

## FIVE CRITICAL POINTS IN THE PROPOSED REFORM OF THE COMMON EUROPEAN ASYLUM SYSTEM

### 1 - Weaker guarantees of rights for refugees and people applying for asylum

- The right to free legal assistance is restricted for refugees with sufficient resources, applications with little chance of success and subsequent applications in the administrative phase or in the second instance appeal phase. Access to this right is excluded in second instance appeals. These restrictions and exclusions imply a serious restriction to access to the right to free legal assistance and a breach of the access to effective legal protection stipulated in Article 13 of the ECHR.

- This means **fewer guarantees in accelerated and border procedures**, while adding new situations where accelerated procedures are applicable. The deadline for accelerated procedures is reduced to 2 months (in the current Directive it is 3 months) in practically the same situations contemplated by the current Directive. These procedures are also to be applied to applicants returned by the Dublin Regulation or who have not applied for protection in the first country of irregular entry or legal stay, and in some cases to unaccompanied minors. It is also important to point out that the application is extended to unaccompanied foreign minors for both accelerated and border procedures.

- As regards **appeals, the automatic suspensive effect is excluded** for rulings in cases of rejection of accelerated procedures, entry denied in the first country of asylum and subsequent application, rejection due to express or implicit withdrawal of the application, and a ruling regarding a previous appeal.

- The Dublin Regulation restricts **the right to an effective appeal** to 3 situations: The risk of inhumane or degrading treatment in the Member State responsible due to failures in the asylum system; decisions for transfer based on the criterion concerning minors, the family criterion, and the dependent persons criterion; and decisions on the assumption of responsibility for the examination (no transfer) when the family criteria have not been applied.

- As regards the exclusion of the possibility of an appeal against the rejection of an international protection application from applicants who have been rejected and who have been moved to another Member State, it should be stressed that this provision may breach the right to effective legal protection stated in Article 47 of the Charter of Fundamental Rights.

- People's rights as regards international protection granted to Nationals of the Member State (employment, social security, health care, education for minors, the freedom of association and access to integration programmes) will be made equivalent. However, access to housing and education for adults is made comparable to the access available to nationals from third countries who are residents. At the same time, access to social assistance may be conditional upon the person's effective participation with international protection granted in the integration measures. Moreover, the power of the Member States is established to restrict social assistance for the beneficiaries of subsidiary protection. This contradicts the reform's intended spirit of harmonisation since it implies discrimination in the treatment of people according to the type of international protection granted and it moves away from the concept of positive integration measures that foster inclusion.

- **Access to the job market is excluded for people applying for international protection subject to accelerated procedures** when the application is deemed unfounded or contradictory, when information or documents are hidden or false, when the application is used as a delaying tactic against expulsion, when they come from a safe country of origin, or in cases of a risk to security. Access to the job market is also excluded for people applying for international protection who come from safe countries of origin, which implies discriminatory treatment based on nationality contrary to Article 21 of the EU Charter of Fundamental Rights and Article 14 of the ECHR.

- The possibility of **rejection of an international protection application before determining the Member State responsible** is included. Without considering the existence of family members in another Member State, in keeping with Article 3 of the proposal, **this may clash with the right to family life** recognised in Article 7 of the EU Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights.

- As regards the **right to information**, Article 6.2 concerning the exchange of information by means of a common informative brochure should require that it is written in a language that the applicants can read. This information must always be provided in the interview, with the authorities verifying that the applicants have understood the text.

- It is established that only the information and documents provided up to the time of the interview for determining the Member State responsible shall be taken into account. However, accreditation of family ties often calls for relationship tests that can take time.

## **2 - Lack of protection for especially vulnerable people who merit international protection**

- **Especially vulnerable people are exposed to accelerated procedures**, particularly on the border where the staff are not trained to identify especially vulnerable people.

- **Applying an accelerated procedure when an application is not presented in a Member State where the person is authorised to stay**, or in a Member State by which he/she entered, implies a reduction in time to study the application in depth, and thus fewer guarantees and greater difficulties in identifying the profiles of people in vulnerable situations in the short space of time. In these cases, there is an obligation to identify the latter before the decision to apply the accelerated procedure, which must be taken into account. If the vulnerability is identified afterwards, the possibility of withdrawing from the accelerated procedure and returning to the ordinary procedure should also prevail.

- **The application of accelerated and border procedures to unaccompanied minors** is contemplated when the minor comes from a safe country of origin, or represents a danger for national security or public order in the Member State for serious reasons, there are reasonable motives to think that a third country is safe country for the minor, or else the minor has deceived the authorities by presenting false information or documents or has omitted to give information or documents about his/her identity that may have had a negative impact on the decision. It is important to point out that most unaccompanied minors lack documents on arrival, so that following this legislation the border procedure would end up being applied to them in most cases.

- **Access to education for minors is restricted if they are in a Member State other than the one required** according to the Dublin Regulation, **excluding them from obligatory formal education if they are waiting to be transferred to the Member State responsible**, including the intention for these minors to have access to “suitable

educational activities". This is contrary to Article 14 of the EU Charter of Fundamental Rights and Article 28 of the Convention on the Rights of the Child.

- **The scope for applying the determination of the child's greater interest is reduced** only to minors applying for international protection, excluding migrant minors who have not presented an application.

- **The discretionary clauses** via which a Member State that is not responsible may take care of studying the application are **only applied in the case of family ties different from the definition of family members**, disregarding situations such as people who for medical reasons are not in a situation to be transferred to a responsible Member State. The assumption of responsibility for humanitarian or cultural reasons is also eliminated. It is essential to maintain this provision in order to guarantee assistance for those who apply for international protection in a situation of special vulnerability and the different treatment in attending to the evaluation of their specific circumstances, which in many cases would make it inadvisable to transfer them to another Member State.

- **There is no improvement introduced as regards the transfer of information between Member States about cases involving people in a vulnerable situation**, medical situations and other specific factors for applicants who are going to be transferred, even though this is one of the greatest deficiencies seen in applying the Dublin system in practice until now. Nor are situations of special vulnerability taken into account in designing the procedure for determining the responsible State, or in taking charge of or transferring the migrant.

### 3 - Penalisation of secondary movements

- **Removing the cessation of responsibility 12 months after the date** of the unauthorised border crossing appears to be at odds with one of the reform's main aims, which is to guarantee that responsibilities are distributed in a sustainable manner and that the system is fairer. The elimination of the cessation does not guarantee this fairness for the Member States that are on the outer border of the EU.
- **Removing the cessation of responsibility in cases where the applicant voluntarily leaves the EU for more than three months or has been expelled** may lead to situations in which family ties formed in the country of origin after the original application for international protection in the EU are not taken into account, or in which the reception and procedural conditions are not guaranteed in the Member State responsible.
- **The new obligations imposed on applicants for international protection entail serious procedural consequences if they are not met.** These consequences are especially disproportionate in the event of failure to comply with the obligation to present the application in the first country they entered irregularly or stayed legally, above all taking into account that the application has not yet been made and this obligation may not be known.
- **Sanctions are included for the case of leaving a responsible Member State** or leaving the place of residence without prior notification or authorisation, such as applying accelerated procedures or rejecting the application due to implicit withdrawal, as well as restricting guarantees in cases where subsequent applications are submitted (the applicant is not permitted to stay, free legal assistance is not recognised, accelerated procedures are applied, these applications are not only not accepted but also rejected as unfounded or abusive, tight deadlines are established for lodging and deciding on appeals, and the automatic suspensive effect is excluded).

- **The possibility of restricting the freedom of movement is contemplated** within the responsible Member State in situations where specific social services are received that are linked to improving the integration of the person who has been granted the status of international protection.
- **The right of people with international protection to live in another Member State** other than the one that has recognised his/her protection **is expressly rejected** for longer than 90 days in a period of 180 allowed by the Schengen Agreement. If these limits are exceeded, the calculation of the period of five years of legal residence in a Member State to be able to request Long-Term EU Residence starts again from zero.
- The proposal in the Reception Directive introduces the concept of “absconding” and “risk of absconding”, **leaving the definition of the objective criteria for determining the risk of absconding to national legislation**, and thereby bestowing **great discretionality on the States**. The serious consequences implied by the “risk of absconding” in restricting the freedom of movement, even extending to detainment and the indeterminate definition that leaves the Member States great discretionality, may lead to the application of measures such as systematic confinement of the applicants in cases of the Dublin Regulation.
- **New situations are introduced to establish the residence in a specific place** when there is a risk of absconding, when the person is in the process of the Dublin Regulation procedure, or when the application has not been submitted in the first country of irregular entrance or legal residence.
- It is possible to **withdraw access to education for minors if they are in a Member State different from the one requested** according to the Dublin Regulation, the guarantee being limited to “educational activities” for the minor pending transfer to the responsible Member State.

- **New situations for reducing or withdrawing the daily economic allowance** are introduced, as well as **replacing the material conditions of reception with aid in kind** when the applicant “absconds”, or is returned to the responsible Member State after absconding, or seriously breaches the norms of cohabitation, or does not apply for international protection in the first country of irregular entrance or legal stay, or breaches obligatory measures for integration.

#### **4 - Application of concepts and restrictive criteria**

- The concepts of safe third country, first country of asylum, safe country of origin and the indeterminate legal concept of “danger to security” are included to be applied automatically. **Applying the concept of safe country of origin** has significant practical ramifications such as the **possibility of applying the accelerated procedure to these applications**, the resulting reduction in deadlines to take far-reaching decisions about the application, difficulties in identifying applicants in a vulnerable situation in these short deadlines and, in summary, a restriction of procedural guarantees. This different treatment of international protection applications according to nationality may clash with the prohibition of discriminatory treatment for refugees depending on their country of origin stipulated in Article 3 of the 1951 Geneva Convention on the Statute of Refugees.

- The **assessment of the possibility of internal abscondment becomes obligatory without taking into account the criteria established by UNHCR** for carrying out this assessment **and excluding cases in which the persecuting agent is the State**. This would lead the persecution to be considered as national in nature and that the alternative to internal abscondment does not exist except when there is clear evidence that the persecution comes from the State authorities whose power is restricted to a specific geographic zone or when the State only controls certain zones in the country.

- **Recognised human rights organisations** (in addition to UNHCR) **are not contemplated as a source of COI in all situations**, as dictated by jurisprudence from the ECHR.

- A restrictive criterion is introduced by **obliging Member States to “normally” reject applications based on circumstances created by the applicant after he/she has left their country** (before, this was optional). This may mean an open invitation to deny any application *sur place*. Furthermore, there is the added danger that rejecting applications because the circumstances have been created by the applicant is contrary to the prohibition of Article 10.3 against requiring the applicant behave discreetly to avoid risk.
- A period of three years is established for the status of refugees (with renewals every three years) and of one year for subsidiary protection (with renewals every two years). **The difference between the status of refugees and the status of subsidiary protection is made greater** in terms of the duration of the residence permit (3+3+3 or 1+2+2), the procedure for reviewing Articles 14 and 20 (only in the first renewal or in the first two), and the possibility of restricting social assistance for beneficiaries of subsidiary protection.
- An obligation is introduced for the applicant to submit all elements and documentation to support their request for international protection, which is optional in the current Directive, with no spread of the burden of proof between the applicant and the authority that decides.
- **These situations for applying the exclusion clauses are extended without including a judgement of proportionality**, which should be included given the gravity of the consequences of denying protection for a person who complies with the refugee status requisites.
- **The texts for the cessation, withdrawal, end or rejection of the renewal of protection status is repetitive and confusing**. Not all of the applicable restrictive criteria are included in them, either.

- As regards **detainment and the right to freedom of movement** for applicants subject to procedures to determine the responsible State, nothing new is introduced as regards what exceptional cases must lead to a detainment order. Given the divergence of State practices seen by the Commission itself, it is advisable to establish clear, precise criteria regarding the exceptional nature of detainment and the assessment of the need for the measure and its proportionality in keeping with the jurisprudence of the European Court of Human Rights.

- **In terms of detention, the situations are extended** without the evaluation or other less coercive alternative measures, maintaining the possibility of detaining minors.

## 5 - Barriers to Reception

- In the reception directive proposed, an international protection applicant is defined as a person who has formalised a protection application for which a final ruling has not yet been dictated, **without including the concept of an applicant as a person who has already stated their desire for protection** and not only as those whose applications have been formalised. It is necessary for these people to be included in order to ensure they have access to the reception system during the period prior to formalisation.

- In the proposed reception directive, the concept of **“family members”** is extended to the family created after leaving the country of origin, but before entering the receiving country. **Other members of the family such as brothers and sisters have not been added**, which in terms of reception may be relevant and is already contemplated in the proposal from the Dublin Regulation.

- **Indeterminate legal concepts such as “dignified standard of living” and “risk of abscondment”** are introduced without defining their content. These indeterminate legal concepts must be defined clearly or eliminated, given the serious consequences they imply and the discretionary nature left by the proposal for the Member States to set the definitive criteria.

- As regards compliance with the transfer to the responsible Member State, in the event of a breach, Article 5 establishes disproportionate procedural and reception consequences that clash with the EU's Charter of Fundamental Rights.

- A corrective measure is introduced for the case of arrivals in large numbers. Using a criterion as high as 150% of the capacity of the Member State in question may affect the reception and procedural conditions that the applicants for international protection face, since they are in that State until that number is reached. If, according to the criteria, a reception capacity has been established, it would seem logical to activate the corrective mechanism when that capacity has been exceeded instead of waiting to reach 150%.

- The mechanism is applied before determining the Member State responsible, which is carried out by the Member State where an applicant for international protection has been relocated. This means that after being transferred from the beneficiary Member State to the relocation Member State, the international protection applicant may again be transferred to a third Member State where their relatives are. This may lead to a lack of effectiveness for the system and a greater delay in access to the procedure to determine the status of refugee.

- As the mechanism is applied automatically, the international protection applicants' individual circumstances are not taken into account, nor special needs such as situations of vulnerability that may make it inadvisable to transfer them to a relocating Member State.

- The corrective mechanism does not take into account international protection applicants who have arrived before this reform comes into effect. Likewise, applicants who were not admitted before the application of the criteria for determining the responsible Member State in keeping with Article 3.3, as well as applicants arriving in the Member State before reaching 150% of its capacity, are also excluded from re-

allocation. All of this may detract from this mechanism's ultimate aim and have a very limited effect on spreading the responsibility for examining the applications and on the reception itself.

- The possibility that Member States may opt out of this corrective mechanism by paying an amount for each non-reallocated international protection applicant in their territory may lead to discriminatory situations, enabling Member States to choose which international protection applicants it accepts in its territory or not, for reasons of religion, ethnicity or nationality.

