European Commission

European Migration Network

COMPARATIVE OVERVIEW OF NATIONAL PROTECTION STATUSES IN THE EU AND NORWAY

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This Synthesis Report presents the main findings of the European Migration Network (EMN) study 'Comparative overview of national protection statuses in the European Union (EU) and Norway'. The study explores the key characteristics of non-harmonised protection statuses and the types of national statuses granted by Member States and Norway to address a protection need not covered by international protection statuses as set out in the Qualification Directive or temporary protection in the Temporary Protection Directive.

The report includes an overview of national statuses granted by particular protection ground, reviewing the conditions and rights associated with each. It also considers commonalities and differences with the minimum standards established at EU level for the EU-harmonised statuses (refugee status, subsidiary protection and, in one case, temporary protection).

This assessment is timely, in light of efforts undertaken since 2016 to strengthen the Common European Asylum System (CEAS) to complement existing legal pathways to admit those in need of protection to the EU, including the proposed Union Resettlement Framework Regulation and, increasingly, other legal pathways for persons in need of protection.

KEY POINTS TO NOTE

1. **Of the countries that participated in this study, 20 Member States and Norway had at least one national protection status (as defined in the scope of this study)** in addition to those harmonised at EU level. This study identified **a total of 60 national protection statuses**.
2. **Limited statistics are available on national protection statuses granted by Member States and Norway**. However, Eurostat figures on authorisations to stay for humanitarian reasons suggest a five-fold increase in the number of national protection statuses granted between 2010 and 2018, following a similar trend to (positive) decisions on refugee and subsidiary protection statuses.
3. **Eleven Member States introduced changes to their legislation on national protection statuses between 2010 and 2018.** These changes often established more restrictive eligibility criteria or adjusted the national protection statuses to the amended EU acquis. In one case, the change had the effect of suspending the application of all available national protection statuses.
4. **National protection statuses cater for a wide variety of needs and situations, exceeding the grounds for international protection under the EU acquis.** These range from serious health conditions, to humanitarian and *non-refoulement* principles, to environmental disasters in the country of origin and the interest of a minor to remain on the territory of a State.
5. **The majority of national protection statuses are based on general humanitarian reasons**. This type of status was available in 15 Member States and Norway. Several more specific protection statuses exist, most commonly for exceptional circumstances (six Member States), the principle of *non-refoulement* (seven Member States), and medical reasons (seven Member States).
6. **The grounds for the national protection statuses remain largely undefined in national legislation.** This leaves a significant margin of discretion to competent authorities, potentially creating challenges for authorities in assessing applications, as well as for applicants when lodging a claim for national protection.
7. **A greater level of discretion is found in Member States' determination procedures than in EU-harmonised statuses.** In half of the statuses examined, asylum authorities are not involved, with other migration authorities or political bodies (president, national parliament) deciding which third-country nationals may access these statuses. In several instances, the application is not examined as part of the single procedure (either at the same time as an application for international protection or at the end of the international protection procedure) but, rather, in a separate procedure.
8. **In the majority of cases, the content of protection is similar to the minimum standards set in EU law**, particularly in relation to the duration of the residence permit, access to healthcare and integration services. **It is rare that national protection statuses offer more favourable standards than EU law.** This only applies to protection statuses available for children, notably in relation to the length of the residence permit and access to social benefits, and to constitutional asylum. When national protection statuses grant less favourable conditions than the EU-harmonised statuses, these chiefly relate to shorter duration of residence permits and restrictions to access the labour market, education, integration services and social benefits. Less favourable conditions were particularly evident in protection statuses granted for serious health reasons, *non-refoulement* principle, and environmental reasons.
9. **In about half of the Member States and Norway that have one or more national protection statuses, such statuses were the subject of debate**. Policy makers in some Member States, such as Sweden and Italy, argued for the abolition of all national protection statuses, claiming that the EU international protection covered all relevant protection grounds. By contrast, civil society often stressed the need to expand the scope of the protection grounds of national statuses, for instance to climate refugees or family members. Media debates predominantly focused on individual situations, raising ethical and emotional questions relating to the status of well-integrated irregular migrants or more vulnerable migrants, for example.

DG Migration & Home Affairs

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SCOPE OF THE STUDY

The study focuses on protection statuses granted to third-country nationals on the basis of national provisions that do not fall under international protection as established in EU asylum law (i.e. refugee, subsidiary and temporary protection). The temporal scope of the study is 2010-2018, with additional information included up to April 2019 where relevant.

The types of statuses considered include those granted on 'humanitarian grounds'. These are often a product of national policies and encompass a variety of situations, eventually decided by national authorities and judges, with varying levels of discretion. 'Humanitarian reasons' is not a defined concept, although references to humanitarian grounds can be found in the EU's subsidiary protection status, in the European Convention on Human Rights (ECHR), and in national provisions. Humanitarian reasons often refer to the state of health of a third-country national, protection against expulsion and the respect of the non-refoulement principle, deriving from State obligations under Article 3 of the ECHR, as enshrined in the jurisprudence of the European Court of Human Rights (ECtHR).

Some protection grounds were left outside the scope of the study. Notably, it does not consider protection grounds deriving directly from international law and for which there are specific EU instruments in place, namely protection for stateless persons and victims of trafficking in human beings or victims of violence, nor does it look at humanitarian visas. The study does not analyse statuses granted to third-country nationals who are considered non-removable due to the impossibility of technically carrying out the return (for lack of travel or identification documents, available transportation, etc.). Lastly, the study does not cover cases based on the right to family and private life, as enshrined by Article 8 of the ECHR and its interpretation by the ECtHR.

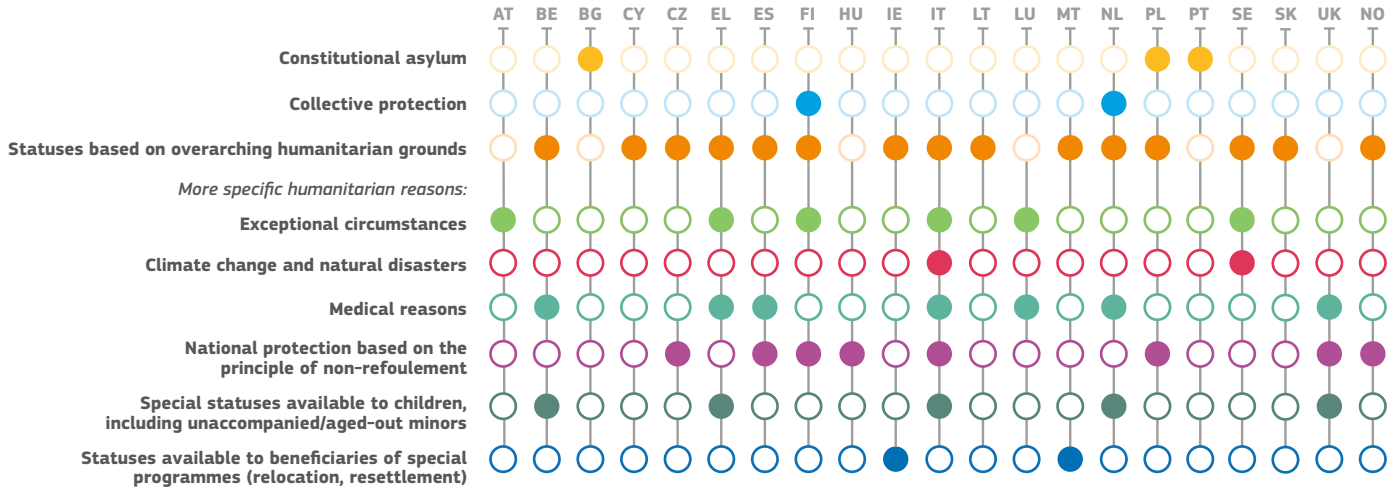
METHOD AND ANALYSIS

The information used in this Synthesis Report comes primarily from national studies prepared by 25 EMN National Contact Points (NCPs).[1] These national contributions were based on desk analysis of existing legislation and policy documents, reports, academic literature, internet resources, reports and information from national authorities. In some Member States and Norway, primary data collection was carried out through interviews with national stakeholders. The statistical information presented here was primarily sourced from Eurostat data, as well as national reports containing disaggregated data.

OVERVIEW AND MAPPING OF TYPES OF NATIONAL PROTECTION STATUSES

The EU asylum framework offers Member States the possibility to adopt non-harmonised statuses provided they do not undermine, and are compatible with, existing EU acquis. Of the 25 States participating in this study, 21 have at least one national protection status.

TYPOLOGY OF NON-HARMONISED PROTECTION STATUSES IN EU MEMBER STATES AND NORWAY



The non-harmonised protection statuses reported were divided into two main categories. The first group comprises constitutional asylum and collective protection, which were usually in place before the introduction of the EU-harmonised protection statuses. The second group consists of statuses based on humanitarian or compassionate grounds. This second category ranges from statuses based on rather generic legislative definitions to more specific statuses covering, for example, medical cases or national statuses based on the principle of *non-refoulement* and are thus situated at the interface between subsidiary protection and Article 3 ECHR. This second group also covers statuses based on very

1 AT, BE, BG, CY, CZ, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK, UK and NO.

specific grounds, such as those linked to natural disasters and climate change or made available to (unaccompanied) children.

Eurostat data on the 'authorisations to stay for humanitarian reasons' is used to give an indication of the scale of national protection statuses. These data show that the number of positive decisions increased five-fold from 2010 to 2019, with a peak in 2016, broadly following the trend in the total number of positive decisions on asylum applications.

CONSTITUTIONAL ASYLUM

Three Member States, Bulgaria, Poland and Portugal, have constitutional asylum as a national protection status. Each defines 'persecution' more broadly than the 1951 Refugee Convention, providing national authorities with greater discretion to grant asylum under their national law to a person who may be excluded from international protection. In practice, constitutional asylum as a national protection status is seldom granted.

Compared to EU-harmonised statuses, Portugal's content of protection offered to beneficiaries of constitutional asylum was the same or more favourable than refugee status. This included, for example, the validity of the residence permit and the lack of material requirements to reunite with family members. This was reinforced by the fact that the grounds for constitutional asylum were examined as part of a single procedure together with the grounds for international protection. In Bulgaria, while the content of protection was the same as refugees status, access to constitutional asylum was framed in a less robust procedure than for refugees, as the decision to grant the status was left to the discretion of the President of the State and the applicant could not appeal a negative decision. The level of protection offered under constitutional asylum in Poland was lower than EU-harmonised statuses, as beneficiaries did not have access to accommodation nor integration measures.

COLLECTIVE PROTECTION

Unlike other (national or harmonised EU) protection statuses, where the determination of the status is individualised, 'collective protection' is made available to a group of persons in need of protection. Two Member States (Finland and the Netherlands) have or had such national protection status. In Finland, the rationale underpinning this status is to enable the government to admit groups of third-country nationals based on 'special humanitarian grounds' or to 'fulfil international obligations'. No definition is attached to 'special humanitarian grounds', leaving the eligibility criteria deliberately undefined. Since its adoption in 2004, this status has been applied only rarely, most recently in 2015, when Finland agreed to review the case of 100 Syrian asylum seekers from Germany. The Netherlands had a collective protection status in place but abolished this category-based (or group) protection in 2014, as the government considered the 'collective' elements sufficiently covered by the existing EU international protection statuses, as well as by the provisions of the ECHR.

The discretionary nature of the status extends to the content of protection. Beneficiaries of this status in Finland do not automatically have access to the right to family reunification, as they would under the Temporary Protection Directive or under refugee status. Rather, their right to family reunification is considered by the government, on a case-by-case basis. However, the content of other rights - including access to the labour market, access to education and integration measures - is similar to the standards set in the Temporary Protection Directive and in the EU asylum acquis. Social assistance was not limited to 'necessary assistance' (Article 13 of the Temporary Protection Directive) or 'core benefits', suggesting more favourable treatment than beneficiaries of temporary protection and subsidiary protection.

PROTECTION BASED ON 'GENERAL' HUMANITARIAN GROUNDS

Of the 25 States that contributed to this study, 15 have national statuses that can be granted on humanitarian grounds. This category of national statuses refers to a broad 'humanitarian' need to cater for cases where the refugee status or subsidiary protection grounds did not apply. These statuses cover a variety of humanitarian or 'compassionate' cases, including prohibition of expulsion for the *non-refoulement* principle, health and medical needs, protection of minors, conflict and unrest in the country of origin, as well as considerations linked to their level of integration in the hosting country.

Three Member States (Italy, the Netherlands and Sweden) introduced changes to this type of protection status. In Italy, the status was discontinued in 2018 when legal reforms introduced a set of more specific protection grounds. In Sweden, the protection status on national grounds was suspended until 2021, following the adoption of the Temporary Act in 2016. In the Netherlands, the discretionary power of the Ministry of Justice and Security to grant a residence permit on humanitarian grounds was abolished in January 2019.

Several Member States grant this status on a discretionary basis. This is illustrated by the lack of specific criteria or list of grounds to determine who is eligible for this form of protection, as well as the discretionary competence of the national authorities issuing this type of national status.

Many of the national protection statuses on humanitarian grounds offer rights similar to the minimum standards set out for EU-harmonised subsidiary protection status, notably regarding the length of the residence permit and access to education and employment. For access to core social benefits, the level of protection is comparable to refugee status under EU law.

PROTECTION BASED ON EXCEPTIONAL CIRCUMSTANCES

Six Member States have a protection status for 'exceptional circumstances', established to offer protection to third-country nationals in exceptionally distressing circumstances that nevertheless do not fall under EU-harmonised statuses or other national protection statuses. Such situations include personal distressing circumstances impeding the expulsion of the third-country nationals (Luxembourg); emerging conflict or natural disaster in the country of origin (Italy and Finland); personal circumstances of a third-country national who, after living regularly in the country for a number of years, required a form of protection by the authorities (Austria). Finally, this status can be used as a residual option where no other EU or national status applies but it is deemed that the person needs to be given permission to stay (Sweden).

Similar to humanitarian grounds, these protection statuses are generally granted at the discretion of the national authorities. This is reflected in the criteria used to assess the eligibility of applications, as well as in their procedures. In some cases, the content of protection is similarly at the discretion of the competent national authorities. In Italy and Finland, for instance, the status can only be granted following the adoption of a government decision determining the specific exceptional circumstances to grant protection, the procedure to be followed and the rights to be granted.

Overall, the statuses granted on the grounds of exceptional circumstances do not provide more favourable conditions than those set out in the EU statuses, notably regarding the length of the residence permit and access to education, social benefits, employment and integration.

PROTECTION STATUSES AVAILABLE FOR CLIMATE CHANGE REASONS AND NATURAL DISASTERS

Only Italy and Sweden have a specific protection status in place for reasons of calamity or natural disaster, for third-country nationals who do not qualify for refugee status or subsidiary protection status.

Sweden's residence permit offers similar conditions to the harmonised EU refugee status, while that of Italy is comparable to EU subsidiary protection, although the status offers less favourable conditions, such as the length of the residence permit.

PROTECTION FOR MEDICAL REASONS

Protection statuses based on medical grounds stand on the fringe of EU asylum and national laws. The extent to which a serious medical condition could amount to subsidiary protection was the subject of recent rulings of the Court of Justice of the European Union (CJEU). This should be considered in conjunction with the ECtHR case-law on Article 3 ECHR, according to which protection against removal of seriously or terminally ill third-country nationals should be granted if certain conditions are met.

In line with the above, seven Member States – Belgium, Greece, Italy, Luxembourg, the Netherland, Spain and the United Kingdom – have a total of 11 protection statuses specifically for medical reasons. This status is granted in cases where a seriously ill third-country national requires tailored procedures and services, where a third-country national irregularly staying in the territory is suffering from a sudden illness requiring healthcare that cannot be provided in their country of origin, or where protection from expulsion or postponement of return are necessary as the third-country national is unable to travel due to the (serious) nature of their medical condition. The Netherlands has three protection statuses that depend on the duration of the medical condition (suspension of departure for medical reasons, stay for 'medical reasons' and 'after residence in connection with medical treatment').

These statuses have undergone no major changes since 2010. Belgium, however, introduced changes in 2015, to discourage the submission of multiple applications from the same person and thus increase efficiency in procedures. National authorities now apply a *prima facie* assessment of the seriousness of the illness and also assume that an application for this 'medical regularisation' status would imply withdrawal of any other pending applications on the same legal ground.

Overall, the national protection statuses for medical reasons do not offer more favourable conditions than EU-harmonised protection statuses. Member States applied similar to less favourable conditions than the harmonised subsidiary protection status, with some not providing access to the labour market, or restricting access to integration support. In the Netherlands, access to social integration support is restricted, as beneficiaries of this status are not expected. In Luxembourg and the Netherlands, where the status was designed to temporarily postpone removal, beneficiaries of suspension of departure for medical reasons do not immediately receive a formal residence permit, limiting their access to the labour market and family reunification.

PROTECTION STATUS ON THE BASIS OF THE NON-REFOULEMENT PRINCIPLE

The principle of non-refoulement can be taken into account at various stages of asylum and migration procedures. It is a core principle of international refugee and human rights law that prohibits States from returning individuals to a country where there is a real risk they will be subjected to persecution, torture, inhuman or degrading treatment or any other human rights violation. The Czech Republic, Finland, Hungary, Italy and Norway each have a national protection status that was granted on the basis of the principle of non-refoulement. With the exception of the United Kingdom, which redefined the conditions for granting this status in its administrative guidelines in 2013, all statuses were established before 2010.

In general, protection granted on the basis of the non-refoulement principle gives access to less favourable conditions and rights compared to the EU-harmonised statuses. An exception is the Czech Republic where the national subsidiary protection based on international obligations granted the same standards of protection as the EU-harmonised subsidiary protection status. In most Member States and Norway, where such status is in place, the validity of the initial permit is aligned with the standards set by the EU-harmonised subsidiary protection, and access to accommodation, social assistance and healthcare are aligned with the content of rights offered by international protection. However, the status does not envisage the long-term integration of beneficiaries, as suggested by the restrictions in access to the labour market, family reunification and mainstream integration support in some States.

PROTECTION STATUSES AVAILABLE FOR MINORS, UNACCOMPANIED AND AGED-OUT MINORS

National statuses for minors, and unaccompanied or aged-out minors are available in Belgium, Italy, the Netherlands and the United Kingdom. These statuses were all established in national legislation after 2010 and generally consist of forms of protection for underage children until they reach the legal age of adulthood.

Overall, these statuses offer similar conditions compared to EU subsidiary protection, whilst in some cases they offer similar or more favourable conditions than EU refugee protection. This was the case for the longer length of the residence permit in the Netherlands and the United Kingdom, and more favourable access to social benefits that exceeded the core benefits in the Netherlands.

PROTECTION STATUSES AVAILABLE FOR BENEFICIARIES OF SPECIAL PROGRAMMES (RELOCATION, RESETTLEMENT)

Only two Member States have a status in place for beneficiaries of special programmes such as relocation or resettlement: programme refugee status in Ireland, first established in 1996, and local subsidiary protection in Malta, created in 2016. These statuses seek to clarify the status of resettled persons and to grant a national form of protection.

Overall, these statuses offer the same or less favourable conditions than international protection. In Ireland, however, programme refugees are the only group given access to targeted orientation and integration support upon arrival.

MAIN DEVELOPMENTS SINCE 2010, CURRENT DEBATES AND CHALLENGES

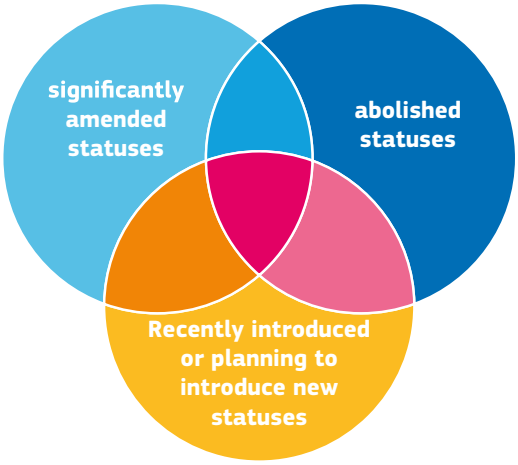
Since 2010, Austria, Belgium, Finland, Ireland, Italy, Malta, the Netherlands, Sweden and Slovak Republic introduced changes to their national statuses.

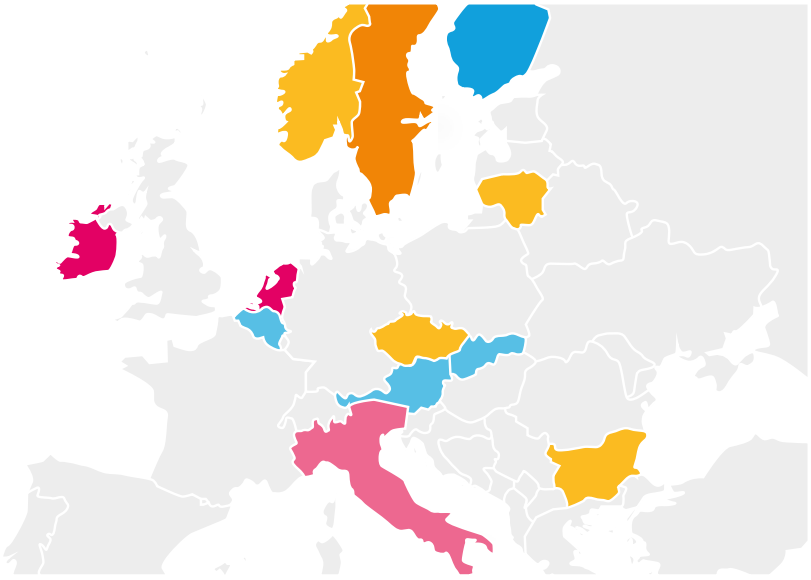
Member States typically introduced amendments restricting the eligibility criteria or tightening the procedures for some national protection statuses, such as humanitarian statuses in the Netherlands and Italy, protection available to unaccompanied minors in Finland and in the Netherlands, and protections available to individuals with medical conditions in Belgium. Sweden suspended the granting of national protection statuses entirely. In Finland and the Netherlands, the changes readjusted the scope of the national protection statuses in line with the eligibility grounds and content of protection set by EU-harmonised statuses.

The national protection statuses were the subject of debate in nine Member States. A common theme was the extent to which the scope of national protection statuses could be expanded and/or whether new ones could be added. Civil society in several Member States argued for expanding the scope of eligibility criteria to grant protection to larger categories of third-country nationals. Conversely, in other countries, for instance Italy and in Sweden, the public debate was rather dominated by policymakers' arguments in favour of reducing the scope of national protection statuses. Reporting in mainstream media mostly focused on individual stories to shine a light on the most vulnerable cases, such as children, migrants with health conditions, etc.

Public debates in Finland, Sweden and Norway also focused on the difficulty of ensuring a uniform practice in granting national protection statuses due to the wide definition of the protection grounds and the ensuing broad margin of discretion for authorities interpreting eligibility criteria.

CONTRIBUTION TO THE 2010 EMN AND 2019 STUDIES ON NATIONAL PROTECTION STATUSES





Source: EMN national reports

FULL STUDY PUBLICATION

https://ec.europa.eu/home-affairs/content/emn-study-comparative-overview-national-protection-statuses-eu-and-norway_en

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