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European Council
on Refugees and Exiles

CREATING MORE "SAFE" COUNTRIES AND FRONTLOADING THE PACT

ECRE'S ANALYSIS OF THE PROPOSED AMENDMENTS TO THE ASYLUM PROCEDURES REGULATION COVERING SAFE COUNTRIES OF ORIGIN, FRONTLOADING THE PACT AND SAFE THIRD COUNTRIES, AND THE POLITICS BEHIND THE MEASURES.

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INTRODUCTION

The reform of the EU's Common European Asylum System (CEAS) concluded in 2024, the Pact on Migration and Asylum ("the Pact"), includes changes to the use of the safe country concepts in EU asylum law. These concepts include the safe country of origin concept, whereby applicants from countries that are safe have their applications processed rapidly and/or in a border procedure; the first country of asylum concept applied when an applicant has received international protection in a third country; and the safe third country concept, which is used to facilitate the transfer of an applicant to a third country designated as safe for them where they can receive protection. The safe country of origin and safe third country concepts are constructions of EU law rather than being derived from international law. While they are used in relation to different groups of applicants, all three concepts are deployed in EU asylum law as a means of limiting the number of people who receive international protection in the EU.

Despite the expanded use of these concepts already envisaged by the Pact, largely as a result of pressure from EU Member States, the European Commission presented new reforms to the Asylum Procedures Regulation (APR) in 2025. The APR alongside other parts of the Pact will become from July 2026. The proposals would further encourage the use of safe country concepts and bring forward – "frontload" – the application of certain parts of the legal framework agreed by the Pact. The amendments would be binding on the Member States with the exception of Denmark and Ireland. Although Denmark opts out of the APR, it has nonetheless led efforts to reform the safe third country concept in the Regulation. Ireland is likely to opt in and apply the proposals as it has done for the Pact as a whole.

This policy paper analyses the 2025 reform proposals and presents ECRE's recommendations. It considers, first, the Proposal for a Regulation amending Regulation (EU) 2024/1348 as regards the establishment of a list of safe countries of origin at Union level (2025/0101), published in April 2025 and covering proposals on safe countries of origin and on frontloading, which are analysed in Sections I and II of this paper. It then assesses the Proposal for a Regulation amending Regulation (EU) 2024/1348 as regards the application of the 'safe third country' concept (2025/0132) in Section III.

Overall, ECRE does not see any value in the amendments proposed. They are based on efforts to outsource responsibility to countries outside the EU which are generally unwilling to assist the EU and, relatedly, already host more displaced people per capita than almost all EU Member States. They also raise serious concerns regarding respect for fundamental rights both for nationals of presumed safe countries of origin and people transferred to presumed safe third countries. In addition, the amendments on safe third countries serve to further distance EU law from international law. The likely consequence is not that people are transferred to third countries but rather that they endure periods of prolonged uncertainty and limbo, accompanied by denial of rights in Europe, while futile efforts are made to transfer them elsewhere. Frontloading certain measures detached from the legislation of which they form part creates legal uncertainty and incoherence. It appears unrealistic to agree the proposal and bring forward the measures significantly before they are due to come into application in June 2026, thus rendering them redundant. All the measures add further complexity to the legal framework, primarily to the already lengthy and complicated APR, and increase the burden on the courts.

The amendments are largely the result of pressure from Member States seeking to minimise their responsibilities and to detract from the implementation of the Pact; they are a response to some states' demands for "innovative solutions" which tend to be anything but. Rather than producing more unnecessary legislation, the EU institutions and agencies should focus all efforts on implementation of the reforms that have already been agreed, and which come into full application in 2026, and on compliance with the current legal framework, given the continued, widespread and often flagrant disregard for EU asylum law and international law across the continent. There seems little sense in producing more law in order to placate states which refuse to respect the law that is in place.

ANALYSIS

I. SAFE COUNTRY OF ORIGIN PROVISIONS

Article 1(1) of amending Regulation 2025/0101 introduces three main changes to the APR. First, it establishes that the EU common list of safe countries of origin envisaged by the APR should be created and come into effect as soon as the Pact instruments apply in 2026. Second, it adds the provision that EU candidate countries are to be classified as safe countries of origin at EU level unless one or more of three circumstances apply. Third, it provides that seven other countries which appear in an annex to the proposal are to be designated as safe at EU level. These countries are Bangladesh, Colombia, Egypt, India, Kosovo, Morocco and Tunisia. For the second and third provisions, Article 61 of the APR which defines safe country of origin for use at the national level is disapplied for the EU common list.

The rationale for the creation of the EU common list appears in Recital (2). While Recital (1) summarises the provisions of the APR whereby specific rules apply to applicants from safe countries of origin, Recital (2), explains that it is necessary "to strengthen the application" of the concept and to "address the divergences between Member States' national lists." An EU list should therefore be established before the APR becomes applicable in June 2026.

The APR in Article 62 already introduced the possibility of an EU common list of safe countries of origin and explains the inclusion in and suspension from the list. The list is to be drawn up by the Commission with assistance from and on the basis of information provided by the EU Asylum Agency (EUAA). The concept itself has existed in law since 2005. The APD and related case law require Member States to lay down in national law the concept of safe country of origin. The APR intends to expand the use of the concept through the creation of the EU common list, which has been proposed before but never realised.

The definition of the concept and the considerations that should inform the assessment of a country as safe appears in APR Article 61. According to the proposed amendment, the definition will continue to apply for national lists but not for at least parts of the EU common list.

Regarding EU candidate countries, Recital (6) explains that candidate countries are granted that status by a unanimous decision of the Council following a recommendation of the Commission. They have been "found to have advanced towards reaching the stability of institutions guaranteeing democracy, the rule of law, human rights and the protection of minorities". They can "therefore" be designated as safe.

As per Article 1(1)(a) of the proposal, there are three circumstances in which the presumption of safety of candidate countries does not hold: risks to life due to indiscriminate violence in situations of conflict; restrictive measures have been adopted against the country by the EU; and the protection rate for nationals of the country concerned is higher than 20%.

ECRE analysis

Candidate countries

ECRE notes a range of concerns with the creation of a presumption in law that EU candidate countries are safe. Candidate status as a threshold for safety is both low and of limited legal relevance to asylum law. A country can acquire candidate status following limited reforms and with relatively low levels of democracy and respect for the rule of law. While the decision is based on an assessment and recommendation by the European Commission and includes reference to democracy, the rule of law and human rights, it does not include a systematic analysis of legal standards of relevance to protection. Designation as a candidate country indicates only that a country is advancing towards and aspires to reach the conditions for membership in the Copenhagen Criteria, including the political criterion of "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities."[1]

The decision to grant candidate status is often highly political in nature, rather than based on a rigorous objective assessment, as with the recent decisions to classify Ukraine and Republic of Moldova as candidate countries. The threshold required for candidate status is uncertain rather than representing an objective legal

1. The general conditions and principles for membership of the EU are set out in the Treaty on European Union (TEU) at Article 49 and Article 6(1). The criteria for accession to the EU that have shaped the Accession process since the mid-1990s are known as the Copenhagen Criteria being agreed at the Copenhagen European Council in 1993. The Criteria were set in the context of post-Communist transition in Europe during the 1990s. They are the end goal for candidate countries, to be met at the end of the Accession process when the country is deemed ready to join, with progress towards the criteria measured during the process.

standard. The Preamble of the proposal on safe countries of origin at Recital (4) refers to the Copenhagen Criteria but this is of limited relevance. The standards in the Criteria are the target for the candidate countries; they may take years or even decades to reach these standards. That they are aiming for these standards says nothing about the current situation.

It is also possible that a country experiences significant regression in terms of standards even after it has been classed as a candidate country – or indeed after it has joined the EU. During the Accession process, significant backtracking can take place, as has occurred in the case of Türkiye on a number of occasions and more recently in the case of Georgia. The situation in Serbia is also relevant, with trend towards repression accelerating following wide-scale protests.[2]

Finally, further linking the Accession process with the fraught question of asylum is also likely to undermine one of the EU's few successful external policies, including by allowing for the intrusion of Member States' migration-related objectives into the Commission-led process.

Recommendations

Overall, for these reasons, ECRE recommends that the co-legislators do not accept this amendment.

If the amendment is pursued, safeguards need to be robust enough to ensure that candidate countries which are – or become – unsafe are not included on the list. In this respect, the three safeguards (a), (b) and (c) in Article 1(1)(a) which rule out the designation of the country as safe are welcome but do not go far enough. The first safeguard is intended to preclude the designation as safe of a country experiencing armed conflict, be that international or internal conflict, and was presumably included to exclude Ukraine from the scope of the measure. The wording mirrors that of the Qualification Regulation, which establishes that a situation of indiscriminate violence resulting from armed conflict creates eligibility for subsidiary protection status. It is correct and coherent with the CEAS as a whole to exclude countries in these circumstances from the list of safe countries of origin.

Similarly, concerning the second safeguard (b), it is also right that a country be excluded from the list if it is subject to restrictive measures – i.e. sanctions – under Title IV, Part Five of the TFEU. Such measures are used by the EU to bring about change in situations where a third country is breaching international law, including violations of human rights, rule of law or democratic principles. As a tool, sanctions tend to be reserved for situations where the most severe violations are taking place, and it is likely that concerns relative to international protection are present.

In terms of the third safeguard (c), if the protection rate is above 20%, then it is right that a country should not be included, however 20% at first instance may constitute quite a high level of protection overall. Although it is not specified, it is presumed that the reference is to 20% at first instance for the statuses in EU law, refugee status and subsidiary protection status. Taking into account decisions made at second and further instances and protection statuses available in national law, the overall percentage of applications awarded a protection status could be 30% or even up to 40% or 50%. While reliable figures for second instance decision-making broken down by nationality are not available for most EU Member States, the average rate of overturning of negative decisions on review has been around one-third for many years.[3]

Recommendations

ECRE recommends either to specify that 20% should be the overall protection rate after the legal process is complete and national protection statuses are taken into account, or that the protection rate should be set at 10% at first instance for international protection statuses in EU law.

2. The European Commission's 2024 Enlargement Package notes serious concerns regarding the rule of law, judicial independence, and democratic governance in both Türkiye and Georgia. The reports highlight setbacks in fundamental rights, media freedom, and political polarisation, particularly in Georgia, where the situation has deteriorated significantly in 2024. See: European Commission, 2024 Enlargement Package, 30 October 2024, available here.

   On Serbia, multiple sources have documented democratic backsliding in recent years, including increased pressure on civil society and media, electoral irregularities, and centralisation of power. See: Freedom House, Nations in Transit 2024 – Serbia, available here; European Parliament resolution of 7 May 2025 on the 2023 and 2024 Commission reports on Serbia, available here.

3. ECRE. Asylum statistics and the need for protection in Europe: Updated Factsheet, December 2022, available at: http://bit.ly/4nuR4l6; Eurostat, migr_asydecfp.

Safety beyond the candidates

The amendment in Article 1(1)(b) adds seven other countries to the list, as per Annex II which is included with the proposal. A summary of the findings of the assessments carried out by the EUAA for each country, along with the sources on which they are based, are included in the proposal. However, none of the original assessments conducted by the EUAA have been made publicly available, nor has the Commission provided any information on the criteria used to determine which countries should be included in the list.

There are several concerns in relation to the proposed amendment.

First, based on evidence available from independent sources[4] on several countries on the list, ECRE doubts the designation of these countries as safe. At the very least, it is clear that even with low protection rates, the countries are unsafe for certain of their citizens and habitual residents. The Commission acknowledges in the explanatory memorandum to the proposal that concerns exist for particular groups or regions within the countries included on the proposed EU list, yet it does not propose any exceptions for these groups or areas. A detailed analysis of the specific country contexts is beyond the scope of this paper.

Second, ECRE questions the value of amending the APR to designate countries as safe without applying the criteria set out in Article 61. The APR was adopted in 2024 and there is no reason to claim – and none is set out – that developments since then render it irrelevant.

Finally, setting different standards for designation as safe for national lists and for the EU common list is inconsistent and confusing.

Recommendations

For these reasons, ECRE recommends that the co-legislators do not accept this amendment.

II. PROVISIONS ON FRONTLOADING

Amendment to frontload provisions on designation of countries as safe

Article 1(2)(a) introduces an amendment to the APR which would allow but does not require Member States to bring forward provisions on the use of safe country of origin and safe third country concepts such that countries in the two categories can be designated as safe with exceptions for particular areas of the territory or for specific categories of people.

The rationale for bringing forward the measure, such as it is, appears in Recital (19), it is "in order to take into account complex and actual situations in third countries…".

The APR provision was included to allow for a wider number of countries to be classified as safe, given that currently Member States might be precluded from doing so due to the presence of conflict in part of the country, the existence of secessionist regions beyond the control of the state or due to targeted persecution against specific categories of people.

When the Pact was agreed, there was no suggestion that these measures be brought forward; they are due to come into full application along with the rest of the Pact in June 2026. In the meantime, the Commission prepared a letter to allow Member States to frontload elements of the Pact which included bringing forward the provisions on border procedures. The Regulation would provide a stronger – and arguably necessary – legal basis for Member States' decisions to frontload.

While specific reasons are not provided as to why these measures should be brought forward, beyond the general need to encourage the use of safe country concepts, the explanation is likely to lie with political and legal developments. First, the Italy-Albania deal has faced obstacles that derive from the definitions of safe

4. For example, Amnesty International reported that Bangladesh's July 2024 protests resulted in mass arrests, torture, and extrajudicial killings, including of students and journalists, with more than 200 fatalities and over 10,000 arrests – Amnesty International, Bangladesh: Thousands of protesters arrested arbitrarily, 2 August 2024, available at: http://bit.ly/3I7U86w; in Tunisia, a sharply escalating crackdown on opposition, media, NGOs, and migrants has been documented since 2023 – this included politically motivated trials, arbitrary detention of over 80 individuals (among them prominent journalists and rights defenders), and repeated abuses against Black migrants – see, for example, HRW, Tunisia: Authoritarian Drift Erodes Rights, 11 January 2024, available at: http://bit.ly/4eEFiAQ; serious concerns have also been flagged in Egypt over repression of civil society and migrant rights – see, for example, Amnesty International, Egypt 2024 , available at: http://bit.ly/46pTRWB; HRW, Egypt – Events of 2024, available at: http://bit.ly/3G6ats1.

country of origin and the Commission is politically required to maintain Italy's support for the Pact and has also spoken positively about the agreement as a model. Italian courts have found that various elements of the deal and its implementation are unlawful, including that certain countries cannot be designated as safe because to do so would rely on assessing them as safe with exceptions for certain parts of the territory which is not currently allowed under EU law. The processes foreseen in the arrangement with Albania can only be used for nationals from safe countries of origin. The Italian courts have also made a number of references to the Court of Justice of the EU (CJEU) on these questions. Among these, two cases (*Alace* and *Canpelli*), have been fast-tracked by the Court.[5]

Second and relatedly, since the adoption of the Pact, the CJEU found against an EU Member State (the Czech Republic) following a preliminary reference concerning the definition of the safe country of origin concept (C-406/22). The CJEU found that a Member State can only designate a whole country, not just parts of it, as a "safe country of origin". The Court interpreted the APD to require that a country can only be designated as safe if it is safe in its entirety. It based this finding on the wording of the APD 2013 and the intentions of the co-legislators when deciding not to include provisions which would have allowed the designation of safety with the exclusion of some parts of the territory. The APR will allow this, as well as the designation of a country as safe except for specific categories of applicants. Bringing forward these elements of the APR allows Member States to expand the use of the concept earlier and might be an attempt to protect the Italy-Albania deal from challenges related to the application of provisions regarding safe country concepts.

Amendment to frontload the use of accelerated and border procedures

The second amendment at Article 1(2)(b) of the proposed Regulation would allow but not require Member States to bring forward provisions on the use of accelerated and border procedures. Specifically, Member States may apply the 20% protection ground for the use of accelerated or border procedures. This refers to the provisions in the APR which render it mandatory to apply the accelerated procedure when the applicant is a national or habitual resident of a third country where the EU-wide average rate of granting international protection is 20% or below according to the latest Eurostat data. Under the APR it is also mandatory to apply the border procedure to the same category of applicants up to a certain minimum number (the Member State's "adequate capacity").

The amending Regulation would allow Member States to bring forward the ground at Article 42(1)(j) of the APR and the same provision but for unaccompanied children that appears at Article 42(3)(e), meaning that they could choose to render it mandatory for applicants from countries where the protection rate is 20% or below to be channelled into the accelerated and/or border procedure.

As per these articles of the APR, the ground cannot be applied when a "significant change" has occurred or when the applicant "belongs to a category of persons for whom the proportion of 20% or lower cannot be considered to be representative of their protection needs…".

ECRE analysis

ECRE opposes frontloading as it allows for selective implementation of the Pact by bringing forward certain measures and not others. There are three main risks in doing so.

First, the Pact consists of complex legislative proposals which were agreed by the co-legislators on the basis of multiple amendments. The amendments include safeguards which form an integral part of the legal content of the legislation and of the political agreements that underlie their adoption. Here, provisions are brought forward without the requisite safeguards also being brought forward. This creates the risk of violations of the fundamental rights of applicants, and particularly due process rights.

For safe countries of origin, the Regulation also brings forward the provision at Article 61(5)(b) which stipulates that the concept may only be applied provided that the applicant is not in "a category of persons for which an exception was made when designating the third country as a safe country of origin", a small safeguard. This is not the case for the safe third countries, where the procedural guarantees are not frontloaded at all, even though the fundamental rights risks of the use of the concept are greater. At the very least, if the Article allowing the use of a wider concept of safe third country is frontloaded, then the related procedural guarantees should also be frontloaded. In fact, procedural guarantees and other safeguards are to be found throughout the APR text, ranging from the reinforced guarantees for applicants in Chapter II, to the list of exemptions in Article 53, but also less prominent elements, such as requirements on documents in Article 29, on the transfer to other procedures if time limits run out or if the case prove to be complex in Article 51 or the reference to the

5. CJEU, Case C-758/24, Alace and Case C-759/24, Canpelli.

suitability of accommodation in Article 54.

The second risk is that frontloading disrupts the delicate balance among the interests of the Member States which was also a precondition for the conclusion of the negotiations. While more relevant to the point on border procedures, it is also the case that bringing forward the wider definitions of safe countries may be in the interests of certain Member States rather than others.

In relation to frontloading the grounds for the use of special procedures, it should be noted that the mandatory asylum border procedure was one of the most controversial of the measures in the Pact and the 20% protection rate as a ground for applying the accelerated and border procedures was only proposed in the amendments to the APR proposal presented in 2020. For the European Parliament, agreement on the expanded and in some circumstances mandatory use of the border procedure was conditional on the inclusion of a range of procedural safeguards. In parallel, for certain Member States, agreement on the expanded use of the border procedure was conditional on the inclusion of balancing elements in other legislation, and notably provisions on solidarity in the Asylum Migration Management Regulation (AMMR) and the Crisis Regulation. It was clear throughout the negotiations – and indeed in the very concept of the Pact – that the legislation was a package deal. To allow selective implementation disregards this integral aspect of legislative process.

Finally, the proposal allows for the earlier use of safe country concepts in a way that seems designed to circumvent recent judgments of national courts mentioned above and the CJEU oversight. As such, the measures could be perceived as undermining the CJEU and the Italian courts at a time when courts and the rule of law are under attack across Europe.

Legal uncertainty and incoherence

More broadly, bringing forward limited provisions from one piece of legislation detached from the rest of the APR and from the full package of legislation creates legal uncertainty and incoherence. Up until June 2026, the APD is in application, as is the Dublin Regulation, the Qualification Directive and so on. It is uncertain how particular elements of the APR can be integrated into the existing legal framework. The amendment proposed in Article 1(2)(b) specifies that the 20% protection rate ground may be used when the Member States are applying the accelerated examination procedure as per APD Article 31(8) or the border procedure as per APD Article 43. However, whichever theory of legislative interpretation is used, legislation is to be interpreted as a whole, based on its objectives, and with articles read in the context of the full legislation. Similarly, implementation of legislation by a state would generally be based on implementing the full piece of legislation as it is intended as a coherent whole.

The proposed Regulation amends a forthcoming Regulation, which will not be in application for another year, but elements of it are extracted and supposed to be applied in conjunction with the current legal framework. As such, it creates a strange mix-and-match approach which disregards the objectives and internal logic of the APR and the Pact as a whole.

Timing rendering frontloading redundant

Given the limited time available before the APR enters into full application, the value of proposing legislation to frontload elements of it, can also be questioned. The Regulation would be in application from the day after it is published in the official journal. Given the time it will take for the co-legislators to carry out their work of analysis, scrutiny, amendment, negotiation and agreement, it seems very unlikely that the text would be adopted before spring of 2026, not long before the measures are due to be applied in any case. It should also be noted that Member States may already apply accelerated and border procedures under certain circumstances as their optional use is provided for in the APD, further suggesting the redundancy of the proposal.

Given the limited practical value of the frontloading amendments, it may be that the reasons for these parts of the proposal lie in political considerations. Since the adoption of the Pact, certain Member States have been clamouring for “innovative solutions” based on outsourcing responsibility to other regions; some have argued for new asylum legislation, particularly on the issue of “instrumentalisation”. Some Member States, notably Poland and most recently and concerningly Germany, are disregarding EU law, adopting laws and applying practices that are flagrantly in breach of EU primary and secondary law. In this context, the Commission has struggled to keep the focus on implementation of the Pact. The provisions on frontloading could be seen as an attempt to maintain Member States support for the Pact by bringing forward elements valued by one or more key Member State.

While such political consideration might lie behind the proposal, ECRE remains doubtful about the tactic of making legal changes for political reasons when such changes generate legal uncertainty and incoherence.

The likelihood of such measures persuading recalcitrant Member States is questionable. ECRE instead recommends renewed efforts to enforce the law through recourse to infringement proceedings and a stronger political response to flagrant violations of the current legal framework, as well as encouraging implementation of the Pact through the use of the financial and assessment power at the Commission's disposal.

Recommendations

For all the reasons outlined above, ECRE recommends that the co-legislators do not accept the proposed provisions on front-loading.

III. AMENDMENTS ON SAFE THIRD COUNTRIES

Background to the proposal

The APR provides for an expanded use of a revised concept of safe third country. The optional use of the concept is allowed under the APD but in practice it has been used infrequently by EU Member States.[6]

While integrated into EU law, the safe third country concept is not part of International Refugee Law. It operates on the basis that an applicant for international protection could have obtained or could obtain international protection in a state outside the EU and therefore the EU Member State where they have made an asylum application is allowed reject the asylum claim as inadmissible.

The logic is similar to that of the first country of asylum concept, which concerns refugees who have already obtained and can again avail themselves of protection in another country. In contrast, when the safe third country concept is applied, the applicant has not previously received protection in the third country, but the argument is made that they both could and *should* receive protection there. In EU law, it is applied as a ground for declaring an application inadmissible, meaning that the asylum application does not progress to a full examination of the merits of the claim. Instead, a rejection decision is issued and – in theory – the applicant should be transferred to the safe third country. According to the APR, the decision must be taken within two months and can be taken in the asylum border procedure as well as in the regular procedure.

When the EU Member States agreed on the Council General Approach on the APR in June 2023, they were unable to reach agreement on some elements of the revision of the safe third country concept and notably on the connection criterion – the requirement that there be a meaningful link between an applicant and a country before it can be classified as safe for the purposes of providing international protection for them. As a compromise that allowed the APR to progress, the connection criterion was maintained with a review foreseen in the monitoring and evaluation provisions in APR Article 77, to take place one year after the adoption of the Pact.

The review, led by the European Commission, was thus due to conclude in June 2025, however it was brought forward with a legislative proposal presented in May 2025. It summarises the findings of the review and describes the options considered. Two key amendments are then proposed.

Removal of the mandatory connection criterion

First, Article 1(1)(a) and (b) amends Article 59(5)(b) of the APR on the "connection criterion". The current APR text, following the APD, requires that there must be a connection between the applicant and the country "on the basis of which it would be reasonable for him or her to go to that country" as a condition for the application of the safe third country concept. The proposal, instead, provides three conditions, any one of which is sufficient, as follows:

(b) one of the following conditions is met:
- i) there is a connection between the applicant and the third country concerned, on the basis of which it would be reasonable for him or her to go to that country;
- ii) the applicant has transited through the third country concerned;
- iii) there is an agreement or an arrangement with the third country concerned requiring the examination of the merits of the requests for effective protection made by applicants subject to that agreement or arrangement.

6. AIDA, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, available at: http://goo.gl/tuHh2D; AIDA Country reports, available at: https://asylumineurope.org/reports/.

Thus, it is no longer mandatory for there to be a connection between the applicant and the country. There are two alternatives. First, transit through the country would suffice. Alternatively, an agreement or arrangement with the country is sufficient where it requires the examination of the merits of the request for "effective protection" made by those subject to it. This would be an agreement or arrangement between the EU or the EU Member State and a third country whereby that country undertakes to examine the protection application.

Article 1(1)(b) adds two subparagraphs to the APR text at Article 59. The first subparagraph includes a reference to the best interests of the child and excludes unaccompanied children from the scope of the third of the three conditions, the existence of an agreement or arrangement. This means that the safe third country concept can still be applied to unaccompanied children but only where there is a connection between them and the country or transit through the country, not on the basis of an agreement or arrangement.

The second subparagraph requires Member Stares to inform the Commission and other Member States *prior* to concluding an agreement or arrangement of this type.

Weakening appeal rights

The amendment at Article 1(2) amends appeal rights when an inadmissibility decision has been taken on the basis of the safe third country concept. APR Article 68(3) on the right to remain is amended to include these cases, meaning that an applicant who receives a rejection as inadmissible following application of the safe third country concept will no longer have the right to remain during an appeal. The automatic suspensive effect of the lodging of the appeal is removed. Instead, the applicant will have to apply to be allowed to remain at the same time as they lodge the appeal, with a five-day deadline for making the request. The deportation is then suspended pending the court's decision on whether to allow the person to remain until the legal process is concluded.

The amendment would bring the rules on appeal rights for inadmissibility decisions based on application of the safe third country concept in line with inadmissibility decisions taken on other grounds (specifically under Article 38(1)(a), first country of asylum, (d) safe relocation by an international court or tribunal, and (e), missing the seven-day deadline for an application following a return decision, and 38(2) subsequent applications with no new elements). Only Article 38(1)(c) is not included (protection granted by another Member State).

It is worth noting that - likely by mistake -, the proposed amendment to Article 68(3) only excludes unaccompanied children subject to the border procedure (i.e. those who are considered a security risk) from its application, but not all other unaccompanied children, who would thus not benefit from the right to remain.

ECRE analysis

Reduction in the required level of protection

The 2025 reform proposals need to be considered in the context of the overall changes that are brought about by the APR, including a significant erosion of the notion of safety. Compared to the APD, the APR changed the definition of safety by introducing the concept of "effective protection", whereby a country can be classified as safe if it has signed and ratified the Refugee Convention of 1951 *or* if five other criteria are in place[7], which constitute a lower level of protection. This contrasts with Article 38(1)(e) of the APD, whereby it was necessary that the applicant could request and obtain refugee status in accordance with the Geneva Convention.

ECRE strongly argues against further changes to the definition of safety as the threshold set by the APR already falls below that required by international law. In ECRE's view, a third country can only be considered as safe if it has ratified and respects the Refugee Convention because it alone establishes in international law

7. These criteria are in place when the people concerned:
   - are allowed to remain on the territory of the third country in question;
   - have access to means of subsistence sufficient to maintain an adequate standard of living with regard to the overall situation of that hosting third country;
   - have access to healthcare and essential treatment for illnesses under the conditions generally provided for in that third country;
   - have access to education under the conditions generally provided for in that third country; and
   - effective protection remains available until a durable solution can be found.

   Then, the definition of safe third country has four cumulative criteria, including the need for effective protection to be available for the person. A third country may only be designated as a safe third country where in that country: (a) non-nationals' life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) non-nationals face no real risk of serious harm as defined in Article 15 of Regulation (EU) .../...+; (c) non-nationals are protected against refoulement in accordance with the Geneva Convention and against removal in violation of the right to protection from torture and cruel, inhuman or degrading treatment or punishment as laid down in international law; (d) the possibility exists to request and, where conditions are fulfilled, receive effective protection as defined in Article 57.

the legal obligations that constitute the provision of international protection. The safe third country concept – if it is to be applied at all – should only be applied with respect to countries that have ratified the 1951 Geneva Refugee Convention without any geographical limitation. Long-standing jurisprudence from Switzerland is illustrative in this respect, ruling for instance that a person cannot find actual protection in a country that maintains geographical limitations on the Convention.[8]

Allowing the substitution of protection in accordance with the Refugee Convention by the second definition of "effective protection" has already undermined the EU's commitment to the Convention and its authority as the cornerstone of the global protection regime.

As well as the representing a standard below the required level set in the Convention, the second definition of effective protection represents a "pick-and-choose" approach to the Convention. In ECRE's view, this is excluded because Contracting Parties are only allowed to make reservations as allowed under the strict rules of the Convention.[9] ECRE also questioned the compatibility of the definition of effective protection with the requirement in Article 78(1) TFEU for the EU's common policy on asylum, subsidiary protection and temporary protection to be "in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties", with the right to asylum laid down in Article 18 of the CFREU, and the objectives of the APR itself.

Process and proposed changes

The two amendments were chosen from four presented by the Commission in an informal discussion with the Member States in January 2025 while the review was underway. The four are as follows (repeating the terms used by the Commission):

1. Revision of criteria for the existence of the required level of protection (definition of "effective protection") in the third country concerned.
2. Reduction of procedural guarantees ("due process").
3. Removal of suspensive effect of legal remedies in additional cases.
4. Removal or revision of the connection criterion ("connecting element").

While the wording of APR Article 77 does not specify which elements of the safe third country concept were to be reviewed, the context for the introduction of the review was a disagreement concerning the connection criterion. It also notes that "targeted amendments" should be proposed "if appropriate". Thus, in terms of the scope of the review, confining it to the connection criterion would have been a possibility. Instead, a broader analysis was undertaken, also covering the level of protection and procedural rights. According to records of meetings of the Member States, some argued for a wider review covering multiple aspects of the concept and its use, and the identification of these four changes suggests an attempt by the Commission to limit the scope of the review.

Nonetheless, in ECRE's view, reviewing elements of the concept that were decided during the legislative process should have been excluded, given the risk of an undemocratic re-opening of legislation which has been adopted in accordance with the EU's legislative rules. In addition, the broader scope of the review may be construed as an intrusion into the role of the CJEU in reviewing EU law, rather than falling within the mandate of the Commission or the Member States.

For procedural as well as substantive reasons discussed below, ECRE therefore rejects the amendments that change applicants' appeal rights when inadmissibility decisions are taken.

The connection requirement

The main change provided for – and the focus of most attention – is the change to the connection criterion. During the review, the Commission evaluated three options: deletion of the connection criterion, its replacement with a transit requirement and further specification of what is entailed by the connection. The final result is a combination of these options. The mandatory requirement of the connection is removed as there are three conditions and only one needs to be in place – a connection, transit through the country or an agreement or "arrangement" with the country whereby it agrees to examine the claim for "effective protection".

8. Swiss Asylum Appeals Commission, Decisions EMARK 2000/10 and 2001/14.
9. According to Article 42 of the 1951 Geneva Convention, States can only make reservations at the time of signature ratification or accession to articles of the Convention other than Articles 1, 3, 4, 16(1), 33, 36-46.

A legal necessity?

Debate has centred on the contention that the connection is not "legally necessary", including frequent repetition of out of context citations of UNHCR's analysis.[10] The role of the connection criterion should be examined in wider legal context. First, while it is true that there is no reference in International Refugee Law to the connection criterion, that is largely because the safe third country concept itself does not appear in international law. Second, the absence of a reference to a specific element does not mean that anything is permitted – the legal requirements for the use of safe country concepts are to be derived from the wider body of international, EU and – where relevant – national law.

The safe third country concept lacks a clear legal basis in the Refugee Convention. It is rather a product of administrative practice of asylum authorities developed over the years, which aims at shifting protection responsibilities to other countries arguably in contravention of the Convention's vision of a global protection system for sharing responsibility and one within which refugees are primarily the responsibility of the state where they are present.

In ECRE's view, the use of the concepts is premised on a flawed interpretation of the 1951 Refugee Convention as not allowing any choice for the refugee with regard to the state of refuge but requiring the refugee to request protection at the earliest opportunity, a misconception which also underlies the EU's system for allocating responsibility. Whereas the Refugee Convention does not provide for an unfettered right to refugees to choose their host state, no obligation to apply in the first country refugees reach after fleeing their country of origin can be derived from the Convention either. According to UNHCR, the primary responsibility to provide protection rests with the state where asylum is sought.[11] In this regard, it should be noted that UNHCR EXCOM conclusions call upon states to take asylum seekers' intentions as to the country in which they wish to request asylum "as far as possible into account", while "regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State."[12] Yet this is precisely what the safe third country concept and the proposed amendments seeks to achieve: the refusal of an asylum claim on the basis that protection could be available elsewhere, regardless of the applicant's intentions or ties.

The assertion that the connection is not strictly required under international law also disregards international agreements such as the 1996 Hague Convention on Measures for the Protection of Children, where connection is used as a concept triggering protection obligations. According to Article 8 of that Convention, a state where a child is present may request another state to assume jurisdiction and take protection measures on the basis of the existence of a "substantial connection" between the child and the requested state.

From the perspective of International Human Rights Law, it is unclear how people would access their rights if sent to a country with which they have no connection, given that this may imply no contacts, no relatives, and no knowledge of the language. Even if protection is in theory available it is likely to not be effective in practice in these circumstances. The risk of violations is exacerbated by the new definition of effective protection. The four-point alternative to Convention-level protection omits many basic human rights. If the level of protection is low and there is no connection between the applicant and the country, the risk is heightened. Thus, with a lower threshold of safety, the connection criterion acts as a safeguard to prevent transfer to a country where a person would be at risk and its removal will increase these risks.

Recommendations

Given that the standard of protection afforded by third countries which are considered as safe is already below that of the Refugee Convention which already generates significant risks for applicants and undermines international law, ECRE rejects the further erosion of standards constituted by the removal of connection criterion.

Practical obstacles and consequences

In practical terms, proposals to simply delete the connection requirement too easily ignore the importance of existing ties with a particular country for a person's successful integration and lead to onward movement, including to other EU Member States. Moreover, they assume that third countries are willing to accept – and

10. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, 2018, available at: http://bit.ly/3TkpoBO.
11. UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements for asylum-seekers, Division of International Protection, May 2013, available at: https://goo.gl/xLPq1l, para. 1.
12. UNHCR, *EXCOM Conclusion No. 15 (XXX), Identifying the Country Responsible for Examining an Asylum Request*, available at: https://bit.ly/3VEkpww, p. 443.

able to provide for - those rejected in the EU. Poor implementation of readmission and other migration agreements with third countries suggest this is wishful thinking for the majority of countries, even with resort to considerable and morally questionable financial and political compensation.

ECRE strongly recommends rejection of further expanding or encouraging the use of the safe third country concept, given its dubious origins. It may also encourage third countries, including the major refugee-hosting countries, to follow Europe and adopt the concept or other measures to limit access to protection on their territories. Thus, protection space, rather than being expanded, will shrink globally at a time when forced displacement is at record levels. Given its contested legal basis and political implications, at most the safe third country concept should be an optional tool for use in prescribed circumstances with sufficient safeguards in place; removing the connection criterion goes in the opposite direction.

Transit as an alternative condition

Whether mere transit can constitute a sufficient connection on the basis of which it would be reasonable to send an applicant to a third country was extensively debated in 2017/2018 in an earlier phase of the reform. The original APR proposal of 2016 provided that transit would be sufficient to meet the connection requirement with certain qualifications, stating that the connection can be assumed on the basis that the "applicant has transited through that third country which is geographically close to the country of origin of the applicant".[13]

In ECRE's view, transit cannot be considered sufficient to fulfil the connection requirement. As emphasised by UNHCR, transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful connection or link with a country.[14]

The CJEU in FMS and courts in several Member States including Austria, the Netherlands, Bulgaria and Greece (including after a Council of State ruling which recognised the status of Türkiye as a safe third country), have ruled that mere transit does not constitute a sufficient connection. Stronger links are required, such as presence of family members with which the applicant still has contact, or prolonged stay or residence.[15]

Transit does not thus constitute a connection; for the same reasons neither does it serve as an adequate substitute equivalent to a meaningful link with the country. The same risks of violations as described above are likely to arise.

While the APD does not specify the type or extent of connection between the applicant and the third country except to say that it must be "sufficient",[16] the APR refers to the "reasonableness" of transferring an applicant. ECRE maintains its position that a meaningful link with the third country is necessary. In practice, what constitutes a meaningful link will depend on many factors and should be assessed on a case-by-case basis, also taking into account the specific vulnerability of the applicant.

National courts have also interpreted the connection with a country narrowly. The Swedish Migration Court of Appeal, for instance, has found ethnicity and mother tongue to be insufficient evidence per se of such connection, even where the applicant's ethnicity would facilitate the acquisition of citizenship in the third country.[17] In Sweden, Austria, Bulgaria, the Netherlands and Greece, the existence of a sufficient connection is interpreted as requiring more than mere transit through the third country concerned, such as for instance the presence of family members.[18]

De-harmonisation

Allowing a choice for Member States reflects their different views – some Member States have insisted in the removal of the connection criterion however some believe it is important and in the case of France it is a

13. With respect to the connection requirement in the recast Asylum Procedures Directive, a Commission Communication relating to the implementation of the EU-Turkey Statement mentions, in a politically rather opportunist fashion that "it can also be taken into account whether the applicant has transited through the safe third country in question, or whether the third country is geographically close to the country of origin of the applicant", without, however, submitting that this is sufficient to comply with Article 38(2) recast Asylum Procedures Directive. See European Commission, *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, COM(2016) 85, 2 February 2016, available at: https://bit.ly/4bipBfk, p. 18.
14. See UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016, available at: https://bit.ly/4ct1NGk.
15. FMS, ibid. para. 157.
16. See Recital (44) recast Asylum Procedures Directive, which refers for the definition of "sufficient" connection to national law.
17. See Swedish Migration Court of Appeal, MIG 2011:5, 10 March 2015, available in Swedish at: https://bit.ly/4cvTFFh.
18. This is the case in Greece for instance. See ECRE, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, available at: http://goo.gl/tuHh2D, p. 21.

constitutional requirement. By providing three options, inconsistency will result.

More de-harmonisation – considering also that Member States will retain the possibility to establish national lists of safe third countries, will likely lead to increased onward movements within Europe, as asylum seekers would try to reach countries where they would have more chances of seeing their asylum application examined. Fragmentation will also be exacerbated if agreements with third countries are made bilaterally by Member States rather than at the EU level. Removing the connection criterion further incentivises such bilateral deals, giving Member States with stronger diplomatic ties disproportionate leverage and increasing the risk of de-harmonisation and unequal treatment across the EU.

Encouraging the use of inadmissibility assessments

The removal of the connection criterion as a safeguard should be assessed in conjunction with the other legal changes brought about by the Pact.

First, the new legal framework foresees an expanded use of inadmissibility assessments so that fewer applicants will have access to an in-merits assessment of their asylum claim. Inadmissibility assessments are a tool for limiting access to protection in Europe, given that in recent years most applicants will receive international protection if able to access a fair, in-merits procedure.

The first iteration of the APR, launched in 2016, provided for mandatory use of inadmissibility assessments including on the basis of first country of asylum and safe third country concepts. The 2020 amendments to the APR proposal removed the requirement to apply the inadmissibility assessment with safe country concepts in the border procedure, although it remained in the regular procedure. Finally, both co-legislators amended what is now APR Article 38(1) to remove the mandatory use of inadmissibility assessments combined with safe country concepts.

In the final text of the APR, Article 38(1) contains may clauses rather than shall clauses: the determining authority may assess the admissibility of an application and it "may be authorised under national law" to reject the application as inadmissible when the grounds listed apply. Nonetheless, it must be underlined that, given the revived prominence of these concepts in Member State discussions and proposals in 2023 and 2024,[19] it is very likely that at least some Member States use the option of issuing inadmissibility decisions on the basis of the first country of asylum and safe third country concepts. Thus, significant risks to the right to asylum in Europe remain. In its assessment of the new legislation, ECRE underlines its view that all applicants should have access to an in-merits examination of the asylum claim, otherwise a strong risk of refoulement pertains.[20]

In this context, ECRE strongly rejects the removal of the connection criterion because it may encourage Member States to choose to use inadmissibility assessments since they will no longer be required to demonstrate a meaningful link between the applicant and the purportedly safe country. It further widens the pool of people to whom inadmissibility assessments can be applied.

It should be noted that Member States must respect the CJEU's judgment in case C-134 *Elliniko Symvoulio*, which rules that rejections must not be issued when third countries are not re-admitting people. The judgment interprets the APD, but it remains directly relevant to the APR as the same provisions appear after the reform.

Further erosion of appeal rights

In ECRE's view, removal of the automatic suspensive effect of an appeal against an inadmissibility decision on the grounds of the safe third country concept would significantly increase the risk of refoulement. It would erode the right to an effective remedy to a level below that is no longer effective and which is below what is required by EU primary and secondary law and the jurisprudence of the European Courts. It would also add to the administrative burden on the Member States and particularly courts, as another group of people will need to request the right to remain during the appeal rather than there being an automatic suspension of the deportation during the appeal process.

The right to an effective remedy could be further undermined if the provision on the suspensive effect of return appeals in the recently proposed Return Regulation was adopted. These issues are explored in more detail in

19. See for example the letter of 15 Member States, *Joint Letter for the undersigned Ministers on new solutions to address irregular migration to Europe*, 15 May 2024, available at: https://bit.ly/45AIrye.
20. ECRE, Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, October 2024, available at: http://bit.ly/4IuZIOF.

ECRE's Comments on the APR and on the proposal for a Return Regulation.[21]

In addition, an alignment between the appeal against inadmissibility decisions based on the application of the first country of asylum concept and those based on the application of the safe third country concept was not agreed to by the co-legislators. The decision was taken to apply different rules in these cases. When examining the use of the concept, the reasoning behind the decision to maintain a distinction can be understood: while not without risks, the use of the first country of asylum concept poses a lower risk of violations including refoulement. In this case, the applicant previously benefited from effective protection (at Convention-level or the lower APR level of "effective protection") and they are able to again avail themselves of protection. If the person had previously benefited from protection, it constitutes a far greater guarantee of their safety than if they are merely able to request and – if eligible – receive protection. Thus, it is reasonable that the APR draws a distinction between the appeal rights in the two cases.

If the automatic suspensive effect is removed for the safe third country concept there is a risk that a person is removed without ever accessing anything akin to a fair asylum procedure. Thus, the right to a fair hearing is not respected. First, the rejection is based on an inadmissibility assessment – there is no access to an in-merits examination. Second, if the second definition of effective protection is used, there is a risk that the country is in fact not safe for the person because it does not offer Convention-level protection. The assessment is carried out in just two months which may not provide sufficient time for a thorough assessment. Third, if they decide to appeal the decision, they may be removed before the appeal is completed because they will have to lodge a request to remain within five days while at the same time preparing the appeal, and they may or may not be allowed to remain.

In terms of political and legislative questions, the negotiation of the APR took place over eight years. As one of the most controversial of the proposals, it was subject to disagreement among the Member States and between the two co-legislators. The need for suitable procedural guarantees was an issue of extensive debate throughout and the final agreement was only reached based on the strengthening of procedural guarantees. To strip procedural guarantees through the review – which was not discussed as an option when the review was included in the APR – would be undemocratic as it would be to disregard the conclusion of the legislative process.

Recommendations

ECRE therefore calls on co-legislators to reject the proposed amendment of appeal rights.

21. ECRE, Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, October 2024, available at: http://bit.ly/4luZIOF; ECRE, Comments on the Proposal for a Regulation of the European Parliament and the Council Regulation establishing a common system for the return of third country nationals staying illegally in the Union, June 2025, available at: http://bit.ly/4lzq7Ll.

CONCLUSION AND RECOMMENDATIONS

ECRE does not see the value in either of the two Regulations proposed to amend the APR. They are intended to respond to political pressure for “innovative solutions” from the certain Member States rather reflecting the changes to the context or legal necessity.

Provisions on frontloading and on further changes to the use of safe country concepts will generally introduce additional complexity to the APR and contribute to Member States pursuing inconsistent approaches.

In terms of frontloading, ECRE is strongly opposed to selective implementation of the Pact since it involves bringing forward certain measures detached from the legislative instrument and full package of reforms. This would allow for implementation of restrictive measures without the requisite safeguards that form an integral part of the legal text and the political agreement that underlies it.

The provisions on safe countries of origin disregard the test for safety, which is part of the APR by creating the presumption that candidate countries are safe and designating other countries as safe on the basis of non-transparent assessments.

The removal of the connection criterion threatens the global protection system by allowing transfers to countries with which applicants have no meaningful ties, increasing risks of human rights violations. The simultaneous weakening of appeal rights further undermines access to effective remedies, compounding concerns raised by previous Pact provisions.

Finally, such proposals are also unlikely to achieve the intended outcomes. Instead, they will likely create prolonged legal uncertainty for asylum seekers and incentivize the formation of questionable agreements with countries that do not uphold fundamental rights, further undermining protection standards.

While politics lie behind the proposals, ECRE is not persuaded that amending the APR before it comes into application will enhance Member States’ support for the Pact; the opposite seems likely – legislative change is a distraction from preparation for implementation of the law and from addressing current non-compliance.

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