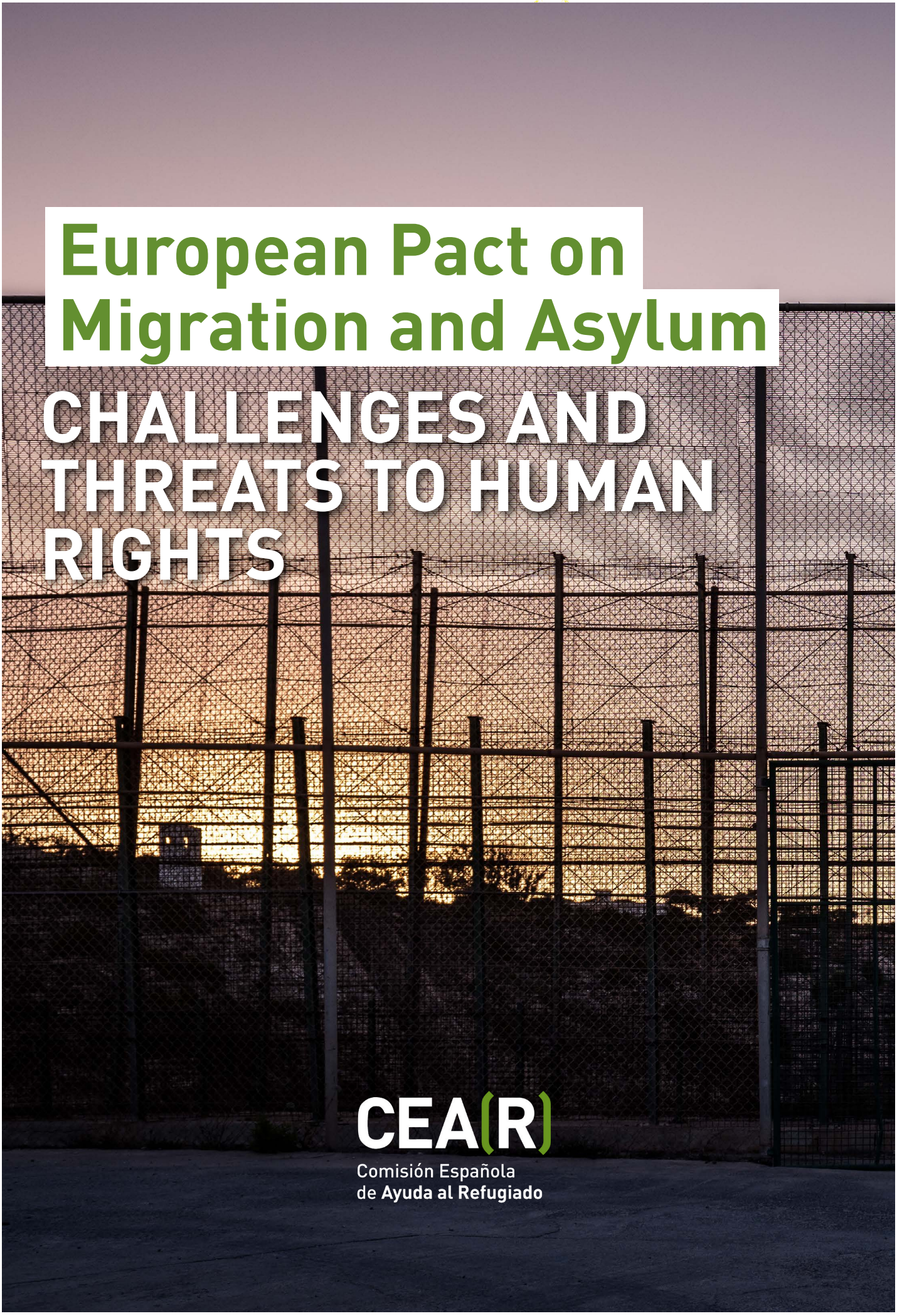

European Pact on Migration and Asylum

CHALLENGES AND THREATS TO HUMAN RIGHTS

CEA(R)
Comisión Española
de Ayuda al Refugiado

This report has been coordinated by the Research and Studies Service of the Advocacy Department of the Spanish Commission for Refugees (CEAR).

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The Spanish Commission for Refugees (CEAR) is a non-profit organisation founded in 1979. Our mission is to advocate and promote the human rights and the comprehensive development of asylum seekers, refugees, stateless persons and migrants in vulnerable situations and/or at risk of social exclusion.

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1. INTRODUCTION

In September 2020, the European Commission brought forward in the framework of the new political cycle a set of legislative proposals which make up the European Pact on Migration and Asylum, as a renewed attempt to move towards the development of a genuine Common European Asylum System (CEAS). The objective of the reform of European migration and asylum policies is to achieve greater regulatory harmonisation, strengthen resilience to crises and establish a more equitable sharing of collective responsibilities towards those seeking asylum in the European Union (EU). An objective that seems more and more unattainable.

In the last decade, the EU has been confronted with a variety of migration situations of different types and scales. The arrival of one million refugees mainly from Syria in 2015 marked a turning point by exposing, among other issues, the flaws of the Dublin System[1], the regulation that determines that the state responsible for handling the asylum application is the first country of arrival in the EU. The premise that "it should not matter which country a person seeks asylum from" stands in contrast to the reality of a lack of harmonisation of asylum rules, which results in unequal treatment of asylum seekers in each Member State. In addition to this disparity, the country of first entry principle concentrates all migratory pressure on border countries, overwhelming their capacity to provide adequate shelter conditions. This system has proven to be unfair, dysfunctional and not in line with the preferences of asylum seekers, who may have family or other links with different Member States.

In this context, there is a pressing need for a reform based on the principle of solidarity and shared responsibility of Article 80 of the Treaty on the Functioning of the European Union (TFEU[2]). However, there is insufficient political will to implement this, as was clearly evidenced by the failed reform of the CEAS in 2016 and the non-compliance with the relocation agreements of the same year[3]. At that time, impetus was also pro-

1 REGULATION (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Official Journal of the European Union, L 180/31, 29 June 2013, available at: https://www.boe.es/doue/2013/180/L00031-00059.pdf

2 Consolidated version of the Treaty on the Functioning of the European Union https://www.boe.es/doue/2010/083/Z00047-00199.pdf

3 "Making the CEAS Work, Starting Today", European Council on Refugees and Exiles (ECRE), Policy Note 22, 2019, available at https://www.ecre.org/wp-content/uploads/2019/10/PN_22.pdf [Accessed 10 August 2023]

vided to the externalisation of borders through the signing of agreements with third countries such as the EU-Turkey Agreement in 2016[4], whose path has been followed by others such as those recently signed between the European Union and Mauritania, Tunisia and Egypt.

All of this highlights, as shown in the 2015 European Agenda on Migration[5] and the New European Pact on Migration and Asylum, the significance of the externalisation of borders and return policies within the European migration strategy, which overshadows issues related to the protection of people and the safeguarding of their rights within and beyond European borders. Preventing people from arriving in the European Union in order to avoid having to take responsibility for them is the increasingly widespread formula for responding to the challenges posed by migratory movements and resolving deep inter-state differences and solidarity gaps.

The new European Pact on Migration and Asylum crystallises decades of pressure to address migration in a short-sighted and securitarian approach. The new rules pose significant protection risks, deepen the externalisation of borders, reinforce measures that endanger human rights and fail to address the shortcomings that justified, eight years ago, the need for a reform of the Common European Asylum System.

Evolution of the negotiation process (2020-2024)

Negotiations have been complex, showing little progress in the first two years: in 2021 there was only agreement by the co-legislators to approve the recast of the Blue Card Directive[6] and Regulation (EU) 2021/2303 establishing the new EU Asylum Agency (EUAA). In 2022, agreement was only reached, based on the provisional compromises already reached in 2018, on the amended Reception Conditions Directive[7] and the Re-

4 EU-Turkey Agreement. https://www.consilium.europa.eu/es/press/press-releases/2016/03/18/eu-turkey-statement/

5 European Commission (2015). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Agenda on Migration. Retrieved from: eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52015DC0240

6 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=celex-%3A32009L0050

7 Agreement of the European Parliament and of the Council. "Asylum: deal on reception conditions for applicants to international protection", European Parliament, 15 December 2022, available at: https://www.europarl.europa.eu/news/en/press-room/20221214IPR64716/asylum-deal-on-reception-conditions-for-applicants-to-international-protection

gulation for an EU Resettlement Framework[8], stemming from the 2016 CEAS reform package. In 2022 the French and Czech Presidencies also succeeded in having the border states unblock the adoption of a Council negotiating mandate on the new Screening and Eurodac Regulations[9], in exchange for a voluntary solidarity mechanism that has so far succeeded in resettling more than 4,000 persons.[10].

It was in 2023 that the greatest progress was made. On 20 April 2023, the European Parliament adopted its position on all the legislative proposals of the Pact[11], announcing the continuation of the package approach[12]. As for the Council, on 8 June 2023, the Swedish Presidency achieved agreement by the Member States on the two key reform proposals: the Procedural Regulation and the Migration and Asylum Management Regulation[13]. Then, under the Spanish Presidency, on 4 October 2023, an agreement was reached in the Council on the Crisis and Force Majeure Regulation, the last remaining dossier to enter the trialogue phase[14].

The race of the co-legislators in the last months of 2023 to comply with the roadmap[15] and approve the Pact before the European elections in June 2024, has resulted in a pressure that has been reflected in an imbalance of power in the negotiations with a strong weight of the positions of some member states. This was reflected in the poli-

8 Agreement of the European Parliament and of the Council "Asylum and migration: deal reached on new EU resettlement framework ", European Parliament, 15 December 2022 https://www.europarl.europa.eu/news/en/press-room/20221214IPR64717/asylum-and-migration-deal-reached-on-new-eu-resettlement-framework

9 https://www.consilium.europa.eu/en/press/press-releases/2022/06/22/migration-and-asylum-pact-council-adopts-negotiating-mandates-on-the-eurodac-and-screening-regulations/

10 https://euaa.europa.eu/news-events/eu-voluntary-solidarity-mechanism-reaches-half-way-mark

11 https://www.europarl.europa.eu/news/en/press-room/20230419IPR80906/asylum-and-migration-parliament-confirms-key-reform-mandates

12 A holistic approach historically advocated by the European Parliament, which calls for a reform of the Common European Asylum System that addresses all the legislative proposals pending on the table. Under the premise of "all or nothing", the inability of the co-legislators to reach an agreement on the Dublin Regulation in the previous European political cycle determined the failure of the reform of the CEAS as a whole in 2019.

13 https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/

14 https://www.consilium.europa.eu/en/press/press-releases/2023/10/04/migration-policy-council-agrees-mandate-on-eu-law-dealing-with-crisis-situations/

15 Co-legislators' roadmap for the New Pact on Migration and Asylum, adopted in September 2022 https://www.europarl.europa.eu/resources/library/media/20220907RES39903/20220907RES39903.pdf

tical agreement reached on 20 December 2023[16], while the European Parliament gave up on issues that constituted "red lines" a few years ago and that now pose serious risks to the right to asylum and human rights. The negotiations have also missed the opportunity to include key issues such as free legal assistance at all stages of the asylum procedure or mandatory relocation as the only form of solidarity, as well as access to the procedure in shorter periods of time and with greater guarantees for people in particularly vulnerable situations.

In February 2024, Member States' representatives (Coreper)[17] and the LIBE Committee of the European Parliament ratified[18] the December agreement on the Pact and reaffirmed the validity of the interim arrangements of the 2016 reform, including the Regulation on the recognition[19]. Moreover, two new Regulations were introduced: one on the Return Border Procedure[20], which removes those provisions of the Procedures and Crisis Regulations that might conflict with the coherence and harmonisation of the Schengen acquis[21], and one which includes amendments to the Screening Regulation to make it compatible with the interoperability of systems in the Schengen Area[22].

On the eve of the European elections in June 2024, the European institutions have given the green light to the reform of EU migration and asylum policies. Once these instruments enter into force, a two-year transitional period of implementation has been established. The Spanish Commission for Refugees (CEAR) analyses in this report the key issues of the European Pact on Migration and Asylum from a human rights-based approach to protection.

16 https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/

17 Asylum and migration reform: EU member states' representatives green light deal with European Parliament - Consilium (europa.eu)

18 https://www.europarl.europa.eu/news/en/press-room/20240212IPR17628/asylum-and-migration-civil-liberties-committee-endorses-the-agreements

19 https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2024/02-14/10.Qualificationofthird-countrynationals_EN.pdf

20 https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2024/02-14/05.RBP_ReturnBorderProcedure_EN.pdf

21 https://www.statewatch.org/media/2239/eu-council-legal-service-opinion-migration-pact-6357-21.pdf

22 https://data.consilium.europa.eu/doc/document/ST-6404-2024-INIT/en/pdf

2. KEY REGULATIONS OF THE EUROPEAN PACT ON MIGRATION AND ASYLUM

The key elements of the reform of the European Pact on Migration and Asylum, analysed below, are closely interlinked. An asylum seeker arriving at a European border must first undergo a pre-entry identity, health and security check (screening), which includes the registration of biometric data in Eurodac and a preliminary vulnerability check. With this information, the aim is to refer the person to the appropriate procedure: if he/she has no protection needs, he/she is referred to the return procedure at the border; and if he/she expresses willingness to seek asylum, his/her asylum application is channelled through a border procedure, fast-track or the regular asylum procedure. The Member State registering the asylum application must determine whether it is responsible for the examination or whether it is the responsibility of another Member State and, consequently, the transfer of the person should take place. The guarantees and rights of persons subject to these procedures may be affected if a situation of migratory pressure, crisis or force majeure exists in the Member State examining the merits of their asylum application. In such situations, States in crisis could benefit from solidarity measures including relocation of asylum seekers, but also wide exceptions and derogations to the basic guarantees of asylum procedures.

In view of the complexity of the interplay of all regulations, as well as the risks of the new rules for asylum and human rights, the implementation phase starting in Spain in the next two years is essential to reduce the difficulties of practical application and ensure the highest standards of protection and the guarantee of rights under Spanish law.

2.1. ASYLUM AND MIGRATION MANAGEMENT REGULATION: THE REFORM OF THE DUBLIN REGULATION

Regulation on Asylum and Migration Management[23] (hereinafter: RAMM) replaces the Dublin III Regulation[24], the fundamental pillar of the Common European Asylum System. The aim of the reform is to achieve greater solidarity and a fairer sharing

23 https://data.consilium.europa.eu/doc/document/ST-6365-2024-INIT/en/pdf

24 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) http://data.europa.eu/eli/reg/2013/604/oj

of common asylum responsibilities between Member States. However, the new rules add complexity to procedures and increase the responsibility of border states, without the solidarity mechanism being effective in relieving the disproportionate pressure to which they have historically been subjected. All this under an approach that focuses on strengthening the externalisation of European borders to third countries, while the protection of people is put on the back burner.

2.1.1. ASYLUM AND MIGRATION MANAGEMENT FRAMEWORK

Externalisation of borders as a central pillar of asylum and migration management

This Regulation establishes a common framework for migration and asylum management based on two pillars: an 'internal' dimension of cooperation between Member States and the EU to, inter alia, ensure access to the international protection procedure and prevent secondary movements; and an 'external' dimension based on agreements with third countries to strengthen returns and prevent irregular migration.

CEAR REMARKS: Fundamental rights and the principles of solidarity and shared responsibility among Member States must be respected in the management of asylum and migration, and in the relations with third countries in this field. This requires that the National and European strategies for asylum and migration management, provided for in this Regulation, include specific measures to respect and guarantee fundamental rights. Moreover, the European Commission must monitor and evaluate the impact of migration and asylum management on human rights (HR), the result of which must be reflected in the Commission's Annual European Report.

An obligation is established for Member States to observe the principle of solidarity and fair sharing of responsibility in Article 80 TFEU. To fulfil this obligation, a "Permanent EU Migration Support Toolbox" is made available to Member States, which includes as a novelty the possibility of derogations and exceptions to react to specific migratory challenges, as well as reinforced actions in third countries.

CEAR REMARKS: The measures to support Member States in migration management provided for in the "Permanent Toolbox" are insufficient to comply with Art. 80 TFEU.

Derogations hinder compliance with this article and erode the establishment of a common asylum system.

Additionally, considering migration policies in third countries as a "tool" puts the focus back on the externalisation of European responsibilities to countries that do not respect human rights and do not guarantee adequate protection. This measure does not promote solidarity among Member States.

Institutional structure for managing situations of migratory pressure and activating the solidarity mechanism

RAMM establishes a complex institutional structure to promote cooperation between Member States towards an effective and solidarity-based management of migration and asylum challenges in the EU. First, Member States must develop national strategies to 'ensure that they have the capacity to effectively implement their asylum and migration management system'. On the basis of these strategies, the European Commission will adopt a long-term European Strategy on Asylum and Migration Management every five years.

Secondly, the Commission drafts an Annual European Report assessing the asylum, reception and migration situation in the EU over the previous 12 months and setting out any possible developments. On the basis of this information, the Commission identifies Member States under migratory pressure[25], at risk of migratory pressure or facing a significant migratory situation[26]. It also proposes to the EU Council the establishment of the Solidarity Fund and the annual number of relocations and binding financial contributions.

Once the Council adopts, by qualified majority, the executive action establishing the Solidarity Fund, the High Level Forum on Solidarity is convened to discuss and coordinate Member States' solidarity contributions. Finally, an EU Solidarity Coordinator is appointed to facilitate the implementation of solidarity measures at the technical level.

CEAR REMARKS: There is a lack of clarity regarding the definition, application and

25 Migratory pressure is defined in Art. 2 RAMM broadly as the arrival of a large number of third-country nationals, including due to landings following SAR operations and secondary movements, where this situation creates "disproportionate obligations" for a Member State.

26 Significant migratory situation is defined in Art. 2 RAMM as a situation that falls short of "migratory pressure" but pushes the asylum and migration system of a Member State to its limits.

practical effects of the concepts of "migratory pressure", "significant migratory situation and "risk of migratory pressure", provided for in this Regulation and also that of "crisis" in the Crisis Regulation. This lack of definition and regulatory overlap can lead to difficulties in application, legal uncertainty and discretion for Member States that find themselves in a crisis situation, and can lead to serious derogations from guarantees and delays in access to rights.

Although the objective of the reform was to harmonise rules and enforcement, the complexity of the organisational and institutional structure introduced leads to serious distortions and even more disparities, making it difficult to achieve the objectives and comply with Article 80 TFEU.

Regarding the architecture of the solidarity mechanism, the Regulation establishes a complex, non-transparent structure, which requires effective inter-institutional coordination, as well as clear criteria for its functioning and the distribution of competences. In addition, by not establishing the frequency of meetings of the Technical Solidarity Forum (which operates the distribution of solidarity measures), the agility, efficiency and effectiveness of the mechanism's functioning is hampered.

2.1.2. RESPONSIBILITY FOR THE EXAMINATION OF ASYLUM APPLICATIONS

Criteria for determining the Member State responsible for the examination of an asylum application

The hierarchy of common criteria established by the Dublin III Regulation for determining the Member State responsible for the examination of an application for international protection lodged in the EU by a third-country national or a stateless person is substantially maintained. The criterion of the country of first entry is maintained as the default criterion, which is in practice the one most often applied. The following new features are introduced in the criteria for determining the Member State responsible:

A. Concerning the criterion of family members, there is an improvement compared to Dublin III, by including long-term resident family members, persons benefiting from international protection who have acquired the nationality of the Member State, and minors born after the family arrived in the Member State. Siblings, married children and adult dependants are excluded from the concept of family.

B. The responsibility of the Member State that issued a residence permit or

visa is increased to 3 years and 18 months respectively after expiry, revocation, withdrawal or cancellation of the residence permit or visa.

C. A new criterion is included which considers the possession of diplomas or qualifications to prove the link with a Member State.

D. The criterion of the country of first entry is placed at the lowest in the hierarchy of criteria (in Dublin III it was before the visa exemption and airport transit zones) and the period of responsibility is extended to 20 months, except in the case of disembarkation following search and rescue at sea (SAR) operations, which remains at 12 months as in the previous legislation.

Finally, the regulation of discretionary clauses allowing Member States to decide to examine an application for international protection registered on their territory, even if they are not the competent ones, is maintained.

CEAR REMARKS: Although the possibility of submitting a diploma or qualification to prove the link to a Member State is incorporated and there are some improvements in the family member criterion, as well as in relation to residence permits or visas, the default responsibility remains with the first country of entry.

Dependent adults are not considered as "family members" in RAMM, but are regarded as such in the Reception Directive, which may lead to inconsistencies in practice. Furthermore, the failure to broaden the concept of family members is a missed opportunity to respond to the serious situations of helplessness affecting siblings, dependent persons and unaccompanied children. The opportunity to guarantee the principle of family unity regardless of the regular administrative situation has also been lost.

The new hierarchy criteria introduced will have very little practical impact because access to residence permits, visas and diplomas or qualifications is very restricted, so that the criterion of first entry will end up operating in a generic manner.

All in all, RAMM does not constitute a real and effective solution to the shortcomings of the Dublin system, nor does it address the pressures faced by external border states such as Greece, Italy and Spain.

In addition, an opportunity has been missed to improve the regulation of the discretionary clauses, which even in the case of dependency has been further restricted by imposing a legal residence requirement, although dependency due to mental illness, physical illness or psychological trauma is contemplated.

Ultimately, CEAR considers that the criteria for determining responsibility in the examination of an asylum application do not give priority to a focus on the protection of persons.

In derogation to the application of the criteria for determining the Member State responsible, the Regulation provides that should there be "grounds for considering the applicant a threat to internal security" when carrying out the security check of the Screening Regulation, the Member State where the security risk is detected shall be responsible for the examination of the asylum application.

CEAR REMARKS: There are concerns that a double security check by several Member States is envisaged if there are reasonable grounds to believe that the applicant poses a "threat to national security". The concept of "national security" is reflected in an indeterminate manner and may give rise to discretion in its application, which contributes to the criminalisation of migrants and refugees. Furthermore, in case an applicant is considered to be a "risk to national security", the Member State considering that such a risk exists is responsible for the examination of the application, which will allow it to apply the mandatory border procedure (including unaccompanied minors) and deprive the person of the right to stay during the procedure.

Limitation of the right to reception due to non-compliance with the obligations of asylum seekers

The obligations of asylum seekers are strengthened, including the duty to cooperate with the authorities by providing the necessary information and to remain in the assigned country until their status is determined. If they fail to comply with these obligations and are not properly informed about them, documentation submitted after the deadline may not be assessed and they lose the right to reception conditions in other EU countries up to the limit of ensuring an "adequate standard of living". Victims of trafficking are exempted from the consequences of non-compliance by secondary movements and the need to consider the individual situation of the applicant and the risk of rights violations is included.

CEAR REMARKS: The increase in obligations for applicants is worrying, with disproportionate consequences resulting from non-compliance such as not assessing documentation submitted after the deadline, without considering the difficulties in collecting this documentation from persons forced to flee their countries. Even more serious is the limitation of reception conditions from the transfer notification until the transfer takes place (usually months later), which contravenes the case law of the Court of Justice of the European Union (CJEU), which has established that the application of the Reception Directive must be

guaranteed until the moment of transfer[27]. Furthermore, it is of serious concern that asylum seekers are deprived of reception conditions in case of "absconding" or secondary movement.

The concept of "adequate standard of living" is not defined in this regulation, and may lead to unequal interpretations in each MS. In any case, Member States are bound by the case law of the CJEU, which has established as an absolute minimum that the person's basic needs such as housing, food, clothing, personal hygiene, and that it does not harm his or her mental and physical health or violate his or her human dignity, must be met.

As positive elements, we value the reference to victims of trafficking in human beings, to whom the consequences of secondary movements will not apply. Furthermore, we welcome the fact that the real risk of violation of fundamental rights in the Member State where the applicant is to be present will have to be taken into account.

Guarantees and rights of asylum seekers in the procedure for determining the Member State responsible

Right to information

The Regulation provides that asylum seekers have the right to be informed of their rights and obligations in the procedure for determining the Member State responsible as soon as their application is registered. Member States are required to provide this information" in writing in a concise, transparent, intelligible and easily accessible form, using clear and plain language and in a language which the applicant understands or may reasonably be supposed to understand", as well as in an adapted form in the case of minors.

CEAR REMARKS: The guarantees of the right to information are further enhanced by setting the maximum period for providing information from the time of registration instead of the time of submission of the application (formalisation in Spain), as well as providing more detail on the content of the information to be provided. However, most of it refers to obligations and consequences of non-compliance. The inclusion of new information for unaccompanied minors and on the right to free legal assistance and advice is to be welcomed.

The accessibility of the information is also improved by including that it should be in clear and concise language, and in the case of minors with a child perspective, although the gender or functional diversity perspective is missing. Member States such as Spain should include this, taking advantage of the possibility provided by the RAMM.

27 https://curia.europa.eu/juris/document/document.jsf?text=&docid=127563&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=11231035

Right to free legal advice

Applicants shall have the right to consult, in an effective manner, a legal adviser or other counsellor, admitted or permitted as such under national law, at all stages of the procedure for determining the Member State responsible. Free legal advice shall include guidance and assistance on the criteria and procedure and in providing information and complying with obligations.

CEAR REMARKS: The inclusion of free legal advice is an improvement on the previous regulation (Dublin III), where it was not foreseen, but the opportunity to introduce legal aid in this complex procedure has been missed.

Personal interview

As a new feature in relation to the personal interview, a template will be provided to the applicant to gather information on the possible location of family members in other Member States. In addition, the presence of an interpreter and the possibility of cultural mediation, the option for the interviewer and the interpreter to be of the same sex, are guaranteed. For minors, the presence of a person with knowledge of their rights and special needs is ensured.

The requirement for qualified personnel to conduct the interviews is established, as well as their knowledge of factors that could affect the applicant's ability to be interviewed, such as having been a victim of torture or human trafficking.

Finally, access to a copy of the interview will be provided to the applicant and his or her legal representative to rectify errors if necessary.

CEAR REMARKS: The guarantees of the personal interview are extended with respect to Dublin III, including the obligation of proactivity of the interviewer, child and gender perspective, training of interviewers, deadlines for access to the report/recording, providing feedback and corrections and the possibility for cultural mediators to participate, an important aspect to take into account in the implementation in Spain.

Guarantees for minors

Priority is given to asylum applications submitted by children and adolescents. Unaccompanied minors are guaranteed to have a representative appointed as soon as possible to assist them throughout the procedure and, in the mean-

time, to be provisionally assisted by a trained person. The representative is responsible for supporting the minor in the process and in the search for relatives.

There is an obligation to assess the "best interests of the minor" before a possible transfer, taking into account the possibilities of family reunification, the minor's well-being and social development, the risk of violence or exploitation, and the minor's right to be heard.

Before transferring a minor to another Member State, the determining Member State should ensure that the Member State of responsibility or relocation makes appropriate arrangements for his or her reception.

CEAR REMARKS: Greater safeguards for minors are introduced which are important improvements compared to the previous regulation (Dublin III). Among others, we welcome the maximum time limits for the appointment of a representative person for the minor and that, in the meantime, a person should provisionally assist him/her. In addition, we appreciate that the obligations of the representative are detailed, the individual analysis of the best interests of the minor before adopting a transfer decision, and the notice to the responsible MS to confirm before the transfer that the minor will receive adequate assistance.

CEAR believes that Spain, when applying these rules, should assess the suitability of the child's representative being the same person from the moment the child arrives.

Procedures for taking charge and transfers

Initiation of procedures, procedure for taking charge and notification for readmission

One new feature is that the procedure for determining the Member State responsible begins with the registration of the asylum application. Priority will be given to the initiation of this procedure for applications lodged by minors, family members or dependants.

A maximum time limit of 2 months from the registration of the asylum application is established for making a request to take responsibility (taking charge) to the Member State considered responsible for the examination of the application. If no request is made within that period, the responsibility lies with the Member State of registration or relocation.

The requested Member State must reply within 1 month taking charge or, where appropriate, justifying why it does not consider that the circumstantial evidence is consistent, verifiable and sufficiently detailed to establish its responsibility. Failure to reply is tantamount to acceptance of the obligation to take charge of the applicant.

In case of readmissions, the procedure is simplified to a simple readmission notice within 2 weeks to the responsible Member State, which remains the responsible Member State, even if it does not acknowledge receipt of that notice or even if the notice is given after the deadline.

CEAR REMARKS: The registration of the asylum application is established as the starting point for the procedure of determining the Member State in charge, previously being the lodging (formalisation in Spain). At the time of registration not always all the information necessary to assess the application of the criteria is available, which together with the reduction and shortening of the deadlines for taking charge procedures (from 3 months from lodging in the previous legislation to 2 months from registration) may increase the responsibility of the Member States of first registration, which in many cases are the countries of first entry. For these reasons, sufficient guarantees must be provided to ensure respect for fundamental rights in these procedures and to avoid situations of unprotection.

On the other hand, progress is being made in simplifying the readmission procedure; it is no longer necessary to make a readmission request, it is simply notified. In order to avoid situations of unprotection of transferred persons, it is necessary to ensure effective coordination between the States of transfer and readmission. The simplification of the procedure together with the shortening of deadlines strengthens the responsibility of the already overburdened Member States of first entry.

Transfer procedure

The transfer of a person to the Member State designated as responsible for the examination of his asylum application must take place within six months of the acceptance of the request to take charge or of the affirmation of the notice of readmission or of the final decision on an appeal where it has suspensive effect. If this deadline is not met, the responsibility of the State of first entry is maintained. An extension of the deadline for States of first entry to carry out a transfer to the Member State in charge is established up to a maximum of 3 years if the asylum seeker absconds, physically resists the transfer, intentionally renders himself/herself unfit for the transfer or does not comply with the medical requirements.

CEAR REMARKS: The deadline for States of first entry to execute a transfer to the Member State in charge is extended to 3 years (currently it is one) if the transfer is complicated by absconding or culpable conduct of the applicant.

Once again the focus is placed on the interests of states and not on the rights of persons seeking protection, who may be left in limbo for a prolonged period of time.

Information exchange and cooperation between Member States on transfers

As a new feature, the information that must be exchanged between Member States in order to perform a transfer of an asylum seeker includes the assessment of the best interests of the minor and information on health and security checks. Mechanisms are also introduced to improve cooperation between States, an important role for the Commission and the support of European agencies.

CEAR REMARKS: Improvements in the exchange of information between Member States, an issue that had been identified as one of the major problems in these procedures, are not noted.

We welcome the inclusion of mechanisms to facilitate cooperation between Member States, as well as the support of the Commission and European agencies.

There has been a setback in the data protection of asylum seekers, whose consent is no longer required for the collection of their personal data, but only for the simple "information" of their registration.

Guarantees and rights of asylum seekers in transfer procedures to the responsible Member State

Notice of the transfer decision

The Regulation establishes a detailed procedure for notifying asylum seekers of transfer decisions to another Member State, ensuring that all necessary information is provided "without delay", including rights to free legal advice, the right to appeal against the decision and to request suspensive effect of the decision. The information should be provided in plain language and in a language that the person understands.

CEAR REMARKS: As a positive aspect, we appreciate greater guarantees in the transfer notifications to another Member State of persons seeking international protection, such as a deadline of 2 weeks after the responsible MS accepts the transfer, that the notice should be in writing and in plain language, as well as information on the possibility to appeal against the transfer decision.

Appeal against the transfer decision

Asylum seekers can appeal against the transfer decision in three cases: if there is a risk of inhuman or degrading treatment, if after the decision there are new circumstances that are decisive for the correct determination of the Member State responsible, or in the case of dependent family members. The deadline for lodging an appeal and requesting the suspension of the transfer until the transfer is completed is 3 weeks after the notification of the transfer decision.

CEAR REMARKS: Very short deadlines are provided for lodging an appeal against the transfer decision. This is combined with the limitation of transfers subject to appeal to three limited cases. The elimination of the automatic suspensive effect of appeals and the shortening of the deadlines for lodging a request for suspension to prevent the person from being transferred are also of concern.

This may be contrary to the case law of the CJEU which has established that the applicant must have an effective and prompt remedy available against the Dublin transfer, based both on challenging the application of any criteria (C-63/15, C-155/15), and on having exceeded the time limits for the execution of the transfer (C-201/16, C-323/21).

Detention for the purpose of transfer

Asylum seekers may be detained on the grounds of their transfer to another responsible Member State in case of a risk of absconding and, as a new development, if they represent a threat to "national security and public policy".

Individuals have the right to receive the detention decision in writing, which must be justified both in fact and in law. When detention is ordered by an administrative authority, prompt judicial review of its validity shall be ensured both ex officio and at the request of the applicant. If the person is in detention, the transfer must take place within a maximum of five weeks. The detention conditions and safeguards of the Reception Directive apply.

CEAR REMARKS: The extension of the circumstances of detention and the discretion of States to consider the risk of absconding, which together with the application of the indeterminate concepts of "security and public policy" implies the risk of generalising detention when it is a measure that should be the measure of last resort.

On the positive side, guarantees are included, such as that the detention decision will be given in writing, must be authorised by a competent authority and include the factual and legal grounds on which it is based.

The European Commission should establish in the EU Implementation Plan clear, objective and homogeneous criteria to avoid arbitrariness and discretion in the assessment of the "risk of absconding" by Member States.

2.1.3. SOLIDARITY MECHANISM

Solidarity measures between Member States

RAMM provides for the creation of a Solidarity Fund as a key instrument to respond to situations of migratory pressure in EU Member States. Member States make solidarity contributions in favour of other Member States, based on their population size and GDP[28], up to the annual number of relocations and financial contributions to be agreed by the Council following a proposal by the European Commission. The Regulation ensures a minimum annual number of compulsory solidarity measures, which is set at 30,000 relocations and EUR 600 million in financial contributions for all 27 Member States. Each year, the number of contributions can be increased according to needs, but the increase has to be proportional between relocations and financial contributions.

States have full discretion to choose the type of solidarity measures to contribute to the Fund from a range of alternatives, all of equal value:

A. Relocations of persons seeking international protection and beneficiaries of international protection who have received protection in the previous three years.

B. Financial contributions to support:

28 The 'reference key' is a formula used to calculate the minimum compulsory solidarity contributions to be made by each Member State. This is calculated by weighting 50% by the member state's GDP and 50% by the size of its population. In this way, smaller, impoverished EU countries contribute less than larger, wealthier ones, on the assumption that the latter have more capacity.

i. actions in other EU Member States in the areas of migration, reception, asylum, border management and operational support;

ii. actions in or with third countries that can directly influence migratory flows towards the external borders of Member States, targeting the improvement of the third country's asylum, reception and migration systems, including assisted voluntary return and reintegration programmes as well as the fight against smuggling and trafficking in human beings.

C. Alternative solidarity measures: in the areas of migration, reception, asylum, return and reintegration, focusing on operational support, capacity building, services, personnel, facilities or technical equipment.

CEAR REMARKS: An "à la carte" system of solidarity is proposed, which jeopardises the protection of people. Spain should reject and refrain from making any financial solidarity contribution related to border externalisation actions. Solidarity contributions should be focused on the protection of persons, i.e. on their relocation to other Member States to guarantee them a dignified reception.

If Spain makes financial contributions, these should be dedicated exclusively to enhancing the reception and asylum system of the Member States, from the perspective of the protection of persons. There is a real risk that "solidarity" financial contributions will be used, for example, to strengthen the Libyan coast guard under the pretext of the programmes to combat human trafficking and smuggling provided for in the Regulation.

On the other hand, a mandatory annual minimum number of relocations is established. This is positive as long as the Commission undertakes an annual review to adjust this quota to existing needs as allowed by RAMM, although it is limited to ensuring that the ratio between relocations and financial contributions is maintained. Member States should prioritise relocation because it is the only solidarity measure that has a people protection focus.

It is also of concern that no specific mechanisms are envisaged to ensure that mandatory solidarity contributions are met. It should be recalled that the lack of such mechanisms prevented the effective fulfilment by Member States of the mandatory relocation quotas established in 2016. On this occasion, it is essential that the Commission implements effective instruments to prevent such a situation from recurring and to comply with the requirements of Art. 80 TFEU.

Functioning and operation of the solidarity mechanism

The Regulation establishes the procedures and requirements for the use of the Solidarity Fund by Member States under migratory pressure. Two situations are distinguished:

A. If the Member State had previously been identified by the Commission as being under migratory pressure, it must inform the Commission and the Council of its intention to use the Solidarity Fund. The type and amount of solidarity measures needed must be detailed, including whether it has used the "Permanent Toolbox".

B. Even if not identified by the Commission, a Member State which considers itself under migratory pressure may apply to use the Solidarity Fund. The Commission will promptly assess the situation of the Member State and decide whether it is indeed under migratory pressure. In any case, the Council may refuse access to the Solidarity Fund if the Member State does not have sufficient contributions.

The High Level Solidarity Forum has an important role to play in this process. It is where Member States' representatives pledge their solidarity contributions and where additional contributions are requested when those of the Solidarity Fund are insufficient.

Solidarity implementation and deductions

Member States must implement their solidarity commitments before the end of the year concerned, with the exception of financial contributions, the implementation of which can be postponed, and even after the implementation acts have expired. However, Member States are allowed to request deductions from their compulsory share of solidarity contributions if they are under migratory pressure or face a significant migratory situation. Solidarity deductions are authorised or not by the Council.

The Solidarity Coordinator coordinates the balanced distribution of the Fund's solidarity contributions among the beneficiary Member States and is accountable to them.

Responsibility offsets

The Regulation establishes a system of "responsibility offsets" as a corrective mechanism so that, in the event that relocation targets are not met or some states fail to make relocation commitments, there is a minimum of solidarity contributions related to the protection of persons and not only financial.

On the one hand, States under migratory pressure can request others to assume responsibility for considering applications for international protection

from those for whom the State under migratory pressure has been determined to be responsible, rather than relocating persons from their territory.

Contributing States may themselves accept and apply to exchange their Solidarity Fund relocation commitments for assumptions of responsibility, provided that the requirement to reach the minimum threshold of relocations set for that year is met, or where the contributing Member State has committed 50% or more of its obligatory share to the Solidarity Fund as relocations.

On the other hand, it will be mandatory for contributing Member States to undertake responsibility offsets (as an alternative form of solidarity) when the number of relocations from the Solidarity Fund is insufficient, either due to lack of commitments or due to the application of deductions, and in any case when the relocations are:

A. Lower than the minimum threshold of annual relocations to be proposed by the Commission for the EU as a whole; or

B. Less than 60% of the number of relocations established by the Council for the establishment of the Solidarity Fund for that year[29]

Responsibility offsets are also mandatory as a penalty to the contributing Member State that fails to meet its relocation commitments, for a number equivalent to the committed relocations and in favour of the Member State concerned.

CEAR REMARKS: The flexibility provided for any Member State in a situation of sudden or unexpected migratory pressure to benefit from solidarity measures is welcomed, but it is important to bear in mind that the Council, composed of the Member States, may refuse access to the Solidarity Fund. Moreover, the mechanism allows for so many exceptions and deductions that the actual minimum number of mandatory annual relocations could be as low as 18,000 for the EU as a whole. This quota is clearly insufficient to meet people's protection needs.

The system could have been facilitated by establishing a "reference key" for the distribution of the contributions to be made by each Member State not only on the basis of GDP and population but also considering the real capacity of the Member State to assume solidarity (border states), as they will have to constantly ask for deductions from their

29 The exchange of relocations for responsibility offsets, once 60% of the annual relocation target has been reached, implies a lowering of the mandatory minimum annual relocation quota. Thus, the minimum quota of relocations that could be mandatory in a given year is lowered from the 30,000 set by RAMM to 60%, i.e. 18,000 relocations.

mandatory contribution.

The complexity of the mechanism renders it almost unfeasible for the Solidarity Fund to really respond to the needs of the Member States because it allows for solidarity contributions to be deducted and provides for exceptions for non-contribution or deferral of contributions. If a sufficient annual allocation is not guaranteed, it may not be effective. Countries that historically do not want to contribute to solidarity may continue to do so.

Finally, it is important to underline that the exception to implement financial contributions within the annual deadline hampers accountability and the very effectiveness of the solidarity mechanism.

Relocation procedure

The relocation procedure for a person seeking or benefiting from international protection will be implemented within four weeks following confirmation by the contributing Member State. The Member State may decline a relocation if the person represents a threat to its domestic "security".

Safeguards are included such as considering family or cultural ties in determining the Member State of relocation and that family members must be relocated together.

Once the relocation has taken place, the Member State of relocation will inform both the beneficiary Member State and the EUAA and the Solidarity Coordinator of the safe arrival of the relocated person. If prior to the relocation, the Member State in charge of the examination of the relocated person's asylum application has not been determined, this procedure should be carried out and, if necessary, the relocated person should be transferred to the third State determined to be responsible.

CEAR REMARKS: Adequate coordination between States in conducting relocations must be ensured, putting people and their rights at the centre. A personal interview of relocated persons should assess factors such as the vulnerability and special needs of the relocated person.

This Regulation allows that after a person has been relocated to another Member State, that Member State may send him/her to another third State. This Regulation allows that after a person has been relocated to another Member State, that Member State may send him/her to another third State.

2.2. PRE-ENTRY SCREENING REGULATION (SCREENING)

The Screening Regulation[30] introduces the new feature of a pre-entry control (screening) of third country nationals intercepted in an irregular border crossing or coming from a disembarkation following a rescue operation at sea, including asylum seekers. It also applies to persons residing irregularly on the territory of a Member State without evidence of having undergone prior screening and to persons authorised to enter exceptionally on humanitarian grounds.

The procedure involves identity, health and safety checks, a preliminary screening of vulnerabilities and the enrolment of biometric data in Eurodac. The aim is to properly channel persons seeking international protection to the border or ordinary asylum procedure and persons without protection needs to the return procedure.

CEAR REMARKS: The introduction of a prior screening for channelling asylum applications is a way of delaying access to the procedure (and all its guarantees) for applicants as the registration of their application will not take place until this screening is completed.

The application of a screening at the external border to persons who have been authorised to enter on humanitarian grounds is detrimental to these persons and is contradictory, as it places them in a situation of legal fiction of "non-entry" despite the fact that they have been authorised to enter.

2.2.1 LEGAL FICTION OF 'NON-ENTRY'

Persons subject to screening at the external border shall not be authorised to enter the Member State until the end of the screening, and shall remain at the disposal of the authorities at the designated locations, in order to avoid the risk of absconding. The screening will cease when the person voluntarily leaves the Member State, provided that he/she is accepted in another country.

A mandatory presumption is introduced that persons subject to screening "have not entered" the European Union, irrespective of their physical presence on the territory of a Member State.

30 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing screening on third-country nationals at external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. Latest version of the co-legislators' agreement available at https://data.consilium.europa.eu/doc/document/ST-6403-2024-INIT/en/pdf

CEAR REMARKS: The case law of the European Court of Human Rights (ECtHR) is clear on the obligation to guarantee the rights of the European Convention on Human Rights (ECHR) where a State Party exercises jurisdiction, even when this is extraterritorial, so that, beyond this attempt at legal fiction, persons under control must be guaranteed all rights. In particular, as soon as a person at a European border expresses their wish to apply for international protection, their rights must be guaranteed immediately by registering their asylum application.

Furthermore, we consider that there is a risk of excessive use of detention, when deprivation of liberty should be the last resort, as people have to remain at the border while pre-entry screening or other locations are carried out in accordance with national law.

2.2.2 FUNDAMENTAL RIGHTS MONITORING MECHANISM

EU law, including the Charter of Fundamental Rights; and international law, including the Geneva Convention, and obligations related to access to international protection, in particular the principle of non-refoulement, must be respected in the application of this Regulation.

The Regulation provides for an independent mechanism in each Member State to monitor compliance with EU law, including the EU Charter of Fundamental Rights.

CEAR REMARKS: It is difficult to comply with the envisaged guarantee of respect for international human rights law when this Regulation seems to dispense with the concept of jurisdiction by introducing a legal fiction of "non-entry". If the person is under the effective control of the authorities of the Member State in question, he or she is considered to be within its jurisdiction, so that all binding human rights protection law would apply.

The subjective scope of the screening procedure is very broad, applying to a large number of persons, including those who are within the territory irregularly. We regard this as a criminalisation of the irregular entry of asylum seekers who do not have legal and safe ways to seek protection, which would be a violation of Article 31 of the Geneva Convention. These people will see their guarantees of access to the international protection procedure undermined.

We welcome the establishment of an independent mechanism to monitor fundamental rights during screening, which could be an opportunity for Member States to guarantee human rights. However, we find it a missed opportunity that its scope is limited to the scope of screening and not to all procedures carried out at the external borders.

The Commission should take into account the findings of the mechanism to assess the

implementation of and compliance with the European Charter of Fundamental Rights and make annual recommendations to member states in this regard.

Spain should guarantee the participation in this mechanism of organisations specialising in human rights, migration and asylum. Furthermore, it should enable this mechanism to propose, in the event of violations of fundamental rights, the initiation of infringement and sanction procedures.

2.2.3 BORDER CONTROL PROCEDURES

Duration, location and guarantees of border checks

Border control shall be carried out at appropriate locations near the border, or within the territory, within a maximum of 7 days.

During the control, organisations and persons providing advice will have effective access to third-country nationals, but this may be limited for reasons of security, public order or administrative management of a border crossing point or control facility.

The Regulation provides that Member States shall ensure that all persons under control enjoy an adequate standard of living, protection of their physical and mental health, as well as respect for the EU Charter of Fundamental Rights.

Member States shall deploy sufficient staff and resources to carry out control efficiently and ensure that staff have the appropriate expertise and have received the necessary training. In this regard, they will ensure that the health checks are carried out by qualified medical personnel, and that the vulnerability screening is carried out by specialised staff trained to identify any signs of a situation of vulnerability including possible victims of trafficking or torture or other inhuman or degrading treatment and situations of statelessness. For the purposes of the vulnerability check, the supervisory authorities may be assisted by non-governmental organisations.

The Regulation determines that, during border control, the best interests of the child shall always be a paramount concern and the child shall be accompanied by an adult relative, if there is one. If not, the State shall ensure that a representative or a person qualified to accompany and assist the child performs his or her duties in accordance with the principle of the best interests

of the child. This person shall not be an official responsible for any element of supervision, shall act independently and shall not take orders from either the officials responsible for supervision or the supervisory authorities.

CEAR REMARKS: There is a risk of excessive use of deprivation of liberty (which should be the last resort) as persons have to remain at or near the external borders while the prior check is carried out, which can last up to 7 days. Furthermore, the Reception Directive could be violated, as it is not clear that there are "adequate and appropriate" facilities and States are given a great deal of discretion to decide how to establish them.

The same applies to the provision that controls may be carried out in locations within the territory, which implies the risk of the use of Alien Detention Centres (CIE in Spanish) or Temporary Alien Attention Centres (CATE in Spanish) to carry out controls (screening) on those persons identified in the territory or even at the border.

The regulation introduces some improvements in the guarantees for persons with special needs, including a specific article on minors, establishing health and vulnerability checks in all cases (not only at the external border), including statelessness, and connecting this vulnerability and health check with the provisions of the Procedural Regulation and the Reception Directive.

However, we consider that the guarantees foreseen for the persons subject to the check are not sufficient as they do not mention the minimum reception conditions and detention conditions of the Reception Directive in the case of persons seeking international protection. The Return Directive is mentioned for non-applicants.

Spain should not lower the standards and guarantees provided for in national legislation for persons under control, including free legal assistance, the right to an interpreter or to an effective remedy. In accessing essential health treatment, Spain should ensure that this includes, inter alia, mental health and chronic and long-term illnesses.

Screening within the territory

This regulation establishes the possibility for Member States to carry out screening within their territory of persons who are present in their territory without authorisation when they have crossed the border irregularly and have not already been screened. This will be done within a maximum of 3 days.

CEAR REMARKS: Although the subjective scope of screening within the territory is limited by clarifying that the person must be irregularly present in the Member State and have crossed the border irregularly, we consider that there is a high risk of racial profiling.

Furthermore, applying the check to persons who are inside the territory undermines the very concept of "pre-entry" checks and consolidates practices that criminalise migrants, racialised persons and refugees.

Form and completion of the screening

A form shall be filled in with the information obtained from the screening, including name, date and place of birth and sex; details of nationalities or statelessness, countries of residence prior to arrival and languages spoken; reason for the screening; information on the preliminary medical check and on the preliminary vulnerability check, information on whether the third-country national has lodged an application for international protection.

The screening ends when all the checks have been carried out, or when the defined time limit is exceeded.

If the person has not applied for international protection, the person is referred (including the form) to the return procedure. If the person has applied for international protection, the person is referred (including the form) to the asylum application registration. If the person is to be relocated, it is referred (including the form) to the authority of the Member State of relocation. If the person is subject to criminal or extradition proceedings, the screening may not be initiated. If it has been initiated it will be referred to the relevant procedure.

CEAR REMARKS: The detail of the information in the screening form can serve for the early detection of specific needs, and guarantees are included as to the availability of such information to the person concerned or to the courts in case of an appeal in the asylum or return procedure. However, there is no provision for an appeal per se against this form and referral to one procedure or another. Nor is it guaranteed that the person has the right to be heard before such a form is completed or the right to be informed of the reasons for deciding that one procedure or the other is applicable.

It is of concern that there is no right to an effective remedy against the decision of the control procedure which channels the asylum application through the asylum or return procedure at the border on the basis of arbitrary and discriminatory criteria based on nationality.

The control procedure is an administrative procedure distinct from the return and international protection procedures and, therefore, Spain must guarantee the right to appeal against the administrative act derived from the control procedure in an independent manner.

2.3. ASYLUM PROCEDURES REGULATION

The Regulation on a Common Procedure on international protection[31] is the result of the provisional agreement of co-legislators on the proposal presented by the European Commission in 2016[32] and the amendments introduced in 2020 in the framework of the European Pact on Migration and Asylum[33].

The main purpose is to establish a common procedure for international protection in the EU to simplify, streamline and harmonise asylum procedures in all Member States, discouraging multiple applications and secondary movements. It aims to ensure swift but high-quality decisions, with enhanced procedural guarantees to safeguard the rights of asylum seekers as well as stricter standards to prevent abuse of the system.

In addition, a new single border procedure for asylum and return is introduced, linked to the screening procedure and mandatory in certain cases. This is the aim of the co-legislators' 2024 agreement on the amended 2020 proposal[34] and is based on the presumption that most arrivals do not have protection needs and that their applications can be examined in the shortest possible time. This leads to a restriction of basic procedural rights and guarantees, undermining the main objective and jeopardising the right to asylum.

2.3.1. RIGHTS AND GUARANTEES OF THE INTERNATIONAL PROTECTION PROCEDURE

31 Amended proposal for a Regulation establishing a common procedure on international protection in the Union and repealing Directive 2013/32/EU. PE-CONS No/YY - 2016/0224(COD) https://data.consilium.europa.eu/doc/document/ST-6375-2024-INIT/en/pdf

32 https://eur-lex.europa.eu/legal-content/ES/ALL/?uri=CELEX%3A52016PC0467

33 https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A52020PC0611

34 The aim of the Commission's amended 2020 proposal is to establish "a seamless link between all stages of the migration process, from arrival to the processing of asylum applications and the granting of international protection or, where appropriate, the return of persons who are not in need of international protection".

General rights, obligations and guarantees

Positive obligations of States and rights to information and interpreter.

Member States must guarantee the rights to information, free interpreters, the right to contact the United Nations Refugee Agency (UNHCR) and other organisations, the right of access to the contents of the file and the right to written notification of the decision on their asylum application.

Information on rights (including free legal assistance), obligations, time limits and stages of the international protection procedure must be provided to applicants as soon as possible and always before registration. It should be provided in written or oral format if necessary, in a language the applicant understands, standardised (with a leaflet produced by the EUAA), and communicated in a child-sensitive manner in the case of minors.

A free interpreter is guaranteed for the registration of the application, the submission/formalisation of the application and the personal interview.

CEAR REMARKS: The general guarantees are strengthened compared to the current Directive with positive obligations for the Member States, so that they will no longer only "ensure" or "not deny", but will have to comply with the concrete provision (inform, provide an interpreter...).

The right to information is reinforced by setting maximum time limits for receiving it, as well as the obligation to provide it in a written, standardised and child-friendly format.

The extension of the right to an interpreter to include both the registration, the presentation and the personal interview is an improvement on the previous legislation, which provided at least only for the personal interview.

Spain should retain the same guarantees in accelerated, border and subsequent application procedures as in ordinary procedures.

Applicants' obligations and consequences of non-compliance

New and more extensive obligations are established for asylum seekers:

- Apply for international protection in the first country of irregular entry or in the first country of legal stay.
- Provide all relevant data, fingerprints, address, telephone, email and photos, as well as notify any changes in such data.

- Submit the application on time and remain available throughout the procedure.
- Submit all available items and documentation as soon as possible.
- Provide an explanation as to why he/she does not have identity documents; attend the personal interview.
- Remain in the Member State in charge or in a specific area according to the Reception Directive.

If the asylum seeker fails to comply with the obligations, the application must be considered discontinued. Member States may suspend the procedure in order to give the applicant the opportunity to justify that the failure to comply with his/her obligations was due to circumstances beyond his/her control.

CEAR REMARKS: The implicit withdrawal of the asylum application is no longer optional for states, but they are obliged to apply it in extended cases. The criminalisation of applicants for not complying with the new and broader obligations imposed on them, such as failure to provide identification data, failure to appear or failure to submit an application within the deadline, implies the implicit withdrawal of their application, which is disproportionate.

Right to remain during the administrative procedure and to documentation

Asylum seekers are allowed to remain in the Member State, for the sole purpose of the procedure, until a decision has been taken by the determining authority. The exceptions to this right to remain that Member States may provide for in addition to in the case of a subsequent application, if the applicant represents a "threat to national security or public order", are extended. Furthermore, the deprivation of this right to remain during the asylum procedure is made mandatory in the event of a European Arrest Warrant.

The Regulation provides for the documentation of the asylum seeker after registration of his application and, in case of a transfer under RAMM, when he is presented to the competent authorities of the Member State responsible. A further document will be provided as soon as possible after the application has been lodged/submitted, without setting a maximum time limit. The content of this documentation and the period of validity of 12 months, renewable until the end of the right to stay in the Member State, are detailed.

CEAR REMARKS: The right to remain of asylum seekers is restricted by extending the exceptions to this right, with new cases in which indeterminate legal concepts such as threat to national security or public policy have to be applied, which can lead to expansive interpretations and can ultimately lead to the expulsion of the person.

With regard to the right to documentation, an improvement can be noted with respect to Directive 2013/33/EU, as it imposes the obligation to issue documentation after registration, instead of after presentation, and details the content of this documentation and its period of validity.

Personal interview

The Regulation maintains the obligation for Member States to conduct a personal interview, distinguishing between an interview on the admissibility of the application and an interview on the substance of the case. The aim is to give the applicant for international protection the chance to present all the elements and explain any contradictions in his or her application. Some new features are introduced in the interview requirements:

- Obligation of the presence of a legal advisor if the applicant has opted for it.
- Possibility of the presence of cultural mediators.
- Obligation to be carried out by the determining authority, except in situations of migratory pressure where it may be carried out by agents deployed by the EUAA or other Member States.
- Obligation for interviewers to be trained and qualified in specific fields, and not to wear uniforms.
- Possibility of carrying out the interview by videoconference.
- Compulsory recording and guaranteed access to the recordings as soon as possible for applicants or their lawyers.

New cases in which the personal interview may be dispensed with are included: subsequent applications and inadmissibility if the person is a beneficiary of international protection in another Member State.

CEAR REMARKS: In relation to the personal interview, we welcome the provision for the possibility of having cultural mediators at the interviews, the compulsory presence of legal counsel if the applicant has opted for it, and the emphasis on the training of the interviewers.

Legal advice, legal assistance and representation

The Regulation recognises the right of asylum seekers to free legal advice during all stages of the asylum procedure. Free legal assistance (and representation) is limited to the appeals procedure, leaving it to States to provide this more protective right during the administrative procedure.

The obligation of states to provide free legal advice at the request of applicants is enhanced, except in the case of a subsequent first application with the aim of frustrating the enforcement of a removal order or subsequent second applications. The extent of this right includes the provision by legal advisers, counsellors or other figures envisaged in national legislation of information on the procedure, rights and obligations, as well as assistance in submitting the application, the type of procedure that is applicable and other legal issues.

CEAR REMARKS: The Regulation refers to legal counselling for the administrative asylum procedure and legal assistance for the appeal procedure.

Member States have the possibility to guarantee in their national legislation legal assistance and representation throughout the administrative procedure, so Spain does not have to lower its standards for free legal assistance in the administrative procedure.

Likewise, the implementation of exceptions to the right to free legal advice, legal assistance and representation is at the discretion of the Member States, so Spain does not have to limit this right.

Specific procedural needs and minors

Assessment of specific procedural needs

The competent authorities of the Member States must assess the applicant's specific procedural needs on an individual basis as soon as the applicant expresses the wish to apply for international protection, collecting the first signs of vulnerability (visibility, behaviour, documents) and reflecting this information at the time of registration of the asylum application.

The continuous nature of this needs assessment is underlined, which, although to be completed within 30 days, continues throughout the asylum procedure and is subject to review if there are new signs of vulnerability.

This allows for the transfer of applicants to medical, psychiatric or other pro-

fessional care, with priority being given to cases of torture, rape and other serious forms of violence. The reports will be considered when deciding on the procedural safeguards required in each case. The competent authorities and all actors involved in this process will receive appropriate training.

States' obligation to provide the necessary support to these persons to enjoy their rights and fulfil their obligations as applicants for international protection is reinforced, including exclusion from accelerated and border procedures.

CEAR REMARKS: We welcome the fact that the individual specific needs assessment process is detailed and that it will start as soon as the applicant's wish to apply for international protection is expressed and will continue throughout the procedure. As in the previous legislation, if the assistance needed by the applicant cannot be provided in the framework of an accelerated and border procedure, this procedure will be discontinued.

Minors and unaccompanied minors

In the assessment of asylum applications submitted by minors, the best interests of the minor, as assessed in accordance with the Reception Directive, will be a primary consideration. A child perspective is included in the right to information and in the personal interview. Moreover, Member States are required to ensure that staff in charge of interviewing and examining applications from minors receive specialised training.

Guarantees of assistance and representation for children without family references in the asylum procedure are reinforced, establishing a period of 15 days for a legal guardian to be appointed (which can be extended to 25 days if there is a disproportionate number of applications) and, while the appointment occurs, the provisional assistance of a qualified person will be provided. Priority is given to multidisciplinary testing for age determination, whereby medical testing is only used as a last resort.

Despite these guarantees, the Regulation maintains and expands the grounds on which a Member State may subject an unaccompanied minor to the accelerated procedure: if he or she comes from a safe country of origin or his or her recognition rate is below 20% of the EU average, represents a danger to public order or national security, subsequent application is not inadmissible, presents false information or documentation or conceals relevant information.

The mandatory application of the border procedure to unaccompanied minors who are considered a threat to national security is also introduced. In this case there will be an automatic suspensive effect of the appeal against the denial of the asylum application. Families with minors may also be subject to the border procedure, but it is stipulated that they will be accommodated in appropriate reception centres and that, if the Member State does not ensure that these conditions are met, this procedure may be discontinued in order to process their application.

Certain guarantees are introduced to avoid the refoulement of minors under the application of safe country concepts, without an individualised analysis, by establishing as a condition that the authorities of that country ensure that they will take charge of the minor and provide immediate access to effective protection.

CEAR REMARKS: Some guarantees for minors are strengthened, such as the introduction of a specific provision that prioritises the best interests of the minor and the obligation for staff to receive specialised training, as well as including a child perspective in the information.

Guarantees for asylum-seeking children without family references are also reinforced by establishing a mandatory 15-day period for the appointment of a legal guardian, and in the meantime appointing a person to assist them.

A significant improvement is also the fact that medical tests to determine age are still used as a last resort, prioritising the use of multidisciplinary testing, which is why it would be highly advisable for Spain to opt for this option.

Despite these improvements, the increase in the number of cases in which an accelerated procedure and even a border procedure can be applied to minors, which entails the possibility of detention or arrest, is a serious step backwards. We believe that in such cases they cannot be returned to where they are fleeing from if an appeal is lodged until it is resolved.

Remedy against refusal of the application for international protection

The right to an effective remedy against decisions in the international protection procedure, such as inadmissibility of the application, refusal as unfounded or manifestly unfounded, implicit withdrawal and withdrawal of protection, is guaranteed. In the case of a return decision in the border return process, if

the decision is taken together with the refusal/inadmission of international protection, it will be appealed jointly; and if the decision is taken separately, the appeal will be made separately, but within the same time limits.

A short time limit of seven to ten days is set for appeals against decisions of inadmissibility, implicit withdrawal or refusal on the grounds that the application is unfounded or manifestly unfounded in the accelerated procedure. In all other cases, the time limit for lodging an appeal is from two weeks to one month.

The cases in which there will be no automatic suspensive effect of the appeal are extended, which implies a risk that the person will be returned to their country of origin or a third country while the appeal is being processed. Particularly noteworthy is this reduction of guarantees in appeals against:

- Refusal on the grounds of unfounded or manifestly unfounded application in accelerated and border procedures (in the latter case, except for applications from unaccompanied minors).
- Refusal on the grounds of implicit withdrawal.
- Decision to withdraw international protection.
- Appeals at second instance.
- Subsequent applications that are unfounded or manifestly unfounded and the suspensive effect of the appeal could also be excluded if the subsequent application is made in order to frustrate or delay the enforcement of the return.

In such cases, the court may decide to suspend the appeal in a legal and factual examination with guarantees that the person will not be removed until the end of the five-day period for applying for the interim relief[35] and until the decision on the suspension is taken. The person concerned has the right to an interpreter, to free legal assistance and to information.

CEAR REMARKS: They increase the cases in which there will be no automatic suspensive effect of the appeal, which is of particular concern in cases of accelerated, border and inadmissibility procedures where the deadlines for the administrative decision

35 Interim measures, or ex parte, are those provisional precautionary measures adopted at the request of the party in response to circumstances of special urgency or emergency, which require their immediate adoption even without the hearing of the opposing party, in order to ensure the outcome of the proceedings.

are tight, or subsequent applications that have fewer procedural guarantees. Furthermore, by forcing applications that do not meet the requirements for international protection to be considered unfounded, the number of cases of the accelerated and border procedures in which the risk of automatic refoulement of the person cannot be avoided increases.

This, together with the short deadlines for lodging and resolving appeals, undermines the effectiveness of appeals. As the ECtHR establishes 'in matters of expulsion from the territory, an effective remedy within the meaning of Article 13 requires the possibility of suspending the execution of an expulsion measure'.

2.3.2. ORDINARY INTERNATIONAL PROTECTION PROCEDURE

Access to the international protection procedure

Registration of the asylum application and the legal fiction of non-entry

The Regulation sets the deadline for registration of the asylum application at 5 days, extendable to 15 days if the State receives a disproportionate number of applications. If the person makes his application to authorities not competent for registration, they have to forward it to the competent authority as soon as possible and at the latest within 3 working days.

Registration is further delayed in case the asylum seeker has been subject to border control (screening), as registration will not take place until the control is completed due to the legal fiction of 'non-entry'.

CEAR REMARKS: It is a step backwards compared to Directive 2013/32/EU to extend the registration deadline from 3 to 5 days and also from 10 to 15 days in case of disproportionate number of applications, and as a consequence, a delay in access to the procedure to persons subject to the screening procedure.

Third-country nationals at European borders are already on EU territory and are therefore entitled to rights and obligations from that moment onwards. The legal fiction of non-entry and not permitting registration until the end of the screening procedure means an additional delay in access to the international protection procedure and in the right to be informed of their rights and obligations, a basic procedural guarantee, according to the ECtHR. As soon as a person expresses his/her willingness to apply for international protection, these rights must be guaranteed immediately through the registration of his/her application, in order to provide legal certainty.

Lodging the asylum application

The asylum seeker must lodge his/her application with the competent authority no later than 21 days after registration. If the Member State is unable to give an asylum appointment within this time limit, due to a disproportionate number of applicants, a maximum extension of two months from registration is allowed.

The application must be made in person and may be made on a written form. The applicant is required to submit the relevant elements to substantiate his/her asylum application at the time of lodging, or at any time thereafter until a final decision is taken. Member States may set a maximum time limit for the submission of documentation. They are also given the power to require the asylum application to be formulated, registered and lodged in the same instance.

CEAR REMARKS: This represents an improvement on Directive 2013/32/EU by setting a maximum time limit of 21 days from registration.

Member States are left to decide whether to require a deadline for submitting all the relevant elements, but Spain should not limit the deadline for submitting documentation, given the difficulties that applicants have in obtaining these elements or evidence.

Currently in Spain, the impossibility of accessing an appointment to file the application for international protection is leaving thousands of people unprotected for months. We consider that the implementation plans should establish measures to ensure effective compliance with the maximum deadlines for registration and filing.

Assessment of the asylum application

As a new feature, the Regulation makes the assessment of the internal flight alternative mandatory in the examination of asylum applications. It also requires the translation of the documentation, which may be paid for with public funds, except in the case of subsequent applications, when it must be paid for by the applicants themselves.

The determining authority may prioritise the assessment of subsequent applications, where there are reasonable grounds to consider threat to national security or public policy and applications from persons who have caused a public nuisance or have been involved in criminal behaviour.

CEAR REMARKS: The mandatory assessment of the internal flight alternative, which was previously a possibility, is a major risk considering that there are non-state actors of persecution. We are also concerned that the Regulation does not include all the UNHCR criteria for making this assessment without jeopardising respect for the principle of non-refoulement.

The assessment of applications is anticipated as a penalty for conduct by the applicant that is considered negative, subsequent applications, etc., also using indeterminate legal concepts, such as threat to national security and public policy, the extensive and discretionary interpretation of which can be detrimental to the applicant.

Admissibility of the application and decision on the merits

The maximum time limit for granting or rejecting an asylum application is set at two months from the date of submission, which may be extended by a further two months in exceptional situations. However, tacit admission in the absence of a reply from the administration is prohibited.

The Regulation makes it compulsory to refuse a subsequent application if there are no new elements In addition to the concepts of first country of asylum or safe third country, new cases of inadmissibility of an application are added, such as the submission of the asylum application only 7 days after the return order, provided that the applicant has been informed of the consequences of not making the application in time.

In relation to the decision on the merits, declaring an application unfounded becomes mandatory when the applicant does not fulfil the requirements for international protection.

CEAR REMARKS: Positive silence is prohibited for granting admission for processing, a guarantee that does exist in the Spanish procedure, which represents a step backwards in the guarantees for the applicant in the absence of a response from the administration.

Extending the grounds for inadmissibility that Member States can use and forcing the inadmissibility of subsequent applications means greater obstacles to obtaining protection. The possibility of rejecting an application if the person comes from a third country considered 'safe' is unfortunately maintained.

Refusal of the application and automatic issuance of the return decision

Where an application for international protection is refused as inadmissible, unfounded or manifestly unfounded, for implicit withdrawal or withdrawal, Member States must issue an automatic return decision in the same instrument, either as part of the decision refusing the application for international protection, or as a separate instrument, but at the same time.

CEAR REMARKS: This article undermines the suspensive effect of the appeal, which guarantees the applicant's stay until the expiry of the time limit for lodging the appeals provided for, which is hardly compatible with the automatic issuing of a return decision alongside the decision refusing international protection.

The reference to the Return Directive entails a decline in the established guarantees, such as the use of a form instead of a reasoned decision and the extension of the grounds for detention.

This automatism of issuing a return decision at the same time as the decision to refuse international protection jeopardises the respect of the principle of non-refoulement and an individualised assessment of Art. 2 and 3 of the European Convention on Human Rights.

Procedures for the withdrawal of international protection

Member States are required to withdraw international protection if new elements come to light indicating that the person is no longer in need of such protection.

In this procedure, guarantees for applicants are strengthened, such as the right to be informed of the obligation to cooperate and the consequences of not doing so (presumed unwillingness to maintain international protection).

CEAR REMARKS: Further guarantees are included in the procedure for withdrawal (cessation, revocation) of international protection, but it becomes obligatory for Member States.

2.3.3. SPECIAL PROCEDURES FOR INTERNATIONAL PROTECTION

Accelerated procedures

The Procedures Regulation makes the accelerated procedure for assessing an application for international protection mandatory. The maximum deadline for deciding on an application under this procedure is three months. Furthermore, the cases in which it must be applied are extended:

A. Issues that are not relevant for international protection.

B. Allegations that are clearly inconsistent, contradictory, false or that contradict the relevant information available on the country of origin.

C. Intention of the applicant to mislead the authorities by providing false information or by failing to disclose relevant information, especially about his or her identity or nationality.

D. Application for the sole purpose of delaying or avoiding expulsion.

E. Third country of origin considered safe.

F. Threat to national security or public policy.

G. Subsequent application considered not inadmissible.

H. Irregular entry into the territory of a Member State or extension of his/her irregular stay and failure to immediately present him/herself to the competent authorities or to apply for asylum as soon as possible.

I. Regular entry, but failure to lodge an application for international protection as soon as possible, without prejudice to the need for international protection that may subsequently arise.

J. The applicant is of a nationality with a protection recognition rate below 20% (EU average).

Moreover, the criteria for applying the accelerated procedure to unaccompanied minors are extended to include minors whose nationality has a protection recognition rate below 20% (EU average), if they are considered a threat to national security or public policy, submit false information or conceal information, or in case of a subsequent application that is not inadmissible.

CEAR REMARKS: The mandatory application of the accelerated procedure and the extension of cases will lead to the majority of applications being processed through this procedure which is carried out in reduced time limits, which do not allow for a proper assessment of applications for international protection or the identification of situations of particular vulnerability.

Furthermore, there is no automatic suspensive effect of appeals against refusals on the grounds that the application is unfounded.

We are concerned that one of the cases of mandatory application of the accelerated procedure is that the person is undocumented. It is important to note that the lack of legal and safe channels means that people in need of international protection arrive at border areas without documentation proving their nationality and identity. Moreover, the Geneva Convention prohibits criminal sanctions for refugees who have been forced to enter safe territory irregularly.

The application of these procedures jeopardises the individualised analysis of applications by introducing discriminatory criteria based on nationality, assessing protection

needs in a general manner and without taking into account the specific circumstances of each applicant. There are insufficient guarantees of protection for persons whose nationality has a recognition rate below 20%.

The serious consequences for the applicant and for the Member States of an assessment that the person may represent a threat to 'national security or public policy' make it necessary for each case to be considered carefully and not under the accelerated procedure.

From a child and human rights perspective, Spain should not apply the accelerated procedure to applications submitted by unaccompanied minors.

The measure to deprive the vast majority of persons whose applications are processed under the accelerated procedure (Art. 17 of the Reception Directive) of access to employment is very serious. This measure is discriminatory, disproportionate and undermines people's autonomy, affecting their social inclusion processes.

Border procedures

The Procedures Regulation extends the circumstances in which a Member State may apply the border procedure for the examination of applications for international protection. As well as applying to asylum applications lodged at border crossing points or transit zones, it can now also be used in cases of interceptions following irregular entries, disembarkations and relocations.

The maximum duration of the border procedure is extended to 12 weeks (up to 16 weeks in case of relocation) and the legal fiction of 'non-entry' is introduced. After this time, the applicant has the right to enter the territory of the Member State, unless he/she receives a decision refusing his/her application and is subject to the return procedure at the border.

When the number of applications processed under the border procedure exceeds a certain threshold ('adequate capacity'), Member States will prioritise the application of the border procedure to nationalities that are easier to return to their country of origin, to a safe third country or to a first country of asylum, as well as to applications that do not include minors and their family members.

It will be mandatory to apply the border procedure if the person seeking asylum:

1. Submits false information or conceals information.
2. Represents a threat to national security or public policy.

3. Comes from a country of origin that has a protection recognition rate equal to or lower than 20% of the average for the EU Member States as a whole.

Perverse provisions for preserving family unity are established in these procedures, including the extensive application of the border procedure to family members of the applicant who present a threat to national security or public policy, even if the family members are already on the territory of the Member State.

Member States should establish a mechanism for monitoring compliance with fundamental rights during the border procedure. If reception conditions for families with minors are not adequate, the Commission may recommend that the Member State discontinue the border procedure.

CEAR REMARKS: Border procedures become mandatory in circumstances involving a very large number of asylum seekers, taking into account that the lack of legal channels of access leads to persons in need of international protection arriving at border areas without documentation proving their nationality and identity.

It is also obligatory to apply it on the basis of indeterminate legal concepts such as 'threat to national security and public policy', as well as introducing discriminatory criteria based on nationality (recognition rate below 20%). These criteria are contrary to Article 33 of the Geneva Convention and jeopardise the individualised assessment of asylum applications provided for in Articles 2 and 3 of the European Convention on Human Rights.

In addition, the maximum duration of detention is extended to 12 weeks, during which time persons may be held in detention conditions, deprived of their liberty.

The principle of family unity from a human rights perspective requires the application of the interpretation that is most favourable to individuals. However, it is invoked to the detriment of the whole family already on the territory by subjecting them to the border procedure if one of their family members is under this procedure for reasons of threat to national security, going beyond the principle of individual responsibility.

There will be no suspensive effect against the refusal of the asylum application in the border procedure, which also entails an automatic return decision, jeopardising the principle of non-refoulement.

The prioritisation criteria for the application of the border procedure are used as a punishment, emphasising the perspective of executing the return.

From a child and human rights perspective, Spain should not apply the border procedure to applications submitted by unaccompanied minors.

The scope of application of the mechanism for monitoring the respect of fundamental rights in the border procedure should be extended to monitor also the respect of these rights in the remaining asylum and return procedures.

Adequate capacity

The Regulation establishes that all EU Member States have 'adequate capacity' to process a maximum of 30,000 asylum applications each year through the border procedure. The European Commission estimates each Member State's adequate capacity limit on the basis of the number of irregular entries, persons disembarked and border rejections recorded in the previous three years compared to the EU as a whole.

Once a Member State has examined the annual maximum number of applications for which its 'adequate capacity' has been set, it will no longer be obliged to apply the border procedure in cases of submitting false information or concealing information and having a nationality with a low protection rate in the EU. However, despite surpassing this maximum, the Member State will still have to apply it in cases of threat to national security or public policy.

CEAR REMARKS: This is a discriminatory criterion, with the effect of treating applicants differently depending on whether they have arrived before or after surpassing this 'adequate capacity', not focused on protection but on the interests of the Member States.

Spain's implementation plans should include guarantees and in any case ensure that applications are processed through the ordinary procedure.

Subsequent applications

A subsequent application for international protection is an application for international protection lodged after there has already been a final decision on the previous application.

The preliminary examination to determine whether there are new elements includes those relating to grounds of inadmissibility if the previous application was refused. This examination may be in writing or through a personal interview, which may be waived if it is already clear in writing that there are no elements other than those presented in the first application.

Member States may deprive the applicant of the right to stay in the case of a subsequent first application that is made for the sole purpose of preventing departure from the country or subsequent second applications.

CEAR REMARKS: Guarantees for subsequent applications are reduced, with the possibility of excluding legal advice, free translations, omitting the personal interview and even depriving the applicant of the right to stay in some cases.

Safe country concepts

The requirement for the application of the first country of asylum and safe third country concepts is that effective protection of the applicant is ensured. Effective protection is considered to exist in a country which:

A. Has ratified and complies with the 1951 Geneva Convention relating to the Status of Refugees.

B. Has not ratified the Convention or has done so with limitations, but meets the following minimum criteria:

- The person has the right to remain in the territory.
- Access to means of livelihood and an adequate standard of living.
- Access to health care and essential treatment.
- Access to education.
- This effective protection is maintained until a durable solution is found.

New requirements are included for a country to be considered a first country of asylum. In addition to ratification of the Geneva Convention or guaranteeing effective protection, it is required that their life and liberty are not in danger, that they do not face serious serious harm and that the principle of non-refoulement is respected. It may be a ground for refusal of the application, unless the applicant justifies that it does not apply in his or her particular case.

With regard to the concept of safe third country, the individualised analysis is limited to those third countries that have not been designated as 'safe' in a national or EU list. A third country with which the EU has signed an agreement providing for the protection of migrants and respecting the principle of non-refoulement is also presumed to be 'safe'. This concept can only be applied if the applicant has not been able to justify why it is not applicable to his or her specific case and if there is a connection between the applicant and the third country that makes it reasonable to return him or her to the third country.

For a country of origin to be designated a safe country of origin, it must be demonstrated that there is no persecution within the meaning of the Geneva Convention and no real risk of serious harm, respect for fundamental rights treaties, as well as the existence of effective remedies against human rights

violations. The application of this concept can be a ground for refusing an application or for the processing of a border procedure and is a mandatory ground for the accelerated procedure (including for minors).

As a new feature, Member States may introduce exceptions to the concepts of safe third country and safe third country of origin for parts of the territory or for specific and well-defined groups of persons. However, no individualised analysis is established on a case-by-case basis.

CEAR REMARKS: Clarity is provided on the definition of what is considered as 'effective protection', however, the mere ratification of the Geneva Convention cannot imply a presumption that such protection exists in the country.

The safe country concepts are based on an analysis of the general situation in the country and do not guarantee individualised analysis. Furthermore, as a new feature, the burden of proof to demonstrate that the country is not safe is placed on the asylum seeker, whereas until now it was the authorities.

The inclusion of a country in the list of 'safe third country' and 'safe country of origin' is not sufficient to guarantee respect for the principle of non-refoulement. The obligation to prepare a list at EU level, the absence of an individualised analysis of the specific case and the obligation to apply the accelerated procedure to these applications lead to a reduction in guarantees and make it difficult to identify situations of vulnerability. Moreover, this different treatment of applications for international protection on the basis of nationality may conflict with the prohibition of discriminatory treatment of refugees on the basis of their country of origin contained in Article 3 of the 1951 Geneva Convention relating to the Status of Refugees.

The criterion of connection between a person and a 'safe third country' is weak and indeterminate. The presumption that a third country is 'safe' is serious if it is a signatory to a bilateral agreement with the EU, as well as if the country is included in a national or EU list of 'safe countries'.

Spain should refrain from creating a national list of safe countries and from using these concepts to refuse an application for international protection, as well as from applying them in a border procedure, which is less protective.

2.4. RETURN BORDER PROCEDURE REGULATION

The border return procedure will apply to persons in need of international protection whose applications have been refused or not accepted in the border asylum procedure.

In such cases, applicants shall be required to stay at locations at or near external

borders or transit zones or other places within the territory for 12 weeks from the moment when they are no longer eligible to stay. If it is not possible to execute the return within this 12-week period, the regular procedure of the Return Directive, which establishes a maximum detention period of 6 months, will be followed.

If persons are still considered as applicants for international protection (because no final decision has been taken), the minimum conditions of the Reception Directive must be fulfilled.

They will be offered a period of voluntary departure of maximum 15 days except in cases of risk of absconding, refusal on manifestly unfounded grounds or risk to national security or public policy.

This regulation also establishes specific rules on the border return procedure for crisis situations, and the adoption of measures under the principles of proportionality, necessity and limitation to the time strictly necessary.

Member States must ensure the protection of the rights of asylum seekers and be consistent with their obligations under the EU Charter of Fundamental Rights and international human rights law.

It also amends the Regulation of the Instrument for Financial Support for Border Management and Visa Policy (BMVI).

2.4.1 DETENTION

Detention is permitted as a last resort when no other less harmful measure can be applied. The EUAA will develop guidance on alternatives to detention.

If the refused applicant for international protection who is subject to the return border procedure has already been detained, he/she may remain in detention for the purpose of preventing his/her entry into the territory and preparing for the implementation of the return. If, on the other hand, he/she has not been detained, he/she may be detained if there is a risk of absconding, if he/she prevents or hinders the preparation of the return or if he/she poses a threat to national security or public policy.

The detention period in the return procedure at the border has a maximum duration of 12 weeks, which, if not complied with, may be extended up to 6 months in application of the Return Directive. Detention will only be continued

as long as there is a reasonable prospect of return and the necessary steps are being taken with due diligence.

The total period for which an asylum seeker may be deprived of liberty could be up to 9 months, adding to the maximum period of 6 months of detention under the return procedure the 12-week maximum duration of the asylum border procedure.

CEAR REMARKS: This regulation allows for the continued or imposed detention of rejected applicants for international protection at the border and subjected to a return procedure at the border, but does not oblige it. Spain should refrain from using this possibility to limit the right to liberty.

Although the preparation of the Guide on Alternatives to Detention is a positive aspect to highlight, no clear criteria are established for the assessment of the need for detention beyond what is set out in the Regulation. It is not clear how the need to detain or not is to be assessed, nor is it made mandatory to give reasons for the decision, justifying that it was used as a last resort. Thus, there is no guarantee that detention will not be used as a systematic measure.

2.4.2 DEROGATIONS APPLICABLE IN SITUATIONS OF CRISIS OR FORCE MAJEURE

If a Member State is in a situation of crisis or force majeure, persons may be held at the locations of the return procedure at the border for a further 6 weeks and detained for a further 6 weeks, provided that the maximum time limits of the Return Directive are not exceeded.

It will also apply to persons whose applications for international protection have been refused before the adoption of the Council Implementing Decision, but who are not entitled to stay after this decision.

CEAR REMARKS: The maximum time a person can be held or detained under the border return procedure is extended to 18 weeks, which should be added to the time they have already been held or detained under the asylum border procedure, to a total of 9 months of detention and 6 months of detention, the maximum allowed under the Return Directive.

The extension of retention or detention periods in situations of crisis, force majeure and instrumentalisation and the lack of sufficient guarantees to protect the rights of persons going through these procedures is of concern.

Moreover, this extension applies not only to persons whose application for international protection has been refused during the period of crisis or force majeure, but also to persons who had already been previously rejected and who were awaiting return at the time the crisis situation was declared. Spain should not apply this measure.

2.5. CRISIS AND FORCE MAJEURE REGULATION

The Crisis Regulation[36] addresses exceptional situations of crisis, force majeure and instrumentalisation[37] in the field of migration and asylum in the European Union, envisaging solidarity measures and establishing specific temporary rules that will derogate from the rules laid down in the RAMM and Asylum Procedures Regulation (APR).

Concept of crisis, force majeure and instrumentalisation

A crisis situation is defined as a situation in which there is a massive influx of third country nationals of such a magnitude that the asylum, reception and return system of a Member State becomes dysfunctional. This may occur as a result of a situation at local or regional level, with serious consequences for the functioning of the Common European Asylum System.

On the other hand, a situation of instrumentalisation of migration would occur, according to this new regulation, when a hostile non-state actor or third country promotes or facilitates the movement of third-country nationals and stateless persons towards the external borders or a Member State, with the aim of destabilising the Union or a Member State, putting at risk essential functions, such as the maintenance of public policy or national security.

Finally, a situation of force majeure refers to abnormal and unforeseeable circumstances beyond the control of the Member State, the consequences of which could not have been avoided despite the exercise of all due diligence, and which prevent the Member State from complying with the obligations set out in RAMM and APR Regulations.

36 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on situations of crisis and force majeure in the field of migration and asylum. Latest version of the co-legislators' agreement of February 2024, available at: https://data.consilium.europa.eu/doc/document/ST-6379-2024-INIT/en/pdf.

37 crisis and force majeure have the same regime of derogations, the concept of instrumentalisation is a 'sub-category' within crisis. It only introduces specific derogations for instrumentalisation in some cases.

CEAR REMARKS: In situations of crisis or force majeure, it is envisaged that states may request temporary derogations from European asylum rules that delay and hinder access to the international protection procedure. The assessment of these circumstances may lead to broad and discretionary interpretations by states that allow them to bypass their asylum obligations. It is important to remember that in situations of crisis or force majeure, fundamental rights must always be guaranteed, and to this end it is necessary that the asylum and reception systems of the States be strengthened and that the response be rapid and effective without this entailing a loss of rights and guarantees.

Furthermore, the definition of the concepts of 'crisis', 'force majeure' and 'instrumentalisation' include indeterminate notions such as 'well-prepared state', 'abnormal and unforeseeable circumstances beyond the control of states', 'destabilisation of the Union or a Member State', 'jeopardising essential functions such as the maintenance of public policy or national security'. Because of their lack of definition, these concepts are open to discretionary interpretation by Member States. In practice, this could lead to the creation of a parallel asylum system for situations of crisis, force majeure or instrumentalisation, with fewer guarantees and serious risks for the fundamental rights of individuals, such as the prolonged use of detention at the border.

In addition, the inclusion of the undefined concept of 'hostile non-state actor promoting or facilitating movement' can be used to criminalise human rights organisations working with migrants and refugees or carrying out humanitarian rescue work at sea. In implementation, states should specifically exclude humanitarian assistance as a possible 'hostile non-state actor', as its provision in the recitals of this regulation is insufficient.

Duration of exceptional measures

The period of application of derogations and solidarity measures is three months, extendable once for a further three months if the Commission confirms the persistence of the crisis or force majeure. Member States should not apply derogations beyond what is strictly necessary to address the crisis, for a maximum period of one year.

CEAR REMARKS: The introduction of broad exceptions and derogations to EU asylum rules in situations of crisis or force majeure erodes the establishment of a Common European Asylum System, whose main problem is the lack of harmonisation and widespread non-compliance with common standards. It is of particular concern that the duration of these exceptions extends up to one year.

Monitoring compliance with fundamental rights

The Commission and the Council will constantly monitor whether a situation of crisis, instrumentalisation or force majeure persists. Particular attention will be paid to compliance with fundamental rights and humanitarian standards and the Commission may request the EUAA to initiate a specific monitoring exercise.

When the Commission considers that the circumstances that led to the establishment of the situation of crisis or force majeure no longer exist, it will propose the repeal of the Council Implementing Decision.

CEAR REMARKS: In situations of crisis or force majeure the European Commission and the Member States must monitor the fulfilment and guarantee of fundamental rights. To this end, European and national implementation plans need to include independent surveillance mechanisms for monitoring respect for fundamental rights in the management and control of external borders. To ensure their independence, it is necessary to involve international organisations, national human rights institutions, the European Union Agency for Fundamental Rights (FRA) and civil society organisations in their functioning, as well as to have a mandate to investigate fundamental rights violations and propose infringement procedures.

2.5.1 SOLIDARITY MEASURES APPLICABLE IN SITUATIONS OF CRISIS OR FORCE MAJEURE

A Member State facing a situation of crisis, force majeure or instrumentalisation may request a range of solidarity and support measures from the other Member States, which may choose from among the different types of contributions provided for in RAMM Regulation:

1. Relocations of persons seeking and benefiting from international protection;
2. Financial contributions targeted at relevant projects to address the situation in the Member State concerned or in third countries which may have a direct impact on migratory flows towards the external borders of Member States;
3. Alternative solidarity measures focusing on operational support, capacity building, services, support to personnel, facilities or technical equipment.

As foreseen in RAMM Regulation, the Council establishes the Solidarity Fund with contributions from each Member State. It also establishes a Solidarity Response Plan which will indicate the total number of necessary relocations or other solidarity measures to address the situation and designates a Solidarity Coordinator to support relocation activities.

The Crisis Regulation also provides that Member States in a situation of crisis or force majeure will be able to deduct their compulsory share from the Solidarity Fund, in addition to accepting or requesting the exchange of relocations for liability compensation.

CEAR REMARKS: This 'à la carte' mechanism is not sufficient to ensure real solidarity, as it does not prioritise relocation with compulsory contributions and considers the financing of (outsourcing) projects in third countries as solidarity contributions. Solidarity contributions should be focused on the protection of persons, i.e. on their relocation to guarantee them a dignified reception. Spain should reject and refrain from making any financial solidarity contribution related to border externalisation actions. If Spain makes financial contributions, these should be dedicated exclusively to enhancing the reception and asylum system of the Member States, from the perspective of the protection of persons.

In situations of crisis or force majeure, states must guarantee the rights and lives of people, so it is essential that, in the evaluation request sent to the European Commission, relocation is the only (or, if necessary, the priority) solidarity measure. The contributing states must also commit themselves solely (or, where appropriate, as a priority) through relocation.

2.5.2. DEROGATIONS AND EXCEPTIONS TO EUROPEAN ASYLUM RULES

Derogations registration deadlines

This Regulation allows Member States, in situations of crisis or force majeure, to register applications within four weeks of their submission during such a period. Priority is given to the registration of applications from persons with special reception needs, minors and their families, as well as probably well-founded applications.

The Member State concerned shall duly inform in a language which the third-country national or stateless person understands or may reasonably be

presumed to understand about the measure applied, the location of registration facilities, including border crossing points accessible for registering and lodging an application for international protection, and the duration of the measure.

When submitting the request, a Member State may notify the Commission of the application of the derogation before being authorised by the Council implementing decision, indicating the precise reasons why immediate action is required. In such a case, it may apply the derogation as from the day following the request and for a period not exceeding 10 days.

CEAR REMARKS: Access to the asylum procedure is hindered by allowing a delay in the registration of applications up to a maximum of 4 weeks, the time limit already being set in the Procedural Regulation 15 days in case of a disproportionate number of applications. This delay severely impacts on access to registration-related rights such as, among others, the right to information, access to employment (6 months after registration), the right to an interpreter for registration and submission, legal advice prior to the submission of the asylum application, and the issuance of documentation accrediting the asylum seeker after registration.

Although priority will be given to the registration of applications from persons with special reception needs, minors and their families, as well as probably well-founded applications, this is not a sufficient guarantee for access to the rights attached to registration for these particularly vulnerable groups.

It is particularly serious that the Member State can apply this derogation before being authorised by the Council or even evaluated by the Commission, which could contradict the final decision, having arbitrarily applied derogations that negatively impact the rights of persons in need of protection.

Spain and the other Member States should refrain from applying derogations without the prior assessment of the Commission and the final decision of the Council. The Commission must, in any case, ensure that the rights of those affected by this situation are guaranteed.

The right to information is eroded by not ensuring that it is provided in a language understood by the asylum seeker. In this sense, the introduction of the clause 'who reasonably understands' undermines the right to be informed and may affect the exercise of other rights due to the lack of understanding of these rights, such as the possibility of applying for asylum, procedural guarantees or the type of assistance available to them.

Derogations applicable to the asylum border procedure

In a situation of crisis or force majeure, Member States may extend the maximum duration of the border procedure for the examination of applications for an additional period of up to six weeks. Furthermore, they may not be required to examine in a border procedure applications lodged up to the limit of their 'adequate capacity', where the measures in the contingency plan set out in the Reception Directive are not sufficient to address the situation in the Member State concerned.

In the case of a mass influx crisis, Member States are allowed to apply the border procedure when the applicant is of a nationality with a recognition rate equal to or lower than 50% and in the case of a situation of an instrumentalisation crisis, they may do so for all applications submitted by anyone who is subject to instrumentalisation.

CEAR REMARKS: Access to the asylum procedure is hindered by allowing a delay in the registration of applications up to a maximum of 4 weeks, the time limit already being set in the Procedural Regulation 15 days in case of a disproportionate number of applications. This delay severely impacts on access to registration-related rights such as, among others, the right to information, access to employment (6 months after registration), the right to an interpreter for registration and submission, legal advice prior to the submission of the asylum application, and the issuance of documentation accrediting the asylum seeker after registration.

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Reduced procedural guarantees

In the case of a situation of instrumentalisation crisis, minors under 12 years of age and their family members, and persons with special procedural or reception needs will be excluded from the border procedure.

In addition, the Member State in a situation of crisis or force majeure should not or should no longer apply the derogation from the asylum procedure in cases where there are medical reasons for not applying the border procedure, or where the necessary support cannot be provided to applicants with special reception needs.

CEAR REMARKS: We do not consider sufficient guarantees that asylum applications of persons with special needs, minors and their families will be prioritised and that the border procedure will no longer be applied to persons with specific needs or for medical reasons, since in the context of a crisis situation or force majeure, characterised by numerous arrivals that overwhelm the capacity of the asylum systems, it will probably not be possible to identify these special needs or medical situations.

Organisations and persons authorised by national law to provide counselling will have effective access to applicants in detention or present at border crossing points. Member States may limit access to organisations and persons authorised by national law to provide counselling to asylum seekers when, for reasons of security, public policy or administrative management of a detention facility.

CEAR REMARKS: We are concerned about the continued limitation of access to organisations (such as CEAR) and persons authorised as lawyers to assist asylum seekers when Member States consider that they may pose a risk to 'public security or public policy', concepts that are widely interpretable in these crisis situations.

Derogations from established deadlines for taking charge, return notifications and transfers.

CEAR REMARKS: The deadlines for taking charge in situations of crisis or force majeure are doubled, which means delays in access to protection for applicants, as their application will not be examined on its merits until they are transferred to the Member State responsible, leaving them in limbo until then.

On the other hand, it is considered positive that transfers to the responsible MS facing a

crisis or force majeure situation should be halted and that, after one year, responsibility should be transferred to the Member State carrying out the transfer. In addition, Member States of first entry in a crisis situation due to mass influx may be exempted from their obligation to readmit an applicant person for whom it has been established that he/she is responsible. This relieves, to a certain extent, the pressure on Member States of first entry in a crisis situation.

Expedited procedure

Where applications for international protection from groups of applicants from a specific country of origin could be well-founded, the Commission may adopt a Recommendation for the application of an expedited procedure, where the personal interview will be omitted in order to prioritise the examination of the application and be concluded within four weeks of the lodging of the application at the latest.

When considering the adoption of a Recommendation, the Commission will first consult with the EU High Level Solidarity Forum, and may consult relevant Union agencies, UNHCR and other relevant organisations.

CEAR REMARKS: The removal of the initially proposed Prima Facie recognition is a missed opportunity to grant protection swiftly to persons in clear need of international protection because they come, for example, from a country at war. In its place, an 'expedited' procedure is introduced that simply cuts red tape, eliminating the personal interview and the time limits for the resolution of well-founded applications.

2.6. EURODAC REGULATION

The Eurodac Regulation[38] extends the scope of the EU fingerprint database to monitor not only asylum but all migration flows, including the use of new biometric data such as facial recognition and its application to children from the age of 6.

38 Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818
Latest version of the co-legislators' agreement of February 2024, available at: https://data.consilium.europa.eu/doc/document/ST-6366-2024-INIT/en/pdf

In addition to storing data on asylum seekers and those who have entered the EU irregularly, Eurodac will also compulsorily include data on persons staying irregularly in a country, as well as persons disembarked following search and rescue operations at sea, resettled persons and applicants for and beneficiaries of temporary protection. Data will also be stored concerning any person who may pose a threat to security, be violent or unlawfully armed.

The storage period for data on asylum seekers is 10 years and data storage periods are extended in the other cases (normally 5 years). Interoperability with other databases (ETIAS, Visa Information System) is ensured, extending its use for the production of statistics.

CEAR REMARKS: The extension of both the objectives, data, subjective scope of application and storage periods is not duly justified and a human rights impact assessment has not been carried out.

It is of concern that the use of coercion is allowed for the fingerprinting of children as young as 6 years old. While the use of force is prohibited in these cases, the concept of 'proportionate coercion' is indeterminate and could lead to abuses and violate the integrity of children subjected to this procedure against their will. Furthermore, we consider that insufficient safeguards are included to protect the digital rights of migrants and refugees and that the best interests of the child are put at risk in the processing of this data.

3. 2016 PROPOSALS

3.1. EUROPEAN RESETTLEMENT FRAMEWORK REGULATIONS[39]

Under the framework of the proposal for a New European Pact on Migration and Asylum, on 23 September 2020 the European Commission published Recommendation (EU) 2020/1364 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways[40]. Thanks to this political impetus, in mid-December 2022, the European Parliament and

39 Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147. https://eur-lex.europa.eu/eli/reg/2024/1350/oj

40 Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways. https://eurlex.europa.eu/eli/reco/2020/1364/oj

the Council reached an agreement[41] on the Regulation for an EU Resettlement Framework, which had been under negotiation for six years and blocked by some Member States since 2018[42].

This is the first EU regulation to open a safe legal pathway for offering protection in Europe and a lasting solution to refugees in vulnerable situations in third countries. It aims to establish a permanent framework and a harmonized procedure for resettlement across the EU, replacing existing ad hoc schemes with two-year plans. However, in line with the concessions already made by the European Parliament in 2018[43], Member States' participation in global resettlement efforts will be voluntary and there will be no mandatory quota after all.

Two-year objectives and plans

The EU Resettlement Framework contains common general guidance to promote the safe and legal arrival of refugees in the EU, based on the global resettlement needs projected by UNHCR. The aim is to encourage Member States to increase the number of places they offer, contribute to overall resettlement commitments, and bolster relations with third countries of origin and host countries of refugees.

It is implemented via a European Resettlement and Humanitarian Admission Plan that will last two years. Each two-year plan establishes the number of people who may be admitted via resettlement (at least 60% of the total), humanitarian admission, and emergency admission, the contributions of each Member State, and the list of priority regions or countries of origin. Although the Regulation is binding, the participation and contributions of Member States will be voluntary. It does not require States to admit any resettled person, nor does it grant the right to request resettlement.

41 European Parliament. (2022). Asylum and migration: deal reached on new EU resettlement framework. https://www.europarl.europa.eu/news/en/press-room/20221214IPR64717/asylum-and-migration-dealreached-on-new-eu-resettlement-framework

42 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52016PC0468

43 Council of the European Union. (2018). Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council. https://www.statewatch.org/media/documents/news/2018/jun/eucouncil-Resettlement-EP-Concessions-9596-18.pdf

On the other hand, it does not intend to be the only resettlement mechanism in the EU, but rather Member States can continue to implement their own resettlement programs in parallel.

CEAR REMARKS: The first-ever European resettlement framework is a good starting point, but it must be developed and broadened based on ambitious commitments from all Member States.

The voluntary nature of commitments jeopardizes its objectives and effectiveness. Spain must make ambitious commitments and encourage other Member States to do so as well.

The Two-year Resettlement Plan must clearly state and ensure that it is complementary to national resettlement plans.

Admission types:

The Regulation defines resettlement as "the admission to the territory of a Member State, following a referral from the UNHCR, of a third-country national or a stateless person, from a third country to which that person has been displaced who is granted international protection and has access to a durable solution".

On the other hand, humanitarian admission refers to the admission to the territory of a Member State, following, where requested by a Member State, a referral from the EUAA, from the UNHCR, or from another relevant international body, of a third-country national or a stateless person from a third country to which that person has been forcibly displaced and, who is granted international protection or humanitarian status under national law, which provides for rights and obligations equivalent to those established to subsidiary protection.

Lastly, the Regulation establishes "emergency admission", that is, admission by means of resettlement or humanitarian admission of persons with urgent legal or physical protection needs or with immediate medical needs. It can be done in territories other than those already specified in the Plan.

CEAR REMARKS: The concept of humanitarian admission does not imply an extension of the subjective scope but refers to the same persons who meet the requirements for international protection, including those who are no longer under the protection of UN agencies other than UNHCR (for example, UNRWA) and who are in a vulnerable

situation.

Establishing humanitarian admission places may facilitate access to protection but may also mean fewer rights for people protected under this status since it is a residence permit without free movement within the EU. This risks compromising resettlement places and increasing humanitarian admissions to the detriment of refugee resettlement.

Spain must advocate for the Resettlement Plan to guarantee a minimum resettlement quota of more than 60% and support politics aimed at progressively assuming more ambitious resettlement commitments adjusted to the increase in needs at a global level.

It is positive that the Regulation includes emergency admission for resettling persons with unforeseen protection needs due to situations such as natural disasters and being in territories other than those provided for in the Two-year Plan.

Functioning

A High-Level Resettlement and Humanitarian Admission Committee will be formed, comprising representatives from the Member States, the Council of the EU, the Commission and the European Parliament. The UNHCR, IOM and EUAA will be invited to participate, as well as civil society organizations. The Committee's role is to specify the content of the Twoyear Resettlement and Humanitarian Admission Plans, although these must ultimately be approved by the Council.

CEAR REMARKS: The participation of civil society and international organizations in the High-Level Resettlement and Humanitarian Admission Committee must be guaranteed.

Eligibility criteria and grounds for refusal

Persons who meet these two criteria will be eligible for resettlement:

i. Persons who are eligible for international protection under the definition of refugee (refugee status or subsidiary protection) of the regulations on qualification, as well as "Persons whose protection or assistance from organs or agencies of the UN other than the UNHCR has ceased for any reason without their position being definitively settled in accordance with the relevant resolutions adopted by the UN General Assembly"

ii. Vulnerable persons, such as: women, minors (including unaccompanied minors), persons with disabilities, survivors of violence or torture (including on the

basis of gender or sexual orientation), persons with medical needs, persons who lack a foreseeable alternative durable solution, in particular those in a protracted refugee situation, etc.

Additionally, in the case of humanitarian admission, family members will also be eligible, under a broad definition that includes siblings as well as dependent persons.

The mandatory grounds for refusing admission are as follows:

i. Having recognized rights and obligations equivalent to nationals of the country of residence.

ii. Having been granted international protection or humanitarian status by a Member State.

iii. Having committed serious crimes, war crimes or crimes against humanity, or any acts contrary to the Charter of the United Nations.

iv. Representing a danger to the community, public order or national security.

v. Having been refused entry or admission by a Member State on security grounds within the last three years.

CEAR REMARKS: The explicit reference to the eligibility for resettlement of Palestinians no longer eligible for protection by UNRWA is very positive, given the situation in the occupied Palestinian territories since 7 October 2023.

It is concerning that the grounds for refusal are worded broadly regarding the Geneva-Convention, which may result in limited protection of refugees in need of resettlement.

Admission and appeals procedure

The admission process begins when a Member State requests that the UNHCR (for resettlement) or other international agencies (for humanitarian admission) refer thirdcountry nationals or stateless persons to them. The Member State assesses whether the applicant meets the criteria of the Union Plan, prioritizing persons who have family or social links in the Member State, or particular protection needs or vulnerabilities. Once the candidate has been identified, their basic data are collected, and they are informed about the procedure.

Eligibility is assessed through supporting documents, personal interviews, or both. For resettlement, States must request that the UNHCR conduct an assessment of the person's vulnerability and eligibility to qualify as a refugee. For humanitarian admission, States may or may not request a full assessment from UNHCR. The process must be completed within a maximum of seven months, extending the time limit by up to three months in complex cases. In the case of emergency admission, the Member State must conclude its decision within one month.

The procedure is discontinued if the applicant withdraws his or her consent or if the State has reached its admissions quota. A positive conclusion means that the Member State grants refugee status, subsidiary protection, or humanitarian protection status under national law with "the same effect", issues a residence permits, organizes travel arrangements, and provides pre-departure orientation. On the contrary, a negative conclusion is not communicated to the applicant and there is no possibility of appeal against the refused admission.

CEAR REMARKS: The lack of specification of what is considered a "social link or other characteristics that can facilitate integration" may contradict the principle of non-discrimination established for prioritizing resettlement applications. Spain must focus on protection needs and under no circumstances apply discriminatory prioritization criteria.

Resettlement request conclusions have an impact on people's lives, and applicants deserve to be notified. Refusals should include a grounded justification and guarantee the right to an effective appeal.

3.2. QUALIFICATION REGULATION[44]

The Qualification Regulation seeks to streamline, simplify and harmonize the procedure for granting and withdrawing international protection in the European Union. It replaces Directive 2013/32/EU with uniform regulations to ensure greater alignment in asylum decisions and international protection content.

44 Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council.

Promoted by the European Commission in 2016, the reform aims to overcome issues related to the lack of harmonization of the criteria for recognizing international protection and the rights of beneficiaries of international protection. Currently, protection recognition rates across the EU vary greatly, resulting in unequal treatment of asylum seekers depending on the country where they submit their application. These disparities encourage secondary movements to Member States with more favorable conditions, undermining the equity and effectiveness of the CEAS.

Therefore, the aim is to establish common criteria for recognizing international protection in the EU, ensuring equal treatment without limiting Member States from establishing more favorable provisions. However, this Regulation is part of a broader package of asylum regulations that impose greater obstacles to accessing the international protection procedure and reduce guarantees for the examination of applications, which limits the potential impact of this new regulation.

Assessment of applications for international protection

The Regulation places the burden on the applicant to submit all the elements and documentation necessary to substantiate their application for international protection. New obligations are also imposed on applicants to be present in the territory of the Member State responsible for examining their application and to-fully cooperate with the authorities.

When assessing an application for international protection, the Member States' determining authorities will be required to assess the internal protection alternative, that is, whether the applicant could have fled to a safe part of their country of origin. Some guarantees are missing from the regulation, such as the presumption that there is no internal protection alternative when the agent of persecution is the State, the transfer of the burden of proof to the authorities, the obligation to weigh the applicant's allegations to the contrary, special protection for unaccompanied minors, greater consideration of personal circumstances and whether the applicant has their basic needs covered, and information from the EUAA's on the-country of origin.

Moreover, the regulation maintains the possibility of requesting international protection for needs arising sur place, that is, when the well-founded fear of persecution is due to activities conducted or events that occurred after the asylum seeker left their country of origin. However, if the applicant is understood to have "created" the circumstances to benefit from this provision, Member States may refuse protection.

CEAR REMARKS: The assessment criteria for applications for international protection are more restrictive than in the Directive. The obligation to evaluate the internal protection alternative is concerning and, although guarantees are established, they do not include all of the UNHCR criteria of reasonableness and opportunity. This jeopardizes compliance with the principle of nonrefoulement. Furthermore, the possibility of refusing sur place applications, including initial applications, is serious, since it implies assessing the applicant's intent. This hints at the presumption of fraudulent use of the asylum institution.

Placing the burden of proof on the applicant is undue, especially considering the circumstances of flight and difficulties in collecting all the documentation from the country of origin. This contravenes the jurisprudence of the CJEU on the shared burden of proof, which states that the competent national authority must "cooperate actively with the applicant so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents." (Case C-277/11 - M. M. - Ireland).

Requirements for obtaining refugee status and subsidiary protection and cases of exclusion

The definition of refugee is the same as in the Directive. For refugee status to be recognized under the Geneva Convention, there must be a causal link between the reasons for persecution (race, religion, nationality, political opinion, membership of a particular social group) and the acts of persecution or the absence of protection against such acts. The requirements for recognition of subsidiary protection have not changed either; they are based on a real risk of suffering serious harm consisting of the death penalty, torture, inhuman or degrading treatment, or indiscriminate violence in situations of armed conflict.

The Regulation introduces new developments regarding persecution based on membership of a particular social group. Now, its not just defined by whether a person shares an innate or common characteristic but also by whether they are perceived to. Common characteristics include the applicant's sexual orientation, gender identity and gender expression, as well as disability. The discretionary

criterion that some Member States used to refuse an application because the risk of persecution disappeared when the person concealed his or her own identity in the country of origin has been eliminated.

CEAR REMARKS: The regulation improves the definition of a "particular social group" by including not just whether the applicant shares a group characteristic but also whether they are perceived to. However, requiring both may be restrictive.

Spain must apply all criteria in a protective manner.

It is very positive that the regulation expressly prohibits application of the discretionary criterion, thus limiting the intrusion of Member States and improving the credibility of LGBTIQ+ asylum seekers.

Regarding the rules for exclusion from refugee status, the criterion of proportionality has been eliminated from the assessment of the grounds for exclusion for acts contrary to the Charter of the United Nations, serious non-political crimes, crimes against peace, war crimes or crimes against humanity. It has also been eliminated from the assessment of the grounds for exclusion from subsidiary protection, which include less serious crimes constituting a risk to national security.

For both exclusion from refugee status and subsidiary protection, a special provision is included for minors that requires determining whether they can be considered responsible under the criminal law of the Member State.

CEAR REMARKS: There is concern that eliminating the criterion of proportionality in the interpretation of serious non-political crimes implies an expansion of the grounds for exclusion from the Geneva Convention. The grounds for exclusion from refugee status must include an assessment of proportionality following the UNHCR guidelines on exclusion clauses, due to its connection with the humanitarian aims of the Geneva Convention and given the seriousness of the consequences of excluding a person who meets the requirements for refugee status from protection. In this regard, it is positive that guarantees are included in the assessment of the exclusion of children from international protection.

Cessation and withdrawal of refugee status and subsidiary protection

Reports from the EUAA and other European and international bodies will be taken into account to assess the cessation of subsidiary protection and refugee status due to changes in the circumstances of the country of origin.

Withdrawal of refugee status is now mandatory: a) when there are reasonable

grounds for regarding that the person constitutes a danger to national security; or b) when, having been convicted of a particularly serious crime, they constitute a danger to the community of the Member State. Previously, withdrawal of refugee status was an option only in certain cases.

CEAR REMARKS: It is positive that an assessment of the COI from the EUAA and other European and international bodies is included for the cessation of international protection. However, by making the withdrawal of refugee status mandatory in more cases and including open-ended legal concepts (national security), fewer people will maintain protection.

Spain must apply the CJEU jurisprudence that establishes that, if refugee status is withdrawn, the person remains a refugee and continues to benefit from non-refoulement and the rights established by the Geneva Convention for such cases.

Content of international protection: rights and obligations

Expansion of family:

The definition of family members is expanded to include relationships formed outside the country of origin and dependent adult sons and daughters. The authorities of the Member State granting international protection to a beneficiary may issue residence permits to family members who do not qualify for international protection themselves, but this is not mandatory. Exceptions to maintaining the family unit are included: marriages or partnerships contracted for the sole purpose of obtaining authorization for entry or residence and for reasons of national security or public order.

CEAR REMARKS: Certain limitations of family extension (which were automatic in the previous Directive) on grounds that can be interpreted broadly since they involve indeterminate legal concepts may violate the right to family life in some cases.

Documentation:

Beneficiaries of international protection are entitled to a residence permit, which must be issued as soon as possible and no later than 90 days after notification of the decision to grant refugee status or subsidiary protection. If the permit is not issued within 15 days, a temporary document is issued or registered to ensure the

person's effective access to all rights.

The residence permit must be valid for at least 3 years for refugee status and one year for subsidiary protection, both renewable for the same period. Continuity of the authorized period of stay is guaranteed by renewing the permit without interruptions.

Travel documents issued by host Member States to beneficiaries of international protection shall be valid for at least one year.

CEAR REMARKS: Establishing deadlines for the issuance of permits is a better guarantee for people seeking international protection. However, the possibility of different durations of residence permits for RS and SP and the limit on access to social assistance depending on legal status contradicts the standardization of rights and obligations of persons with refugee status and persons with subsidiary protection.

Spain must opt for equal rights, since this Regulation allows it, from the perspective of positive inclusion measures.

Freedom of movement:

Beneficiaries of international protection will not be entitled to move freely within the EU, except for short stays authorized under the Schengen Agreements or if they obtain a residence permit in another Member State.

CEAR REMARKS: As in the current Directive, the restriction on the movement of beneficiaries of international protection between Member States is maintained. This is incompatible with a harmonized Common European Asylum System.

Inclusion and ESCR:

The Regulation establishes the obligation to guarantee equal treatment in access to employment, including consideration of prior experience and access to recognition of qualifications and education.

The regulations on education guarantee equal treatment, except in access to scholarships and study loans (adults). It includes the express right to complete secondary education for persons of legal age.

Social security benefits may be linked to participation in compulsory integration measures that may be established by the Member State. Member States may continue to limit the access of beneficiaries of subsidiary protection to basic benefits (minimum income support, assistance during pregnancy and illness, parental and child care assistance, housing assistance).

Equal opportunities in access to housing will have the same conditions as those applicable to other foreign persons.

CEAR REMARKS: The explicit inclusion of equal treatment in employment and recognition of education is a step forward. However, the Regulation introduces the possibility of limiting it in certain cases.

The possibility of different durations of residence permits for refugee status and subsidiary protection and the limit on access to social assistance depending on legal status contradicts the standardization of rights and obligations of persons with refugee status and persons with subsidiary protection.

Spain must opt for equal rights, since this Regulation allows it, from the perspective of positive inclusion measures.

Unaccompanied minors:

Improvements have been made to the provisions for unaccompanied minors by providing more detail on the role of guardian, their functions, the requirements for accessing this position and the procedure for reviewing and revoking their guardianship if necessary.

CEAR REMARKS: The Regulation improves the provisions for unaccompanied minors who are beneficiaries of international protection.

3.3. AMENDED RECEPTION CONDITIONS DIRECTIVE[45]

The amended Reception Conditions Directive is a 2016 proposal by the European Commission to harmonize reception conditions and ensure equal treatment for third-country nationals and stateless persons applying for international protection in any Member State. Colegislators reached a provisional agreement in 2018 and a definitive agreement in 2022, which was approved as an agreement in February 2024, entering into force on 11 June. A transitional period has been established for its implementation and Member States have two years to transpose the provisions of the directive into internal state regulations.

Objectives

The main objective of amending the Reception Conditions Directive is to establish more harmonized reception standards that guarantee equal treatment and an adequate standard of living for asylum seekers in the EU. Furthermore, it aims to reduce incentives for secondary movements and increase the autonomy of applicants and their prospects for social inclusion. This would all contribute to a more equitable distribution of applicants for international protection in the EU.

CEAR REMARKS: The Reception Directive is the only text of the Pact that has not been approved as a Regulation, which means that it is not directly applicable and does not have a general scope. It maintains the unequal conditions of the previous legislation and fails to guarantee the objective set by the Commission to prevent secondary movements.

Definitions

"Family members" means, in so far as the family already existed before the applicant arrived on the territory of the Member States, the following members of the family of the beneficiary of international protection who are present on the territory of the same Member State in relation to the application for international protection:

(i) The spouse of the applicant or their unmarried partner in a stable relationship.

45 Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection https://eurlex.europa.eu/eli/dir/2024/1346/oj

(ii) Minor or adult dependent children of the couples referred to above, or of the beneficiary, provided that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as provided for under national law.

(iii) Where the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for that beneficiary, including an adult sibling.

"Risk of absconding" means: the existence of reasons, in an individual case, which are based on objective criteria defined by national law to believe that an applicant might abscond.

CEAR REMARKS: There is concern about the discretion given to Member States to apply the concept of "risk of absconding", especially given the serious consequences it entails, such as the limitation of freedom of movement and the fact that it is grounds for detention.

It is positive that the definition of "family members" has been expanded. However, this is not reflected in the other Regulations (RAMM, APR), which may generate inconsistencies in its practical application. The application of this concept can ensure family unity for dependent adult children in reception facilities in the same country but not if the family members are in different Member States.

Rights and freedoms

Information

The Directive stipulates that Member States must provide applicants with information relating to reception conditions as soon as possible and far enough in advance. The information should be provided no later than three days from the lodging of the application or within the timeframe for its registration.

Information will be provided on organizations or groups that provide specific legal assistance and representation free of charge and who can inform or assist applicants with the reception conditions available, including healthcare.

The information must be transmitted in writing, in a concise, transparent, intelligible and easily accessible form, using clear and plain language and in a language that the applicant understands. If necessary, it may be provided orally or visually using videos or pictograms adapted to the needs of the beneficiaries.

Documentation

Member States must ensure that the applicant receives a document with their name on it indicating that an application has been submitted and registered. Applicants will not be required to provide unnecessary or disproportionate amounts of documentation or impose other administrative requirements before being granted the rights under the Directive.

Applicants may be provided with a travel document only when serious humanitarian reasons or other imperative reasons arise that require their presence in another State. The validity of said document will be limited to the purpose and duration necessary for the reason for which it was issued.

Freedom of movement

Where there is a risk of absconding, Member States may decide for reasons of public order or to effectively prevent the applicant from absconding that a person may reside only in a specific place that is adapted for housing applicants[46].

Upon the request of the applicant, Member States may grant permission to reside temporarily outside the specific place. Reasons shall be given if such permission is not granted.

Decisions affecting restricted freedom of movement must be proportionate, sufficiently wellfounded and take into account relevant aspects of the applicant's individual situation, including their specific reception needs.

Applicants must be informed in writing of this decision, as well as of the process to appeal it and the consequences of failing to comply with the obligations imposed. In addition, Member States shall ensure review by a judicial authority ex officio where those decisions have been applied for more than two months, or that they may be appealed.

Employment

The waiting time for access to the labor market has been reduced to 6 months, provided that a decision has not been made on the application and the delay can

46 This applies specifically to applicants who are required to be present in another Member State while awaiting the decision of the responsible Member State or the implementation of the transfer procedure and to applicants who have been transferred to the Member State where they must be present after having absconded to another Member State.

not be attributed to the applicant. Where the State has accelerated the examination of an application for international protection as established in the Procedure Regulations, access to the labor market shall not be granted or, if already granted, withdrawn[47].

Member States must guarantee effective access to the labor market for applicants allowed access to it. They will also ensure that applicants enjoy equal treatment in certain areas[48] and may restrict it in some cases[49].

Applicants shall not be deprived of access to the labor market during appeal procedures where they have the right to remain on the territory during such procedures and untilnotification of the dismissal of the appeal. Lastly, the Directive specifies that access to the labor market may be restricted or revoked if already granted when a State has activated the accelerated examination procedure, as described in Article 42 of the RAMM, and in cases where the applicant has concealed relevant information or documents concerning their identity[50]. Access to the labor market will be maintained during appeals if they have a suspensive effect.

47 This will take place under the accelerated examination procedure, in the cases laid out in points (a) to (f) of Article 42 of Regulation (EU) 2024/1348.

48 As regards: a) conditions of employment, minimum working age, and working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements in the workplace; b) freedom of association, affiliation and membership in an organization representing workers or employers; c) education and vocational training; d) recognition of diplomas, certificates and other qualifications within the framework of existing procedures; e) access to appropriate systems of evaluation, validation and recognition of studies.

49 As regards paragraph 3, letter b), by depriving them of the possibility of participating in the management of public law bodies and of holding a public law office, by depriving them of the possibility of receiving grants and loans related to education and vocational training and the payment of fees for access to university or postsecondary education or of receiving education and vocational training not included under the framework of a valid employment contract, when its purpose is to promote employment. Lastly, as regards section 3, letter c), equal treatment shall not be granted until 3 months have passed from the date of registration of the application for international protection.

50 Bearing in mind 52 and Article 17 Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024

Education

Member States shall grant to minor children of applicants and to applicants who are minors the same access to education as their own nationals and under similar conditions[51], for so long as an expulsion measure against such minors or their parents is not actually enforced.

Member States shall grant minors access to an education system as soon as possible and shall not postpone the granting of that access for more than two months from the date on which the application for international protection was lodged taking into account school holidays. Member States shall provide education within the general education system. However, as a temporary measure and for a maximum period of one month, Member States may provide that education outside the general education system[52].

Housing

Member States shall ensure an adequate standard of living in the accommodation they offer and the necessary support to meet the reception needs of asylum seekers. Moreover, Member States must also ensure the protection of applicants' family life, ensure that they have the possibility of communicating[53], and grant access to the housing by family members and civil/international society organizations to assist the applicants.

Health care

Member States shall ensure that applicants, irrespective of where they are required to be present, receive the necessary health care, whether provided by generalists or, where needed, specialist practitioners[54]. Member States shall ensure that

51 The special needs of minors must also be taken into account regarding their right to education and access to health care.

52 Preparatory classes, including language classes, shall be provided to minors where it is necessary to facilitate their access to and participation in the general education system. If access to the general education system is not possible due to the specific situation of the minor, the Member State concerned shall offer other education arrangements in accordance with its national law and practice.

53 They are allowed the opportunity to communicate with their family members, legal advisers or counsellors, persons representing UNHCR and relevant national, international and non-governmental organizations and bodies.

54 Health care shall be of adequate quality and include, at least, emergency care, essential treatment of illnesses, including of serious mental disorders, and sexual and reproductive health care which is essential in addressing a serious physical condition.

the minor children of applicants receive the same type of health care as provided to their own nationals who are minors.

Member States shall provide necessary medical or other assistance to applicants who have special reception needs.

CEAR REMARKS: The Regulations generally improve the rights recognized by the Reception Conditions Directive (right to information, right to documentation, etc.). However, the severe restrictions on freedom of movement that Member States may impose are concerning, since they may have very serious consequences, such as limiting material reception conditions. Spain should not limit freedom of movement under any circumstances and should guarantee freedom of movement throughout its territory, as recognized by the Supreme Court in its ruling of the Fifth Section, Administrative Litigation Chamber, dated 29 July 2020.

The Regulation limits access to employment in most cases of accelerated procedure (which is also expanded in the Regulation of Procedures) and undermines access to this right, which is essential for the integration and autonomy of applicants for international protection. On a positive note, shortening the time it takes for minors to access education reinforces equal treatment.

Improvements are made to the right to health (sexual and reproductive, minors, specialists, etc.).

Detention

Member States shall not hold a person in detention for the sole reason that that person is an applicant or on the basis of the nationality of that applicant. Where necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

When detaining an applicant, Member States shall take into account any visible signs, statements or behavior indicating that the applicant has special reception needs. Where the assessment provided for in Article 25 has not yet been completed[55], it shall be completed without undue delay and its results shall be taken into account when deciding whether to continue detention or whether the detention conditions need to be adjusted.

55 According to Art. 25 of the Directive, this is an individual assessment to determine whether the applicant has any special reception needs.

An applicant may be detained only to determine or verify their identity or nationality; to determine the elements on which the application for international protection is based, which could not be obtained in the absence of detention, in particular when there is a risk of absconding; to ensure compliance with legal obligations imposed on the applicant through an individual decision in cases where they have not complied with such obligations and there continues to be a risk of absconding; and to decide, in the context of a border procedure, on the applicant's right to enter the territory.

Furthermore, when the applicant is detained subject to a return procedure, in order to prepare the return or carry out the removal process, and the Member State can substantiate on the basis of objective criteria, including that the applicant already had the opportunity to access the procedure for international protection, that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision. Lastly, when protection of national security or public order so requires.

In any event, Member States shall ensure that the rules concerning alternatives to detention are laid down in national law. The detainment period shall be as short as possible. The detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based as well as why less coercive alternative measures cannot be applied effectively. The detention order will be reviewed, and information will be provided on the possibility of challenging the order, aswell as the possibility of requesting free legal assistance and representation.

Conditions of detention

Detention shall take place in specialized detention facilities. Where a Member State cannot provide such accommodation and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners[56].

Member States shall ensure that persons representing the UNHCR have the possibility to communicate with and visit applicants in conditions that respect priva-

56 Likewise, detained applicants shall be kept separately from other persons who have not lodged an application for international protection. Where this is not possible, the Member State concerned shall ensure that the detention conditions provided for in the Directive are applied.

cy[57]. They shall also ensure that family members, legal advisers or counsellors and persons representing relevant NGOs have this possibility. Limits to access to the detention facility may be imposed only where they are objectively necessary for security, public order or the administrative management of the detention facility.

Lastly, Member States shall ensure that applicants are systematically provided with information which explains the rules applied in the facility and sets out the rights and obligations of those applicants in a language which they understand. In the event that an applicant is detained at a border post or in a transit zone, Member States may derogate from that obligation in duly justified cases and for a reasonable period of time which shall be as short as possible[58].

Detention of applicants with special reception needs

Where the detention of applicants with special reception needs would put their physical and mental health at serious risk, those applicants shall not be detained. Minors shall, as a rule, not be detained. Minors and their families shall be placed in suitable accommodation and less coercive alternatives to detention must be effectively applied.

Minors may only be detained in exceptional circumstances, as a measure of last resort and after detention is assessed to be in their best interests[59]. Such detention shall be for the shortest possible period of time. Minors shall never be detained in prison or another facility used for law enforcement purposes. In the same vein, all efforts will be made to release minors and ensure their right to education. The best interests of the child shall be a primary consideration for Member States[60]. Lastly, if the applicant is detained at a border post or in a transit zone, Member States may derogate from the rules mentioned above, in duly justified

57 That possibility shall also apply to an organization working on the territory of the Member State concerned on behalf of UNHCR pursuant to an agreement with that Member State.

58 This derogation shall not apply in cases referred to in Article 43 of Regulation (EU) 2024/1348 concerning the conditions for the application of the border asylum procedure.

59 Especially in these cases: (i) in the case of accompanied minors, where the minor's parent or primary caregiver is detained; or (ii) in the case of unaccompanied minors, where detention safeguards the minor.

60 Among other provisions, if unaccompanied minors are detained, they shall be accommodated in adapted facilities with staff qualified to safeguard the rights of unaccompanied minors and attend to their needs. Similarly, detained families shall be provided with separate accommodation that guarantees adequate privacy and detained families with minors shall be accommodated in detention facilities adapted to the needs of minors.

cases and for a reasonable period of time, which shall be as short as possible[61].

CEAR REMARKS: This Directive increases the circumstances in which Member States may detain an applicant of international protection but does not require them to do so. Spain must therefore opt for less harmful alternative measures, as permitted by the Directive, and prevent the detention of minors and people in vulnerable situations in all cases.

Reception Conditions

Member States shall ensure that material reception conditions and health care received provide an adequate standard of living for applicants. These conditions must be met in the specific situation of applicants with special reception needs as well as persons who are in detention. Some limitations on reception conditions [62]are established and the reasons for which material reception conditions may be reduced are also expanded[63].

CEAR REMARKS: The concept of "adequate standard of living" is not defined in the Directive and may lead to different interpretations by each Member State. Spain must clearly establish the criteria for defining this concept and, in accordance with the jurisprudence of the CJEU, which has established as an absolute minimum that the person must have their basic needs met, such as a place to live, food, clothing, personal hygiene, and that this does not undermine their mental and physical health or place the person in a situation of degradation incompatible with human dignity.

There is concern about the expansion of the conditions of limitation of reception, among

61 Exceptions will apply to paragraphs 3, 4 and 5 of Article 13 of the Directive. In such cases, Member States shall have sufficient facilities and resources in place to ensure that they apply the derogations established only in exceptional situations. When applying those derogations, Member States shall inform the Commission and the Asylum Agency thereof.

62 Article 21 introduces limitations on the reception conditions (employment, language and vocational courses, and material reception conditions) in the event of notification of transfer to the Member State responsible, which may only be received in the MS where their presence is required. Therefore, the transfer decision shall state that the relevant reception conditions have been withdrawn.

63 In accordance with Article 23, Member States may reduce material reception conditions in more cases than in the current Directive, for example: daily expenses allowance, serious and repeated breach of the rules of the accommodation center, or violent and threatening behavior.

others in the event of non-compliance with mandatory integration measures or with the restrictions on movement within the MS. This is disproportionate and Spain should not exercise this option.

Limiting reception conditions in the case of a transfer by RAMM contravenes the jurisprudence of the CJEU26 which has established that the application of the Reception Directive must be guaranteed until the moment in which the transfer is carried out, which may be months after the applicant is informed of the decision, taking into account the concept of dignity of the Charter of Fundamental Rights of the EU.

Spain must ensure that any form of reception implemented in exceptional situations that could be similar to those of a crisis or force majeure guarantees the highest possible reception standards and does not last longer than necessary.

It is positive that prevention of all types of violence has been expanded to include violence committed with a sexual, religious, gender, or racist motive. In addition, there will be safe places for women with children, and separate toilets for men. Spain must ensure that specific protocols for the prevention of violence are implemented in practice, with clear measures and accessible information.

Reduction or withdrawal of material reception conditions

With regard to applicants who are required to be present on their territory, Member States may reduce or withdraw the daily expenses allowance. If duly justified and proportionate, Member States may also reduce other material conditions of reception or, in certain cases[64], withdraw other material conditions of reception.

Member States may adopt such decisions when an applicant in certain cases[65]

64 When an applicant has seriously or repeatedly breached the rules of the accommodation center or has behaved in a violent or threatening manner in the accommodation center.

65 Where an applicant: a) abandons a geographical area within which the applicant is able to move freely or the residence in a specific place designated by the competent authority without permission, or absconds; b) does not cooperate with the competent authorities, or does not comply with the procedural requirements established by them; c) has lodged a subsequent application; d) has concealed financial resources, and has therefore unduly benefitted from material reception conditions; e) has seriously or repeatedly breached the rules of the accommodation center or has behaved in a violent or threatening manner in the accommodation centre; f) fails to participate in compulsory integration measures, where provided or facilitated by the Member State, unless there are circumstances beyond the applicant's control.

Such decisions shall be taken objectively and impartially, based on the circumstances of each case, and shall state the reasons on which they are based. The applicant shall be informed of them.

Special reception needs

Member States shall, as early as possible after an application for international protection is made, individually assess whether the applicant has special reception needs, using oral translation where necessary[66]. The assessment shall be initiated by identifying special reception needs based on visible signs or on the applicants' statements or behavior or statements of the parents or the representative of the applicant.

Member States shall ensure that the staff assessing special reception needs meet certain requirements.[67]

The best interests of the child are reinforced as a primary consideration for Member States when implementing the provisions of the Directive that may affect minors. Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development[68].

In the case of unaccompanied minors, States shall designate a person to provisionally act as a representative under the Directive until a representative has been appointed, which must happen as soon as possible. This must be communicated to the unaccompanied minor.

CEAR REMARKS: We welcome the significant improvements made in addressing specific reception needs. Among others, the procedure for evaluating special needs, provisions on the protection of minors, specific mention of the LGBTIQ+ community, and post-traumatic stress disorder all stand out.

66 The assessment referred to in Article 25 of the Directive may form part of existing national procedures or of the assessment referred to in Article 20 of Regulation (EU) 2024/1348.

67 These include, but are not limited to: (i) being trained and continuing to be trained to detect signs that an applicant has particular reception needs and to address those needs when identified; (ii) including information concerning the nature of the applicant's particular reception needs in the applicant's file, with a description of any visible signs or the applicant's relevant statements or behavior; (iii) referring applicants to the appropriate medical practitioner with informed consent and offering oral translation for such review if necessary.

68 In particular, the following factors must be taken into account: a) family reunification possibilities; b) the minor's well-being and social development, taking into particular consideration the minor's background and the need for stability and continuity in care; c) safety and security considerations, in particular where there is a risk of the minor being a victim of any form of violence or exploitation, including trafficking in human beings; d) the views of the minor in accordance with his or her age and maturity.

Contingency planning

Each Member State shall draw up a contingency plan in consultation with local and regional authorities, civil society and international organizations. The contingency plan shall set out the measures to be taken to ensure an adequate reception of applicants in accordance with this Directive in cases where the Member State is confronted with a disproportionate number of applicants for international protection, including of unaccompanied minors. These provisions shall also apply in cases where housing capacities normally available are temporarily exhausted[69].

CEAR REMARKS: Contingency planning by Member States is an essential requirement for the activation of the solidarity mechanism in the event of migratory pressure. Spain must prioritize the development of these plans that are tailored to reality and must include the organizations that work in the field of reception of international protection applicants.

3.4. REGULATION ON THE EUROPEAN UNION AGENCY FOR ASYLUM

In its Communication of 6 April 2016 entitled "Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe", the Commission set out its priority areas for structurally improving the CEAS, including the creation of a new mandate for the EU's Asylum Support Office (EASO). Regulation (EU) 2021/2303 of the European Parliament and of the Council establishes the EU Asylum Agency to replace and assume the tasks of the EASO, established by Regulation (EU) No 439/2010, which is repealed as a result of the new Regulation.

The EU Asylum Agency shall perform the following tasks:

69 Art. 20.10 b) of Directive 2024/1346.

A) Facilitate, coordinate and strengthen practical cooperation and information exchange among Member States on their asylum and reception systems.

B) Gather and analyze information of a qualitative and quantitative nature on thesituation of asylum and on the implementation of the CEAS.

C) Support Member States when carrying out their tasks and obligations in theframework of the CEAS.

D) Assist Member States as regards training and, where appropriate, provide training to Member States' experts from all national administrations, courts and tribunals, and national authorities responsible for asylum matters, including through the development of a European asylum curriculum.

E) Draw up and regularly update reports and other documents providing information on the situation in relevant third countries, including countries of origin, at Union level.

F) Set up and coordinate European networks on third-country information.

G) Organise activities and coordinate efforts among Member States to develop common analysis on the situation in countries of origin and guidance notes.

H) Provide information and analysis on third countries regarding the concept of safecountry of origin and the concept of safe third country (the 'safe country concepts').

I) Provide effective operational and technical assistance to Member States, in particular when their asylum and reception systems are subject to disproportionate pressure.

J) Provide adequate support to Member States in carrying out their tasks and obligations under Regulation (EU) No 604/2013.

K) Assist with the relocation or transfer of applicants for or beneficiaries of international protection within the Union.

L) Set up and deploy asylum support teams.

M) Set up an asylum reserve pool in accordance with Article 19(6) (the 'asylum reserve pool').

N) Acquire and deploy the necessary technical equipment for asylum support teams and deploy experts from the asylum reserve pool.

O) Develop operational standards, indicators, guidelines and best practices in regard to the implementation of Union law on asylum.

P) Deploy liaison officers to Member States.

Q) Monitor the operational and technical application of the CEAS with a view to assisting Member States to enhance the efficiency of their asylum and reception systems.

R) support Member States in their cooperation with third countries in matters related to the external dimension of the CEAS, including through the deployment of liaison officers to third countries.

4. CONCLUSIONS

The new European Pact on Migration and Asylum does not address the main shortcomings that for decades have prevented the construction of a true Common European Asylum System and weakens the necessary balance between solidarity and shared responsibilities among Member States. Falling far short of a protective approach focused on the protection of individuals, the reform poses serious risks to the right to asylum and human rights, with a particular focus on measures for the externalisation of borders and return to third countries. The primary objective is to prevent people from arriving and, if they do arrive, to expel them as quickly as possible. The main conclusions drawn from the report's analysis are discussed below:

SHARED RESPONSIBILITY AND SOLIDARITY AMONG MEMBER STATES

- **No progress is being made towards an equitable sharing of responsibility** for asylum between Member States. Minimal changes are made to the criteria for determining responsibility for examining asylum applications which do not address the shortcomings identified in recent years. This, together with the reduction of procedural deadlines and the cases of cessation of responsibility, means that the criterion of the country of first entry prevails and is reinforced. All of this increases the pressure on border states such as Spain, which also have new responsibilities derived from the new screening and asylum and return procedures at the border.
- **Solidarity is 'à la carte' or 'flexible' and a system of mandatory relocation is not guaranteed.** The annual minimum amount of mandatory relocations, which could be as low as 18,000 relocations for the EU as a whole, seems difficult to meet due to the complexity of the mechanism contained in the Pact and the numerous exceptions and deductions that could be used by Member States. In addition, the lack of enforcement mechanisms makes it difficult to relieve the situation of border states.
- The inclusion of the possibility for Member States to choose between different forms of solidarity leaves the protection of persons in the background. Paying not to receive people is unacceptable. It is also unacceptable to use solidarity funds to prevent people in need of protection from reaching the EU by enhancing cooperation on migration control with third states that do not respect human rights and do not guarantee adequate protection.

- Rather than achieving the desired balance between solidarity and responsibility set out in Article 80 of the TFEU, which has been the main basis for this reform, the measures proposed will deepen the existing differences in the Member States, without providing effective responses to the needs identified in terms of solidarity and from a protective approach.
- Finally, the European Pact makes an **insufficient commitment to increasing legal and safe ways to seek protection.** On the contrary, it strengthens the securitarian approach and the externalisation of borders to third countries that do not respect human rights, forcing migrants, asylum seekers, refugees and stateless persons to risk their lives in increasingly dangerous journeys. There is a need to change course and to commit to migration policies that put people and their rights at the centre.

PRE-ENTRY CHECKS

- The new pre-entry screening procedure **delays access to the international protection procedure and all its guarantees**, which poses a risk of violating the principle of non-refoulement.
- **The legal fiction of 'non-entry'** and the claim that a person has 'not arrived' in the EU until the Member State in question authorises entry, regardless of his or her physical presence on European territory, entails the risk of a possible breach of the European Convention on Human Rights, and of the case law of the European Court of Human Rights on what is considered to be the exercise of jurisdiction by a State Party. If the person is under the effective control of the authorities of the Member State, all binding human rights protection law apply.
- **Risk of borders becoming no-rights zones.** In the new detention places where the control procedure will take place, there is a serious risk of poor reception conditions and excessive use of detention (which should be the last resort), circumstances which ultimately increase the pressure on EU border states.
- The **mechanism for monitoring the respect of fundamental rights** will be essential in this procedure in order to avoid situations of unprotectedness as, inter alia, the right to an effective remedy against decisions taken in the control procedure is not guaranteed.

ASYLUM AND RETURN PROCEDURES AT THE BORDER

- **More obstacles to accessing the right to asylum, under an approach based on expulsion and return.** The link of asylum and return procedures at the border, as well as the extension of the scope of application of border and accelerated procedures, is based on the assumption that the majority of persons arriving in the European Union do not have protection needs and that the examination of applications can be carried out in the shortest possible time. This assumption prejudges situations that should be analysed individually and within appropriate timeframes that the accelerated procedures do not allow. The presumption of the risk of absconding and the reinforcement of the criminalisation of asylum seekers is also a cause for concern.
- **The deprivation of liberty of asylum seekers at European borders is generalised.** The link between the screening procedure and the asylum and return border procedures, together with the disproportionate extension of the duration of these border procedures and the extension of the grounds for detention, will in many cases result in people being deprived of their liberty and without access to their rights for up to 9 months at European borders39.
- **Fewer protection guarantees and risk of violation of the principle of non-refoulement.** The channelling of an asylum application into the border procedure on the basis of nationality, the inadmissibility of an application through the discretionary application of the 'safe third country' concept and the automatic issuing of a return decision together with the decision to refuse international protection jeopardise an individualised assessment set out in Articles 2 and 3 of the European Convention on Human Rights. This, together with the extension of obligations for applicants and the undermining of basic procedural guarantees such as the right to legal assistance, the right to be heard, and the automatic suspensive effect of appeals, pose a real threat of violation of the principle of non-refoulement.

RESPONSE TO CRISES AND SITUATIONS OF MIGRATORY PRESSURE

- The discretionary use by Member States of the concepts of 'crisis situation, force majeure or instrumentalisation' makes it possible to **suspend the right to asylum and violates all the guarantees of the procedure:** de-

laying access to asylum and reception and preventing an individualised assessment of asylum applications with the generalised application of border procedures that jeopardise the principle of non-refoulement. Also in these situations, the primacy of the interest of states violates other specially protected human rights of children or persons in vulnerable situations, who are intended to be deprived of their liberty at borders.

- The wide range of exceptions and derogations to asylum rules demonstrates the **primacy of states' interests** over the protection needs of individuals and **erodes the construction of the Common European Asylum System**, whose main problem is a widespread failure to comply with common standards and a lack of harmonisation.
- The crisis response system is complex, with overlapping solidarity provisions between the Crisis Regulation and the Asylum and Migration Management Regulation (RAMM). In the absence of mechanisms to ensure compliance with solidarity measures, crisis states are allowed to evade their protection obligations. In practice, this could result in a significant proportion of Member States maintaining a **quasi-permanent state of derogation from asylum rules and a sub-standard regime of rights** for people seeking protection in the EU.
- Although the **Temporary Protection Directive** is maintained, the opportunity to regulate prima facie protection has been lost, offering instead another procedure of dubious practical relevance.

HUMAN RIGHTS MONITORING AND IMPLEMENTATION OF THE PACT

- It is imperative to ensure the establishment by Member States of **independent mechanisms for monitoring compliance with fundamental rights** in the application of screening and asylum procedures at the border. This mechanism should be an instrument present at all stages of the international protection procedure, from surveillance and control activities at borders, when the person arrives on EU territory, during the application process, in the reception system and, where appropriate, to ensure that the return procedure is carried out with all guarantees and in compliance with the principle of non-refoulement.
- The mechanism should be equipped with guarantees to ensure its independence, involving national human rights institutions such as the Om-

budsman, the EU Fundamental Rights Agency and civil society organisations in its functioning.

- The implementation of the European Pact on Migration and Asylum is the next key phase of reform, given the complexity and interrelatedness of the standards, as well as the serious risks to the rights and protection of migrants and refugees. **EU and national implementation plans must be developed from a human rights** and European Charter of Fundamental Rights approach. The European Parliament should propose amendments on those aspects necessary to achieve this objective after receiving the European Commission's report. Essentially, Spain must ensure the maximum guarantees and standards of protection provided for by Spanish legislation in the application of the new rules.

5. ANNEX: GLOSSARY OF TERMS AND ABBREVIATIONS

APR: Asylum Procedures Regulation

BMVI: Border Management and Visa Instrument

CATE: Centros de Atención Temporal de Extranjeros (Temporary Foreigners' Assistance Centres)

CEAR: Spanish Commission for Refugees

CEAS: Common European Asylum System

CFREU: Charter of Fundamental Rights of the European Union

CIE: Centro de Internamiento de Extranjeros (Detention Centre for Foreigners)

CJEU: Court of Justice of the European Union

COREPER: Committee of Permanent Representatives of the European Union

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EU: European Union

EUAA: European Union Asylum Agency

EURODAC: European Asylum Dactyloscopy Database

FRA: Fundamental Rights Agency of the European Union

Geneva Convention: 1951 Convention relating to the Status of Refugees.

HR: Human Rights

LIBE Committee: Committee on Civil Liberties, Justice and Home Affairs of the European Parliament.

RAMM: Regulation on Asylum and Migration Management

SAR: Search and Rescue Service

TFEU: Treaty on the Functioning of the European Union

UNHCR: United Nations Refugee Agency

Stateless person: a person who is not considered as a national by any state under its legislation.

Schengen Area: free movement zone made up of 29 European countries that have eliminated internal border controls since 1995, establishing common controls at their external borders to facilitate the movement of people and trade.

Externalisation of borders: a phenomenon that involves shifting the management of migration and asylum policies to third states and is intended to prevent and contain the arrival of migrants and refugees.

Secondary movements: refers to the movement of migrants, including refugees and asylum seekers, who for various reasons move from the country in which they first arrived to seek protection or permanent resettlement elsewhere.

Principle of non-refoulement: a prohibition imposed on states by international law to expel or return a person to the territory of any country where his or her life or freedom would be threatened, or where he or she would suffer torture, inhuman or degrading treatment or other serious violations of his or her fundamental human rights. It is the essential guarantee of the right to asylum.

Package approach: a holistic approach historically advocated by the European Parliament, which calls for a reform of the Common European Asylum System that addresses all the legislative proposals pending on the table. Under the premise of "all or nothing", the inability of the co-legislators to reach an agreement on the Dublin Regulation in the previous European political cycle determined the failure of the reform of the CEAS as a whole in 2019.

Prima facie recognition: in the field of international protection, this is used to refer to the group determination of refugee status by a state or UNHCR on the basis of evident and objective circumstances in the country of origin or, in the case of stateless asylum seekers, the country of former habitual residence. A prima facie approach recognises that those fleeing such circumstances are at such risk of harm that they fall within the applicable refugee definition.

Refugee: a person who is outside his or her country of origin due to a well-founded fear of persecution on account of political opinion, religion, ethnicity, nationality or mem-

bership of a particular social group, and therefore requires international protection. The definition of a refugee is to be found in the 1951 Geneva Convention and regional refugee instruments, as well as in the UNHCR Statute.

Asylum seeker or applicant for international protection: a person who has formally requested international protection and recognition of his or her refugee status and has not yet received a definitive response from the authorities.

Dublin system: regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. According to this regulation, the state in charge of processing asylum applications lies with the first country of entry of the applicant, among other criteria.

Trialogues: informal follow-up meetings of the three EU institutions: the Council, the Parliament and the Commission to facilitate the legislative process of a given proposal. Each trialogue involves three members: one from the Commission, one from the Parliament and the Council Presidency, each representing their respective institutions.