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Safe or Not? Some Much-Awaited Clarification on the Designation of Safe Third Countries of Origin by the CJEU (GC, *4 October 2024, Ministerstvo vnitra České republiky, odbor azylové a migrační politiky, C-406/22, EU:C:2024:841*) *

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A. Facts and Ruling

This ruling of the Court of Justice of the European Union (CJUE) concerns the interpretation of the concept of "safe country of origin" as included in Directive 2013/32/EU on common procedures for granting and withdrawing international protection (hereafter, "the Procedures Directive").
There are three main issues on which the Court rules in this landmark judgment. First, the referring court asks whether the fact that a third country has availed itself of the provisions of Article 15 of the European Convention on Human Rights (ECHR) (derogation from obligations under the Convention in time of emergency) means that it can no longer be considered as a safe country of origin within the meaning of the Procedures Directive. Second, it also wonders whether that directive prohibits Member States from designating a country as a safe country of origin only in part of its territory, subject to a territorial exception. Third, should the assessment of any of these previous questions reveal that EU law precludes the classification of a country of origin as safe, does the Procedures Directive require the referring court to raise this issue *ex officio*?

1. Facts, National Proceedings, and Questions Referred for a Preliminary Ruling

On 9 February 2022, the applicant, a native of Moldova, applied for international protection in the Czech Republic. In his application, he recounts witnessing a fatal hit-and-run, after which unknown individuals assaulted him. Following this attack, he went into hiding. Later, he found his home burned down. Fearing for his safety and citing a

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lack of police action, he fled Moldova to the Czech Republic using a false Romanian passport. He feared returning due to threats from his attackers. The applicant was also concerned over regional instability following Russia's invasion of Ukraine.
By decision of 8 March 2022, the Ministry rejected the applicant's international protection application as manifestly unfounded under domestic asylum law. In fact, the Czech Republic considered Moldova to be a safe country of origin by decree, with the exception of Transnistria. During the appeal proceedings, on 9 May 2022, the Brno Regional Court granted the suspensive effect on the asylum rejection decision because, in Moldova, he would run the risk of suffering serious harm from private individuals who had already caused him harm in the past. Moreover, on 8 May 2022 pro-Russian separatist troops in Transnistria went on state of alert and Moldova derogated from its obligations under the ECHR. Following the Russian invasion of Ukraine, Moldova informed the Council of Europe that it would temporarily suspend certain obligations under Article 15 of the Convention, including the right to freedom of expression.

2. The Court's Decision on the Three Questions

Under these circumstances, the Regional Court of Brno referred three questions to the Court of Justice for a preliminary ruling. We will analyse the questions separately.

– Is it possible for a third country to derogate from the ECHR in accordance with Article 15 and remain "safe"? Yes, but…

The first question relates to events that occurred while the asylum seeker was already on the territory of the Czech Republic as a result of the ongoing conflict between Russia and Ukraine. The referring court reflects on the fact that Moldova has activated the mechanism provided by Article 15 ECHR, which gives the possibility to derogate from the obligations of that Convention in the event of "war or other public emergency threatening the life of the nation".
Partially following the conclusion of the Advocate General, the CJEU states that a third country does not cease to fulfil the criteria enabling it to be designated as a safe country of origin according to Article 37 of the Procedures Directive for the sole reason that it invokes the right to derogate from the obligations laid down in the EHCR (§§ 54–55). The Court leans its reasoning on the guarantees enshrined in Article 15, which prevent the violation of international law and serious violations of human rights. Indeed, the Convention holds firm the prohibition of exceptions to the right to life, the prohibition of torture and inhuman and degrading treatment, slavery and the principle of legality. However, the Court observes that this invocation undoubtedly reveals a significant change in the way rights and freedoms are protected in the derogating country. For this reason, it is required that the competent authorities of the Member State assess, in any case, whether the *current* conditions might challenge the designation of the country in question as safe.

– Can a safe country of origin be such if parts of its territory do not meet the safety criteria? No, but only for now

By its second question, the national court asks, in essence, whether Article 37 of the Procedures Directive must be interpreted as precluding a third country from being designated as a safe country of origin except certain parts of its territory. The question is central and highly significant. The Court follows a straightforward and clear interpretative reasoning grounded in the provision's wording. Considering not only the terms, but also the context, the objectives pursued by the rule and its genesis, the Grand Chamber of the

CJEU concludes that, under the Procedures Directive, the Member State cannot exclude certain parts of the territory from the presumption of safety. The most convincing (and simplest) argument is the one based on the evolution of the provision. While Article 30 of the former Procedures Directive 2005/85 expressly provided for the possibility for a Member State to designate as safe even *only a portion* of the territory, this possibility was explicitly repealed, in 2013, in the recast Directive (and also justified in the Commission's proposal). Nevertheless, this possibility reappears in Article 61 of the new Regulation 2024/1348. This Regulation was formally adopted in May 2024, together with the other instruments of the Pact on Migration and Asylum, but will only apply as of 12 June 2026.

The Court emphasises the legitimate discretion of the Union's legislator to conduct a balancing exercise, in compliance with the principle of proportionality, between the need to rapidly examine applications from safe countries and the right of asylum seekers to have access to an adequate assessment of their claim. But because the safety designation has significant consequences on the procedure, allowing applications from such countries to be subjected to a special regime of a derogatory nature (e.g. accelerated procedures, rejection in the form of manifest inadmissibility, limitation of the suspensive effect of the appeal), the interpretation of these derogation rules has to be strict and rigorous (§§ 70–71). This constitutes another important teaching of the judgment.

– Must the national court consider *ex officio* that the designation of the country as safe is contrary to EU law, without requiring an objection on the part of the applicant? Yes, always

To answer the third question, the Court mobilises Article 46(3) of the Procedures Directive, in light of Article 47 of the Charter of Fundamental Rights. When a court reviews the rejection of an international protection application from a country designated as safe, it must examine all relevant conditions for that designation. This is applicable even if the applicant has not explicitly raised this issue during the appeal. Concerning the scope of the right to an effective remedy, the Court focuses on the meaning of *a* "full and ex nunc examination of both facts and points of law". Referring to its *Alheto* ruling (C-585/16), the Court reminds that Member States are obliged to adapt their national law so that the domestic court can evaluate all elements that enable it to make an up-to-date assessment of the case, even subsequent to the decision on the application. These include the material conditions for the designation of the third country as safe, as set out in Annex I of the Directive (see also the definition of safe country of origin, EMN Glossary).

B. Discussion

This is the first time the Court has ruled on the concept of safe country of origin, apart from case A (C-404/17) regarding a purely procedural point on the need for Member States to adopt a list in their national law. The Court only referred to *A* in § 47 of the ruling under examination to confirm the relative presumption of country safety, consistently disproven by the individual contrary evidence of the applicant. This current ruling, as I will try to explain in this short commentary, could have a significant impact on the Member States' approach to the designation of such safe countries of origin. The judgment has already had some consequences on the suspension of accelerated and border procedures in Italy, raising extensive debate about the role of national judges in evaluating safe country national lists.

1. Different Implementation of the Concept of Safety

As reported by Advocate General Emiliou, the concept of "safe country of origin" forms part of a broader category of related concepts which also include "first country of asylum", "safe third country" and "European safe third country", all covered in the Procedures Directive (AG's opinion, § 40). In essence, Member States can use these concepts to make their asylum procedures more efficient. They all introduce some form of derogation from the main rules that otherwise govern the examination of international protection applications. However, their legal consequences differ (on this topic, EUAA 2022).

Since their emergence in the 1990s, these concepts have been subject to criticism by several scholars on the basis that they may lead to the curtailment of the international protection applicants' right to an adequate examination of their situation (see, *ex multis*, Goodwin-Gill 1992; Hunt 2024 and Costello 2016). At the same time, when coupled with the appropriate safeguards, these concepts have also been considered as improving the expediency of the asylum procedures by allowing States to concentrate their resources on the examination of applications from non-safe countries of origin.

Due to the lack of agreement on a standard EU-wide list of safe countries of origin, the implementation of this concept widely varies. Member States have broadly adopted the concept with 19 Member States using it. The map drawn up by the EUAA clearly shows the differences between Member States: despite a general consensus on the top 5 safe countries of origin (Albania, Moldova, Montenegro, North Macedonia, Serbia, Turkey) discrepancies prevail among the rest. The risk is an application of the concept influenced by the different migration flows (as regards migrants' country of origin) involving the different Member States.

The significance of this CJEU's ruling stems directly from this diversity in the concept's application. It is of paramount importance that Member States comply with the obligation to review their national safe country of origin lists and check the fulfilment of security requirements and respect for human rights, case by case, for each country included in the list. Following the answer to the second question, in the present case, the referring court will now be able to assess the situation of Moldova as safe *in its entirety*, considering that on 11 April 2024 Moldova notified the Council of Europe of the termination of the derogation regime under Article 15 ECHR.

2. The CJEU's Rejection of Partial Safety Designations and Possible Impact

Concerning possible exclusions of parts of a country of origin's territory, the Court's negative decision is entirely acceptable, undeniably linked to the wording of the rule. Despite this, several Member States have continued (§ 14 of the summary of the request for a preliminary ruling) to apply the concept of safe country of origin by excluding *some territories of a particular country* and *some groups of people from the same country*, following the possibility given by the former 2005 Directive (as well as the indications given by UNHCR, e.g. with regard to vulnerable persons such as women, minors, LGBTQ+, human rights defenders, etc.). This is not surprising, since in fact the application of the rule in these terms, as also emphasized by the Court, has been re-

proposed by the new procedural Regulation 2024/1348, in the second paragraph of Article 61.
On the other side, but the Court of Luxembourg has not ruled on this point, what certainly remains possible is the case-by-case assessment, even under the Procedures Directive, during the personal assessment of the specific conditions of a particular applicant. That country, generally considered safe in its entirety, is not safe for him or her for a specific reason. As a result, there is the possibility of overcoming the relative presumption of safety (Article 37 of the Procedures Directive, § 3).
Otherwise, territorial exceptions or group exceptions are actually used by several Member States to balance the need to speed up the processing of asylum applications with the protection of applicants from conflict zones or with special individual situations (namely for parts of Armenia, Bosnia and Herzegovina, Georgia, Moldova, the USA and India). With this judgment, the Court now declares these exceptions unlawful. Does this mean that if such exceptions exist, the country of origin in question is no longer safe? Or is it just a question of the drafting method of the lists, since the presumption of safety is relative and can be overcome in practice by an applicant with certain subjective situations?
The impact of the Court's ruling will thus be relatively short in time, as it will only concern applications submitted under the 2013 Procedures Directive regime, which will remain in effect for approximately another year and a half. Unfortunately, this will once again lead to a fragmented application of EU asylum law, subject to constant reforms and changes, which naturally follows the rules of application of laws over time. In other words, this means that the same asylum seeker coming from a country considered safe in its entirety with an application registered in May 2026 could be subjected to an entirely different asylum procedure than a compatriot applying in July 2026. This would be possible if the portion of the territory from which they come is excluded from the presumption of safety or if they belong to a clearly identified and excluded group.
A request for preliminary reference lodged by the Ordinary Court of Florence on 4 June 2024, currently pending before the CJEU (C-388/24, *Oguta*), concerns the possibility of excluding *certain groups of people* from the application of the concept of safe country of origin and all its procedural consequences (which are stringent for asylum seekers). It is true that the Court did not merge the cases but still, under the same Procedures Directive, it is difficult to imagine a different outcome from the one stated in the judgment under comment. In a nutshell, what the Court upholds – but only and solely under the 2013 Procedures Directive – is that if a country is considered safe, it is safe in its entirety and in general terms, thus without exceptions.

3. National Courts' Role in the Examination of the Material Conditions of Designation: Is It Fair?

Leaving aside the already underlined possibility for the individual applicant to overcome the presumption of safety, the interpretation of the third question on the effective remedy could have serious consequences from an institutional point of view. While the designation of safe countries of origin is clearly the duty of the government, the scrutiny of the "substantive conditions" for designating a third country as safe falls on the national judiciary, which shall examine the legitimacy of the designation incidentally. Does this mean that the judge is invested with the possibility of deciding on the safety of the

country *tout court*, thus overriding the assessment made by the government? This point is not clear in the CJEU's ruling, but crucial.
In the immediate future, the solution given by the Court will have relevant consequences for the dis-application of both border and accelerated procedures, which are central to the general framework of the new Pact on Migration and Asylum. For example, this argument is present in the press release of the Ordinary Court of Rome, which did not validate the detention of 12 Egyptian and Bangladeshi nationals who should have been hosted in the newly opened Hotspot centre in Albania (a consequence of the Italy-Albania Protocol of November 2023 – on the topic see De Leo, 2024), within the highly experimental externalisation procedure. The judges justify their decision due to the impossibility of recognising as "safe" the countries of origin of these asylum seekers, interpreting the duty of the national judge to scrutinise the procedure for designating the countries of origin as safe, in general, without examining the merits of asylum applications. In Italy, the list in 2024 counted 22 countries of origin, which recently decreased to 19 as a result of the CJEU's judgment in comment. A few days later, on October 25th, the Court of Bologna referred a preliminary ruling to the CJEU (case C-750/24) regarding the new government decree on safe countries. The court sought clarification on the criteria that should be applied when assessing a country's safety and the importance of considering the persecution of minorities in this determination.
The judges' questions are legitimate and must be considered within the European context. In the ruling commented here, the Court even noted that certain derogations from fundamental rights under the ECHR might not be relevant to safety assessments (§ 62). If the designation criteria are intended to be uniform, as outlined in Annex I of the Directive, how is it that possible that such significant differences exist in the manner each Member State interprets safety? Moreover, how can we assume that each national judge, exercising freedom of judgment (if you'll pardon the pun), could consistently validate or reject such diverse applications while adhering to the principles of uniformity?
Indeed, an important consequence of the judgment in comment could be to make Member States responsible for a more considered, up to date and transparently justified choice on the designation of countries as safe. Such designation would avoid the institutional collision that could arise whenever a national judge is led to question that designation during the examination of an asylum claim.

Concluding Remarks: Increasing Inequalities

This is one of those cases where what remains implicit in the ruling may carry more weight than the words themselves. It is clear that the lack of a common EU list of safe countries of origin certainly does not contribute to a uniform application of these concepts within the Common European Asylum System, and this ruling helps to corroborate that impression. Regarding the method of designation, the security assessment and the role of the national court, the Court's interpretation will also be binding on Member States under the new Regulation. On the contrary, this will not be the case for the Court's answer to the question on territorial exceptions, which are only forbidden under the current Procedures Directive.
Surely, having as many different lists as there are Member States, from 2026, with even the possibility of excluding some parts (even different ones?) and some identified groups (which ones and with which unitary criterion?) will represent a challenge capable of interfering with the principles of equality and legal certainty. The temptation for Member

States to draw up "convenient" lists based on statistics of the composition of migration flows according to migrants' country of origin could be even greater, in order to accelerate the asylum application process. Once again, national judges will be at the forefront in assessing the validity of the designation of safe country of origin made by the authorities, raising the risk of inconsistent application of the rules on a case-by-case basis. This task places a significant burden on national courts, carrying a legal and political responsibility that might be more effectively managed by the European Union.

C. Suggested Reading

To read the case: CJEU (GC), 4 October 2024, *Ministerstvo vnitra České republiky, odbor azylové a migrační politiky*, C-406/22, EU:C:2024:841.

Case law:

- CJEU, 25 July 2018, *Migrationsverket*, C-404/17, EU:C:2018:588.
- CJEU, 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584.

Doctrine:

- Costello, C., "Safe country? Says who?", *IJRL*, Vol. 28, Issue 4, 2016, pp. 601–622;
- De Leo, A., "Managing Migration the Italian Way: The 'Innovative' Italy-Albania Deal under Scrutiny", *VerfBlog*, 29 October 2024;
- Goodwin-Gill, G. S., "Safe country? Says who?", *IJRL*, Vol. 4, Issue 2, 1992, pp. 248–250;
- Hunt, M., "The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future", *IJRL*, Volume 26, Issue 4, December 2014, pp. 500–535;
- Peers, S., "'Safe countries of origin' in asylum law: the CJEU first interprets the concept", *EU Law Analysis Blog*, 14 October 2024;
- Venturi, F., "Italy's 'safe countries of origin' legislation under CJEU scrutiny: challenging the (un)safety", *Diritti Comparati*, 4 July 2024.

Other sources:

EUAA, "Applying the Concept of Safe Countries in the Asylum Procedure", December 2022.