof normally applicable in asylum procedures.

Under the new regulation, applications must be examined in an accelerated examination procedure, and completed within a maximum of three months, where a country may be considered an SCO for the applicant; the use of the border procedure should be optional for the Member States. In the H.I.D. and B.A. case, the CJEU ruled that for the sake of non-discrimination between applicants for whom different types of procedures apply, the accelerated procedure must not deprive applicants of the basic principles and guarantees set out in the Asylum Procedure Directive. The new regulation maintains the possibility of accelerated examination of applications from unaccompanied children from SCOs; a fact criticised by ECRE.

As regards the suspensive effect, a court or tribunal will have the power to decide, following an examination of both facts and points of law, whether or not the applicant is allowed to remain on the territory of the Member States, pending the outcome of the remedy on the applicant’s request.

Member States may retain or introduce legislation that allows for the national designation of SCOs other than those designated at EU level. Where a third country is suspended from being designated as an SCO at EU level, Member States must not designate that country as an SCO at national level.

Member States are required to notify the Commission and the European Union Agency for Asylum (EUAA) of the third countries designated as safe third countries or SCOs at national level on the date of application of the regulation, and immediately after each designation or changes to the designations.

**Member States' SCO lists**

The common EU-level SCO list seeks to reduce existing divergences in national SCO lists and discourage abusive applications with unclear motivations. According to the new Common Procedure Regulation, which will start to apply in 2026, the transposition of the SCO concept is mandatory for all Member States.

So far, according to the 2022 EUAA report, SCO lists have been introduced in 19 EU countries. Not having adopted SCO lists, Bulgaria, Lithuania, Portugal and Romania do not apply the concept. In Latvia and Spain, no legal provision exists on the designation of a national SCO list, while in Poland, the concept is not defined in law.
EU candidate and potential candidate countries represent the top five SCOs on national lists in EU Member States. However, their recognition rate as SCOs varies between Member States, ranging from 17 lists for Albania, to four and three for Moldova and Türkiye respectively (see Table 1 below).

Table 1 – Candidate and potential candidate countries on EU Member States' SCO lists

<table>
<thead>
<tr>
<th></th>
<th>Albania</th>
<th>Bosnia and Herzegovina</th>
<th>Georgia</th>
<th>Kosovo</th>
<th>Moldova</th>
<th>Montenegro</th>
<th>North Macedonia</th>
<th>Serbia</th>
<th>Türkiye</th>
<th>Ukraine</th>
</tr>
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<tbody>
<tr>
<td>How many Member States include country in their SCO lists</td>
<td>17</td>
<td>16</td>
<td>14</td>
<td>15</td>
<td>4</td>
<td>16</td>
<td>16</td>
<td>16</td>
<td>3</td>
<td>0</td>
</tr>
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Data source: European Union Agency for Asylum, 2022

Countries tend to designate a country of origin as safe when they receive relevant numbers of applicants from that country. Accordingly, the differences in national lists somewhat reflect the differences in applicants’ countries of origin in Member States.

Member States frequently define exceptions for certain regions or categories of asylum-seekers in a country of origin. In these cases, Member States apply the standard asylum procedure in line with the Asylum Procedure Regulation, and not the SCO concept. Exceptions for certain geographical areas concern for example Armenia in relation to Nagorno-Karabakh, Georgia in relation to Abkhazia and South Ossetia, and Moldova in relation to Transnistria, to name but a few. Exceptions for certain profiles of asylum-seekers are usually applied to specific groups and vulnerable people, including LGBTIQ+ applicants, minorities, political activists, journalists, human rights defenders, women and girls.

Accordingly, national SCO lists are heterogeneous, and some Member States do not apply the concept at all. The uneven use of accelerated procedures leads to different recognition rates for similar asylum applications. Moreover, this encourages asylum-seekers to apply for asylum in host countries where the chances of success are higher.

Stakeholders have criticised this kind of nationality-based examination as an approach focused more on migration prevention than on protection. Furthermore, according to some, civil society is seldom engaged in national procedures used to choose which countries to include on national SCO lists. Procedures for establishing these national lists also differ significantly between Member States, as countries have different authorities responsible for designating safe countries and different avenues for challenging or verifying these designations. The criteria used and the sources on which national authorities base their decisions remain unclear and opaque, while disparities and a lack of clarity regarding the process for designating a country as safe raise questions about possible political agendas driving the establishment of these lists.
MAIN REFERENCES

ENDNOTES
1 The ‘safe country of origin’ concept is different from a ‘safe third country’ concept. The ‘safe third country’ rule does not address the question of whether the asylum-seeker was safe in the country of origin. It simply asserts that the asylum-seeker should (in view of the country applying the rule) have applied for asylum somewhere else, usually in a country the applicant has transited and that is considered capable of offering him or her adequate protection against persecution or serious harm. It is for that other country to decide whether the asylum-seeker has sufficient grounds to be considered a refugee, or to receive another form of protection. For that reason, EU asylum law classifies the ‘safe third country’ rule as a rule determining the admissibility of an asylum application, not its merits.
3 Until the Russian invasion of February 2022, Ukraine, too, was designated as a SCO in nine EU+ countries (EU Member States plus Iceland, Norway and Switzerland). Subsequently, Ukraine was either removed from national lists, or the implementation of the designation was suspended.