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## **Chapter 4: Advances in the Common European Asylum System (2013 recast)**

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**Summary.** 1. Introduction. 2. The Common European Asylum System (CEAS). 2.1 International reference regulatory framework. 2.2. Evolution of the community acquis: from the Dublin Convention (1990) to the Green Paper (2007). 3. The *consolidated* European asylum system acquis. 3.1. The *Consolidated Dublin II* Regulation: cooperation and coordination of systems for determining the State responsible for examining an asylum application. 3.2. Consolidated legislation on procedures for persons applying for international protection. 3.3. Consolidated legislation on the reception of persons applying for international protection. IV. Conclusions.

**Keywords:** CEAS; consolidated European asylum; international protection; determination of Member State responsible for examining an asylum application; Consolidated Dublin II Regulation

### **1. Introduction**

The aim of this paper is to examine the progress of European regulations on the international protection of asylum seekers. It is important to make two clarifications, even if they may be obvious: on the one hand, that the specific regulations on the protection of asylum seekers in the European Union (hereafter referred to as the EU) provide the basis for the Common European Asylum System (CEAS) and, on the other hand, that the internal regulatory harmonisation of the Member States is based on these minimum requirements.

One approach to the Common European Asylum System is based on the assertion that the free movement of persons and the freedom of movement in the Area of Freedom, Security and Justice must be guaranteed not only to the nationals of the Member States but also to those persons residing in the European Union and asylum seekers and refugees.

Since the start of the nineties, the number of people seeking international protection within the EU has increased to such an extent that the Member States decided to implement common solutions to cope with these demands<sup>1</sup>. There is no question that the set of common principles adopted at a European level is of great humanitarian value. However, the results obtained are far from effective<sup>2</sup>.

The fact that the results have not been satisfactory is due to a substantial lack of harmonisation of the asylum systems in the EU, and a lack of consistency in the application of EU legislation. The fact that it is applied differently by governments can be attributed to the existence of optional provisions that increase the discretion of Member States when interpreting the uniform regulations. The most recent case law of the Court of Justice (CJEU) supports this assertion<sup>3</sup>.

To overcome these shortcomings the Common European Asylum System (CEAS) was set up to achieve a “higher level of protection and greater equality of protection across the whole territory of the EU and to guarantee greater solidarity between the Member States of the EU”<sup>4</sup>. These principles were reflected in the consolidated legislation of June 2013, whose primary focus is on the protection objectives which govern the CEAS and on improving the various regulatory frameworks and existing practices.

The amended legislation (*consolidated* “asylum package”<sup>5</sup>) includes the recast of the Directive on procedures for granting international protection and asylum<sup>6</sup> and

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<sup>1</sup> Over 330,000 people applied for asylum in EU countries during 2012. 2,565 of those did so in Spain. Worldwide, during the first six months of 2013, 5.9 million people were forced to flee their homes. UNHCR has warned that the year 2013 could be the stage for the highest forced population displacement ever seen. *See the Mid-Year Trends Report for 2013* (UNHCR), available at the following address: <http://unhcr.org/52af08d26.html>.

<sup>2</sup> This is highlighted in the *UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States*, UNHCR, 2010, available at the following address: [http://www.acnur.es/PDF/7399\\_20120830130348.pdf](http://www.acnur.es/PDF/7399_20120830130348.pdf)

<sup>3</sup> Thus, matters referred to the CJEU such as the concept of protection, procedural guarantees, shared responsibility and the conditions for the admission of asylum seekers highlight the difficulties of interpretation for Member States when applying the Dublin criteria.

<sup>4</sup> This was highlighted in the GREEN PAPER on the future of the Common European Asylum System which reflected on the gaps in European asylum legislation that were prevalent at that time and recommended improved cooperation between Member States. Brussels 6.6.2007. COM(2007) 301 final.

<sup>5</sup> *See*: <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2013/9240>

<sup>6</sup> Directive 2013/32/EU of the European Parliament and of the Council, of 26th June 2013, on common procedures for the granting or withdrawal of international protection (recast). OJEU L 180, of 29.6.2013. Entry into force, 19.6.2013 (except for articles 47 and 48 which will be applicable from 21.7.2015). Repealing, with effect from 21st July 2015, Directive 2005/85/EC.

the Reception Directive<sup>7</sup>, the Dublin Regulation<sup>8</sup> and the EURODAC<sup>9</sup>, in addition to the consolidated Qualification Directive in 2011<sup>10</sup>. It must be applied in accordance with the governing principles of the CEAS. Its transposition into national legislations should make it possible for the coexistence of asylum systems in the different Member States to be more effective and function with quality standards and legal certainty.

In this paper we will examine the aforementioned *consolidated* asylum legislation. We will not discuss regulations that have not been amended; specifically the rules for refugee status and subsidiary protection beneficiary status referred to in Directive 2004/83/EC, of 29<sup>th</sup> April<sup>11</sup> and

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<sup>7</sup> Directive 2013/33/EU of the European Parliament and of the Council, of 26th June 2013, laying down standards for the reception of applicants for international protection (consolidated text). OJEU L 180, of 29.6.2013. Entry into force, 19.6.2013 (except for articles 13 and 29 which will be applicable from 21.7.2015). Repealing, with effect from 21st July 2015, Directive 2003/9/EC.

<sup>8</sup> Regulation (EU) 604/2013 of the European Parliament and of the Council of 26th 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 (Consolidated text). OJEU L 180, of 29.6.2013. Entry into force, 19.6.2013. Repealing Regulation (EC) 343/2003, article 11, section 1, and articles 13, 14 and 17 of Regulation (EC) 1560/2003. It will be applicable to applications for international protection lodged from the first day of the six month following its entry into force and, from that date, it shall be applicable to all applications to take charge of or take back applicants, irrespective of the date on which the application was submitted. The Member State responsible for examining an application for international protection lodged before said date shall be determined in accordance with the criteria set out in Regulation (EC) 343/2003 (art. 49).

<sup>9</sup> Regulation (EU) 603/2013 of the European Parliament and of the Council of 26th June 2013, regarding the creation of the “Eurodac” system for the comparison of fingerprints for the effective application of Regulation (EU) no 604/2013, 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, and on requests for the comparison with Eurodac data submitted by the law enforcement authorities of Member States and Europol for law enforcement purposes, and amending Regulation (EU) no 1077/2011, establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast). OJEU L 180, of 29.6.2013. Entry into force, 19.6.2013. It will be applicable from 20<sup>th</sup> July 2015. Repealing Regulation (EC) 2725/2000 and Regulation (EC) 407/2002 with effect from 20<sup>th</sup> July 2015.

<sup>10</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13<sup>th</sup> December 2011, establishing rules on the requirements for qualifying 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 provided (recast). OJEU L 337, de 20.12.2011. Repealing Directive 2004/83/EC with effect from 21<sup>st</sup> December 2013.

<sup>11</sup> The aim of this Directive is to establish the conditions that have to be met by third-country nationals and stateless persons to obtain the status of a refugee or a person who, for various reasons, requires international protection, in addition to the content of the protection provided. See Vargas Gómez Urrutia, “The Common European Asylum System”, at [https://www.academia.edu/2629858/El\\_sistema\\_Europeo\\_Comun\\_de\\_Asilo\\_Marina\\_Vargas](https://www.academia.edu/2629858/El_sistema_Europeo_Comun_de_Asilo_Marina_Vargas)

the regulations on temporary protection contained in Directive 2001/55/EC of 20<sup>th</sup> July<sup>12</sup>.

We will start with a brief historical outline of the CEAS, with reference to the international instruments (chiefly the 1951 Convention on the Status of Refugees) and those referred to by the TFEU when it demands that the adoption of measures on asylum must comply with the international framework for the rights of refugees. A summary will then be presented of the historical evolution of European measures regarding asylum, up to the establishment of the CEAS (2010). Finally, there will be a special focus on the amendments and developments in the consolidated legislation (2013).

## **2. The Common European Asylum System (CEAS)**

It is worth remembering that the original Treaties of the European Communities did not contain any provisions relating to asylum or refuge. This is because the main purpose of the 1957 Treaty of Rome was economic in nature. However, the prospect of achieving a space without internal borders, where the various factors of production, including people, could move freely within the internal market was a determining factor in the earliest Community measures on asylum. However, this did not mean that the legal systems of each Member State did not include such regulations, as all of these States are party to the main international instruments whereby asylum seekers are granted refugee status for their protection.

### **1.1 International reference regulatory framework**

After the end of the Second World War, the political and ideological movement to promote the international protection of human rights focused on the system of territorial asylum as an institution to protect people. This idea, which focuses on the protection of human rights, is reflected in the *Universal Declaration of Human Rights of 10<sup>th</sup> December 1948*<sup>13</sup> which confers upon a persecuted person the right to "seek and enjoy asylum" (but not the "right to obtain asylum"). In turn, the *United Nations' Declaration on Territorial Asylum Territorial*, approved by Resolution 2312 (XXII) of

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<sup>12</sup> The aim of these regulations is to meet the need to harmonise national legislations on the temporary protection of displaced persons on the basis of solidarity between Member States. See Vargas Gómez Urrutia, "The Common European Asylum System", at [https://www.academia.edu/2629858/El\\_sistema\\_Europeo\\_Comun\\_de\\_Asilo\\_Marina\\_Vargas](https://www.academia.edu/2629858/El_sistema_Europeo_Comun_de_Asilo_Marina_Vargas)

<sup>13</sup> Link: <http://www.un.org/es/documents/udhr/>

14<sup>th</sup> December 1967<sup>14</sup> considered asylum to be a right of the State, although it stated that the situation of those persons who were entitled to invoke article 14 of the Declaration “was of concern to the International Community”. After the “Cold War”, the International Community once again issued the Universal Declaration so, in the *Vienna Declaration*, approved on 23<sup>rd</sup> June 1993<sup>15</sup> by the World Conference on Human Rights, it was reaffirmed that “everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one’s own country”.

The most important international instrument to recognise the right to apply for and obtain refugee status is the *Geneva Convention relating to the Status of Refugees of 29<sup>th</sup> July 1951*<sup>16</sup> and its *Protocol of 31<sup>st</sup> January 1967*<sup>17</sup>. In the Convention, the notion of the “refugee” is broadly defined and therefore, as opposed to other conventional definitions, and given the universal nature of the Convention, this has become a definition of general international Law.

The Geneva Convention regime establishes the international obligation of States Party to consider a person a "refugee", for the purpose of granting them such status, any foreign applicant who, owing to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” is outside the country of their nationality (or normal place of residence if they are a stateless person) and is unable or unwilling, owing to such fear, to avail themselves of the protection and return there. The Convention sets out the principle of “non-return” (*non-refoulement*), according to which, every person has the right not to be handed over or refused entry or to be returned to their country of origin (or a third country) if they are going to be persecuted there, in gross violation of their fundamental human rights, in particular their rights to life, physical and moral integrity and freedom.

In addition to these regulations, it is worth noting article 3 of the *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, adopted in New York on 4<sup>th</sup> February 1985<sup>18</sup> and the *Convention on international cooperation in the matter of administrative assistance to refugees*, signed in Basel on 3<sup>rd</sup> September 1985<sup>19</sup>. It is also

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<sup>14</sup> Link: <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf/0009>

<sup>15</sup> Link: <http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/A.CONF.157.23.Sp>

<sup>16</sup> Link: <http://www2.ohchr.org/spanish/law/refugiados.htm>

<sup>17</sup> Link: [http://www2.ohchr.org/spanish/law/refugiados\\_protocolo.htm](http://www2.ohchr.org/spanish/law/refugiados_protocolo.htm)

<sup>18</sup> Link: <http://www2.ohchr.org/spanish/law/cat.htm>

<sup>19</sup> Link: [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-1987-13701](http://www.boe.es/diario_boe/txt.php?id=BOE-A-1987-13701)

worth remembering the important *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4<sup>th</sup> November 1950, which, despite not directly protecting the right to seek and obtain asylum, does impose this as an effect arising from the obligations to respect the human rights of others (for example, Protocols 4 and 7 of the ECHR contain provisions that protect foreigners' rights of free movement and residence). In particular, article 3 (protecting the right not to be tortured), article 8 (protecting the right to respect for private and family life) and article 14 (protecting the right not to be discriminated against). In addition to the above there are a number of *Decisions by the European Commission of Human Rights* and, above all, the case law of the *European Court of Human Rights* that have defined the standards for the protection of the right of foreigners not to be expelled, returned or refused entry pursuant to the different articles of the ECHR<sup>20</sup>.

## **2.2. Evolution of the community acquis on asylum: from the Dublin Convention (1990) to the Green Paper (2007).**

As we have pointed out, the *Treaties establishing the European Communities* did not contain provisions regarding asylum or refuge, given the economic nature of the commitments undertaken by the six States that signed the *Treaties of Rome* of 25<sup>th</sup> March 1957. The *Single European Act of 1986*<sup>21</sup> introduced article 8 A into the EEC Treaty (art. 7 A after the Maastricht Treaty and art. 14 after the Amsterdam Treaty) of vital importance for freedom of movement inasmuch as it established an area without internal borders within the internal market in which the free movement of goods, people, services and capital were guaranteed. The abolition of internal borders made it likely that soon measures would be established which would make it possible to strengthen external border controls, although it would be some years later that a common policy on asylum and immigration would be established.

Indeed, the first measures to transfer the responsibility for checks on third-country nationals from internal borders to external borders are contained in the *Schengen Agreements*, the first on 14<sup>th</sup> June 1985 (initially signed by the Benelux States, France and Germany) and the second, on 14<sup>th</sup> June

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<sup>20</sup> See C. Quesada Alcalá, "At odds with Europe and its asylum policy. Commentary on the Judgment of the European Court of Human Rights. The case of Salah Sheekh v. the Netherlands, of 11th January 2007", RGDE (General Journal of European Law), no. 13, May 2007.

<sup>21</sup> Link:

[http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_singleact\\_es.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_es.htm)

1990 (in full force from 26<sup>th</sup> March 1995)<sup>22</sup>. In the 1985 Agreement there was no specific reference to asylum, although article 20 could be understood to implicitly refer to it by requiring the signing Parties to strive for the harmonisation of their regulations on certain aspects of the rights of nationals from non-member States of the European Communities. The 1990 agreement was more explicit, devoting a chapter to the responsibility for examining asylum applications (Chapter VII) within the context of the abolition of external border controls and the free movement of people.

At the same time, just one day apart, in the city of Dublin the *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities* was signed. It can be said that from that moment, in terms of legislation, the European commitment to a common asylum system was established.

The *Dublin Convention of 15<sup>th</sup> June 1990*<sup>23</sup> aims to determine the Member State responsible for examining an application for asylum within a procedural framework, i.e. following uniform procedures for all signatory States. The underlying idea consisted of, on the one hand, preventing the phenomenon known as *refugees in orbit* from occurring in the borderless area (preventing asylum seekers from being sent consecutively from one Member State to another, without any assuming responsibility for the examination) and, on the other, the standardisation of the procedures would prevent the *secondary movement* of refugees between Member States in search of whichever would grant them the most favourable conditions.

The provisions of the Dublin Convention were to replace those laid down in the 1990 Schengen Agreement. However, their implementation did not provide the expected results. This was mainly due to the national differences in asylum regulations –due to both their traditions and legal systems- but it was also a consequence of the differences regarding who could be considered a refugee under the different national administrative procedures. Differences that arose despite the common part of the *1951 Geneva Convention relating to the Status of Refugees* and its amendments in the *New York Protocol of 31st December 1967*.

The Dublin Convention gave a dramatic boost to the process of harmonising asylum policies in the EU, with the continuity thereof being

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<sup>22</sup> BOE núm. 183, de 1 de agosto de 1997. Corrección de errores en BOE núm. 235, de 1 de octubre

<sup>23</sup> <http://www.interior.gob.es/normativa-89/acuerdos-y-convenios-1272/convenio-de-15-de-junio-de-1990-1380?locale=es>

guaranteed by Reglamento (CE) 343/2003 del Consejo, de 18 de febrero de 2003, which established the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

This Regulation was repealed by Regulation (EU) 604/2013 of 26<sup>th</sup> 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 stateless person (consolidated text). It will be applicable to asylum applications submitted from the month of February 2014.

Given these difficulties, the idea that was initially proposed in 1991 by the Interior Ministers of the Member States was picked up again. It consisted of incorporating the asylum policy into the third pillar of the TEU, taking advantage of the legal basis offered by the *Maastricht Treaty of 7<sup>th</sup> February 1992*. Indeed, in Section VI (provisions relating to the JHA – Justice and Home Affairs- articles K to K9) there was the first explicit reference to asylum and immigration. The asylum policy also appeared as one of the areas considered to be of "common interest" for the Member States, regardless of any wording that tied it to immigration policy in the above text.

However, the work aimed at revising the *Dublin Convention* and placing it within the area of intergovernmental cooperation did not have the desired success. The fact is that the negotiations for the *Amsterdam Treaty of 2<sup>nd</sup> October 1997*, which was already on the horizon, were going to change the legal basis of the asylum and immigration policy, as the measures to be adopted would be incorporated under Section IV, entitled "Area of Freedom, Security and Justice" (AFSJ). In other words, the *communitisation* of asylum procedures resulting from the Amsterdam Treaty was consistent with the objectives and structure of the new European Treaty, which was aimed at correcting the failings and overcoming the shortcomings of the previous system, characterised by a breadth of objectives but a lack of specific measures and programmes for its implementation.

In any event, the level of intensity with which the EU intervened in this matter was now redirected towards no more than three types of measures (guarantee, support and complementary), depending on whether the competence was exclusive or shared with the Member States. It goes without saying that these measures are aimed at ensuring the free movement of people, although their scope is different. While for *guarantee*



*measures*, in particular the abolition of internal border controls, the EU's competence is exclusive in nature, for *support measures* and *complementary measures*, a result of the gradual improvement of the internal market, the EU shares regulatory competence with the Member States and, in all three cases, with the regulation of international Law.

Having made this distinction, it is worth noting that the lodging of asylum applications, the determination of the responsible State and the minimum standards for the protection of displaced people are considered support measures, while the reception and accommodation of asylum seekers, refugees and displaced persons and the rules on the reception and granting of asylum seekers and refugees are considered complementary measures. Along with these specifics, Section IV of the TEC (now in Section V of the Lisbon Treaty) has an important caveat as to its scope of application, as the United Kingdom, Ireland and Denmark enjoy a special status. Perhaps these limitations to the competences attributed to the EU and the need to link to the measures to the internal market explain the difficulties in adopting the necessary coordinated policies.

The *Treaty of Nice of 26<sup>th</sup> February 2001*, which again amended the TEU and the TEC, did not change the above system, although it did anticipate the application of qualified majority voting and the co-decision procedure for the adoption of the vast majority of the planned measures relating to asylum, provided that the Community legislation defining the common rules and basic principles which should govern these matters had been unanimously adopted beforehand.

Before concluding this section by discussing the *Treaty of Lisbon*, it is worth highlighting three political and institutional milestones in the process of developing the CEAS. We refer to the *Tampere European Council in 1999*, the *Hague Programme of 2004* and the *Green Paper on the future of the Common European Asylum System of 2007*.

Tampere Council of 1999. This Council made the attainment of the Area of Freedom, Security and Justice a priority on the EU's political agenda, establishing the basic principles for developing a "new" common policy on asylum. This ambitious programme of policy guidelines and specific asylum objectives needed to cover: a) the principle of non-refoulement and the commitment that no persons would be repatriated to a country where they were suffering persecution; b) the full and inclusive application of the Geneva Convention; c) the time for the implementation and development of the system (two stages, short and long term); d) on the basis of solidarity

between Member States, the Community policy would also be aimed at the temporary protection of displaced persons; and, e) the system for identifying asylum seekers (EURODAC) would have to be established promptly. The Action Plan anticipated that the CEAS proposal would be adopted at the end of 2010.

Hague Programme of 2004. In relation to asylum, its objective consisted of proceeding to the second stage of the CEAS through the creation of a common asylum procedure and a uniform status for people who are granted asylum or subsidiary protection. For that purpose, the system would have to be based on the full and inclusive application of the Geneva Convention on the status of refugees, as well as other relevant treaties. Furthermore, it aimed to fully assess the legal instruments adopted during the first stage, to ensure that the Member States implemented them in full. The Programme calls upon the Commission to present the instruments and measures from the second stage with a view to their adoption before the end of 2010. From another angle, the Programme anticipated the creation of suitable structures to facilitate practical cooperation and collaboration between the Member States within a single procedure for the assessment of applications for international protection.

2007 Green Paper on the future of the Common European Asylum System. Its aim, as established by the *Hague Programme*, was to identify the possible options “under the current EU legal framework” to shape the second stage of the construction of the CEAS which, as noted above, is not only intended to ensure the transposition of the legal instruments adopted and their efficient application in the Member States, but also “to achieve both a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States”.

Based on this approach, the Green Paper focused on examining certain aspects of the Directives on the processing of asylum applications (Directive 2005/85/EC), the reception conditions for asylum seekers (Directive 2003/9/EC) and the granting of protection (Directive 2004/83/EC). At the same time, it addressed other cross-cutting themes relating to situations of vulnerability, the matter of integration and other areas not covered by current regulations. Finally, it stressed that the Dublin system (*Dublin II* Regulation and EURODAC), which was now fully applicable in the Area of Freedom, Security and Justice, could be made more effective.

The content of the 2003, 2004 and 2005 Directives was incorporated into the Spanish legal system through Law 12/2009 of 30<sup>th</sup> October, governing the right to asylum and subsidiary protection<sup>24</sup>. In any event, the amendments to the "2013 European asylum package" requires the Member States to adopt new legislation, still pending at the time of this writing.

Despite altering the institutional structure of the EU and giving the Court of Justice new powers, in addition to other important changes, the *Treaty of Lisbon of 13<sup>th</sup> December 2007* –in force since 1<sup>st</sup> December 2009- did not make substantial changes to matters relating to the AFSJ. Its regulation is contained in articles 67 to 89 of the Treaty on the Functioning (TFEU).

The starting point was to consider the Area of Freedom, Security and Justice as a "new Union" objective, which would make it possible to increase the range of issues covered and add new areas of regulation. Regarding competences, the Treaty of Lisbon established the AFSJ as an area of shared competence. Article 2.2 of the TFEU indicates that "The EU and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the EU has not exercised its competence. The Member States shall again exercise their competence to the extent that the EU has decided to cease exercising its competence".

Regarding the areas covered, article 67 of the TFEU establishes three sets of measures, including in the first of them (Chapter 2) the policies on border controls, asylum and immigration. The fact that the EU was committed to taking the lead on this issue was demonstrated when it declared "it shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement".

In light of article 78.2 of the TFEU, the fact that the line of action initiated by the commitments made in Tampere would continue was demonstrated by the system (CEAS) being based on granting a uniform status that was valid throughout the EU. This was accomplished through common mechanisms, criteria and procedures that had to be adopted by all Member States for granting or withdrawing this status.

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<sup>24</sup> Regarding Spanish Law, see the analysis in the book coordinated by M. Camino Vidal Fueyo, *Legal Framework of the Right to Asylum in Law 12/2009* (R. García Mahamut and J. Galparsoro), Centre for Political and Constitutional Studies, Number 21 Citizenship and Immigration Forum, Madrid, 2010. Available at this address: [http://www.cepc.gob.es/docs/doc\\_publicaciones/21.pdf?sfvrsn=0](http://www.cepc.gob.es/docs/doc_publicaciones/21.pdf?sfvrsn=0).

In the following section we will examine these policy areas and the regulations derived from them, taking into account the latest recast (2013) of the European asylum acquis.

### **3. The *consolidated* European asylum system acquis.**

As we have just noted, the legislative harmonisation undertaken to fulfil the commitments made in Tampere, on the legal basis of Chapter IV of the Amsterdam Treaty is an ongoing process. The most important regulations derived from it are part of a continuing line of work which is therefore continually evolving.

The method selected for this paper distinguishes between regulatory instruments for cooperation and coordination, as applicable, and we will pay particular attention to Regulation 603/2013, of 26<sup>th</sup> June (recast), the *Dublin II Regulation* and regulatory instruments for material harmonisation in specific policy areas. More specifically, we will examine the consolidated texts of the Asylum Procedures Directive and the Reception Directive (2013 consolidated texts).

#### **3.1. The *Consolidated Dublin II Regulation*: cooperation and coordination of systems for determining the State responsible for examining an asylum application.**

Before implementing any harmonising measure relating to asylum, it is first necessary to determine which State is responsible for examining an asylum application. The European system is focused on preventing *asylum shopping* and cases of what are known as *refugees in orbit*.

For example, it is assumed that the asylum seeker will go to the country which can provide them with the highest levels of protection and process their application more efficiently, which in principle suggests greater asylum migration pressure in those countries with higher standards of quality. Additionally, it is conceivable that multiple applications will be submitted or, as is more common, the applicant enters a specific State but applies for asylum in another State.

Both phenomena occur as a result of significant gaps in the harmonisation of the EU's asylum systems and in the diversity of national procedures, whose implementation does not comply with the governing principles of the CEAS.

The efforts of the European Parliament and Council to reconcile the obligations derived from international and European Law on refugees with the desire of Member States not to increase the pressure on their national systems were legally reflected in *Regulation (EC) no. 343/2003 of 18<sup>th</sup> February 2003 (Dublin II Regulation<sup>25</sup>)*, whose basic objective is to guarantee that each application is handled by a single Member State (the responsible State). However, the internal procedures have not been fully harmonised, despite the fact that the reception and procedures Directives establish the guidelines for standardisation.

The problem lies in the wording of some of their provisions, which are overly long, resulting in inadequate transposition in certain States, difficulty in interpreting them and a greater margin of discretion in the processing of applications. This is all a reflection of the difficult political balances that it was necessary to find during negotiations to secure agreements.

It is worth remembering that the CEAS is based on the assumption that the asylum laws and procedures in the Member States of the EU are based on common standards, making it possible for asylum seekers to enjoy similar levels of protection in all of the Member States. In practice, the reality suggests otherwise: the significant variation in procedures and laws in the Member States means that the asylum seekers are not treated equally across the EU. The system is unfair and inequitable. In its 2008 assessment, the European Parliament went on record saying that without harmonisation “the Dublin system will continue to be unfair both to asylum seekers and to certain Member States”<sup>26</sup>.

As the UNHCR has reported, during the procedures for determining the State responsible for examining asylum, under the Dublin II Regulation (of 2003), the applicants “wait” in a kind of legal limbo. Often separated from their families and under arrest, they wait to be transferred to another State which is considered responsible for their application. In some cases this assessment does not even take place, and the applicant is returned to the country of origin or to a third country, without even knowing if it is a safe country.

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<sup>25</sup> This Regulation replaces the provisions of the 1990 Dublin Convention at EU level (Denmark is subject to the Regulation pursuant to Council Decision no. 2006/188/EC, of 21<sup>st</sup> February 2006). The Dublin II regulation is supplemented by Regulation (EC) no. 1560/2003 of 2<sup>nd</sup> September 2003, establishing applicable provisions to facilitate cooperation between the authorities of competent Member States with regard to processing requests to take charge or for readmission and requests for information and the completion of transfers ; and, Regulation (EC) no. 2725 of 11<sup>th</sup> December 2000, regarding the creation of the EURODAC system for the comparison of fingerprints for the effective application of the Dublin Convention.

<sup>26</sup> Quoted from ACNUR. Document “Asylum in Europe. The Dublin Regulation”, Available at this address: [http://www.acnur.es/PDF/7364\\_20120830124023.pdf](http://www.acnur.es/PDF/7364_20120830124023.pdf).

Improving the CEAS measures (consolidated acquis from 2013) is likely to significantly improve the way that the asylum systems function in the EU's Member States, and to guarantee that they are run with high quality standards. *Regulation (EU) 604/2013, of 26<sup>th</sup> June (recast Dublin II Regulation<sup>27</sup>)*, is designed for this purpose, a text which, together with *Regulation (EU) 603/2013 of 26<sup>th</sup> June*, forms the core of the so-called "consolidated asylum package".

With regard to how it works, it has been established as a general principle that only one Member State will be responsible for examining an asylum application. However, any Member State may decide to examine an asylum application, even when it is not responsible under the criteria set out in the Regulations. On this point, there is the Ruling of the Court of Justice of 21.12.2011, joined cases C-411/10 and C-493/10, N.S. and M.E where the concept of safe countries was analysed for the transfer of an asylum seeker to the Member State responsible for the examination. The Court was asked if there was a rebuttable presumption of respect for fundamental human rights from that Member State.

Regarding the criteria that will make it possible to determine the responsible State, the applicant's situation must be summarised when submitting the asylum application. The criteria basically revolve around objective and subjective elements (members of the family, existence of a residence permit or valid visa, illegal status of the party concerned in the territory of the State in which asylum is being requested, among others).

For example, if a member of the applicant's family already has refugee status in a Member State, it will be responsible for their asylum application. If a member of the applicant's family has an asylum application that is being examined as part of the normal procedure of a Member State, this State will be responsible for their application. The Regulation establishes a rule for the joint processing of asylum applications lodged by several members of a family. If there is a residence document or valid visa, the Member State that issued the residence document or valid visa will be responsible for the asylum application. There are specific solutions for cases where the applicant holds several permits or visas. If the illegal status of the applicant is taken into account, for example if they cross the border of a Member State illegally, that State will be responsible for examining the application, unless it can be demonstrated that the applicant has lived in the Member State in which they presented their asylum application. This rule may change according to the duration of the illegal status in a specific Member State, or due to other family matters.

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<sup>27</sup> See note 2 above.

The Court of Justice has ruled on this matter in its Ruling of 6.11.2012 C-245/11<sup>28</sup> which analyses the scope of article 15 of the Dublin II Regulation in a case where a Member State –which is not initially responsible for examining the application- can necessarily become the responsible State due to the fact that a number of relatives reside in that State who –for health or other reasons- depend on the asylum seeker whose application was presented in another Member State.

It is possible for the Member State that has received an asylum application to present a *request to take charge* to the Member State it considers to be responsible. When this occurs, the Member State responsible for the asylum application must fulfil certain obligations, in particular taking responsibility for the applicant and examining their application. In the request to take charge, it is necessary to indicate any elements of proof that enable the requested Member State to determine whether it is indeed responsible. When the requested State decides to take charge of an applicant, it must notify them, through a reasoned decision, that the application cannot be examined in the Member State in which it was lodged, indicating the Member State in which it should be lodged.

The Regulation also establishes a number of regulatory provisions regarding the treatment, communication and transmission of the personal data of the asylum seeker and the reasons for them seeking asylum. The Regulation does not prevent Member States from establishing bilateral agreements that enable, among other things, the exchange of liaison officers, the simplification of procedures and the shortening of time limits.

The *Dublin II* Regulation (*recast*) establishes, among the obligations of the Member States, that it is compulsory to hold an interview for any case that falls within their scope (to establish the responsible Member State). As we have seen above, one of the criteria for establishing which country is responsible for the process where illegal entry has occurred (the most common cases) is the first country entered illegally. With the new consolidated text, the requirement of a compulsory interview will enable a better analysis of other applicable criteria, including those relating to the family unit.

Furthermore, the possibility of an appeal with a suspensive effect (in the previous Regulation the appeal did not have a suspensive effect) on the

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<sup>28</sup> Its aim is to examine article 15 of the Regulation. On the one hand, a person who has been granted asylum in a Member State, who depends on the assistance of the asylum seeker because they are suffering from a serious illness. In relation to article 15, subsection 2, namely the obligation of that Member State, which is not responsible under the criteria established in chapter III of the Regulation, to examine the asylum application lodged by said asylum seeker.

transfer decisions<sup>29</sup> will ensure the proper application of the criteria of the Dublin system during an examination, with the hierarchy established in the Regulation, before the transfer takes place.

### **3.2. Consolidated legislation on procedures for persons applying for international protection**

The *minimum standards for common procedures for granting or withdrawing international protection* were governed by Directive 2005/85/EC, of 1<sup>st</sup> December, which was replaced by Directive 2013/32/EU, of 26th June (*Recast Procedures Directive*). Its purpose is to develop new standards with a view to establishing a common asylum procedure in the EU (Considered 12).

To a large extent, achieving international protection depends on establishing suitable procedures that examine the application in the most complete and fairest way possible. In particular, respecting due process during the procedure and ensuring a high quality decision process in all Member States. The *Recast Procedures Directive* is based on these principles and establishes the right to a personal interview, the right to receive information and communicate with the specialised organisations in the Member States (UNHCR), the right to a lawyer and the right to appeals as procedural principles.

Regarding the *territorial scope*, the Directive will be applicable to all applications for international protection submitted in the territory, including at the border, in territorial waters and in the transit zones of the Member States, and to the withdrawal of international protection. It will not be applicable to applications for diplomatic or territorial asylum that are lodged in the representations of the Member States. In any event, the Member States may decide to apply the Directive to procedures relating to any type of applications for protection that do not fall within the scope of Directive 2011/95/EU.

One of the important issues introduced by the consolidated legislation is the concentration of resources and quality of the process during the initial phase. In this sense, and so that decisions on granting or withdrawing international protection are made according to common quality standards,

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<sup>29</sup> The suspensive effect of the appeals complies with international Law and the case law of the ECHR established in relation to the application of refugee law. The *Recast Procedures Directive* recognises the automatic right of asylum seekers who appeal against a negative decision to remain in the territory of the Member State in question. It is true that this suspensive effect may not be automatic in some circumstances, but there is the option to request, from the courts of the States in question, the right to remain in the territory while the appeal is being processed, until the appeal ruling is issued.



the training of the personnel of the determining authorities is important, taking into account the training provided by the European Asylum Support Office<sup>30</sup>.

Establishing clearer definitions regarding access to the international protection procedure helps to ensure the fulfilment of the fundamental guarantees (article 2) and the filing of the application with the competent authority, in accordance with domestic Law, and its registration within a maximum of three business days of it being filed (which may be extended to ten business days when an application for international protection is filed by a large number of third-country nationals or stateless persons at the same time).

It is possible that the application may be filed with other authorities which are not competent for registering it under domestic Law. In that event, the Directive establishes that the Member States must ensure that it is registered within a maximum of six business days of the application being made. The Directive requires that Member States ensure that these other authorities (such as the police, border guards, immigration authorities or personnel from detention facilities) have the relevant information and personnel with adequate training, and instructions on how to inform applicants of where and how applications must be filed. An application for international protection will be deemed to be lodged from the moment in which the applicant submits the form or, where provided for in domestic Law, the competent authorities of the Member State concerned receive an official report.

The requirement of a personal interview is an additional procedural guarantee which **must** be provided to the applicant before the determining authority adopts its decision. The absence of a personal interview in accordance with the Directive will not prevent the determining authority from making a decision on an application for international protection. Nor may it adversely prejudice the decision of the determining authority.

Its requirements, content, recording and report are detailed in articles 14 to 17 of the Directive.

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<sup>30</sup> See Art. 4. Section 3. The Member States shall ensure that the personnel of the determining authority referred to in section 1 are properly trained. To that end, Member States shall provide for relevant training which shall include the elements listed in article 6, section 4, letters a) to e), of Regulation (EU) no. 439/2010. They shall also take into account the relevant training established and developed by the European Asylum Support Office (EASO). Persons interviewing applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect the applicant's ability to be interviewed, such as indications that the applicant may have been tortured in the past. Section 4. When an authority is designated in accordance with section 2, Member States shall ensure that the personnel of that authority have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive.

Regarding the obligatory nature of interviews and competent persons, interviews on the substance of the application must always be conducted by the “personnel of the determining authority”. Whether or not it is possible for interviews to be provided for minors depends on each country’s legislation. When holding a personal interview on the substance of the application, the determining authority must ensure that the applicant is given the opportunity to present the elements necessary to substantiate the application as completely as possible, in accordance with article 4 of Directive 2001/95/EU. This will include the opportunity to give an explanation regarding any elements which may be missing and/or any inconsistencies or contradictions in their statements.

It is possible to dispense with the personal interview on the substance of the application in cases that have been evaluated when the determining authority adopts a favourable decision regarding their refugee status based on the available evidence or because the determining authority is of the opinion that the applicant is unable (or unfit) to be interviewed due to enduring circumstances that are beyond their control. It dispenses with the rules of private international Law regarding the law applicable to a person’s capacity (personal law) and establishes that, when in doubt, the determining authority must consult a medical professional to know whether the condition that makes the applicant unable or unfit to be interviewed is temporary or permanent.

Given that it is a personal interview, it will be conducted without the presence of family members, unless the determining authority believes that it is necessary for other family members to be present for a proper examination to be performed. It must take place under conditions that guarantee appropriate confidentiality and under conditions that enable the applicants to present the grounds for their applications in a comprehensive manner.

To that end, the Member States will:

- a. ensure that the person who is going to conduct the interview is competent to take account of the personal and general circumstances surrounding the interview, including the applicant’s cultural origin, gender, sexual orientation, gender identity or vulnerability;
- b. wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

- c. select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;
- d. ensure that the person who conducts the interview on the substance of an application for international protection does not wear a military or law enforcement uniform;
- e. ensure that interviews with minors are conducted in a child-appropriate manner.

Each personal interview must be recorded either in a thorough and objective report or a transcript (audio or audio-visual). The applicant must be fully informed of the content of the report or of the substantive elements of the transcript, with the assistance of an interpreter if necessary, and they must have the opportunity to make comments and/or provide clarification orally or in writing regarding any mistranslations or misconceptions that appear in the report or transcript. This must be done either at the end of the personal interview or within a specified time limit, before the determining authority makes a decision. Furthermore, the applicant's lawyers or other legal advisors will have access to the report or transcript and, where applicable, the recording, before the determining authority makes a decision.

Regarding the possibility of using expedited examination procedures – when it is likely that there are no grounds for an application or for reasons of national security or public order – the Member States may establish shorter time limits for some stages of the procedure, notwithstanding the obligation to perform a proper and complete examination of the application.

The right to an effective remedy before a court is referred to in article 46 of the recast Directive. It must be ensured that applicants can appeal against: (1) a decision made on this application for international protection, including a decision considering an application in relation to refugee status and/or subsidiary protection status to be unfounded; (2) a decision to consider an application to be inadmissible pursuant to article 33, section 2<sup>31</sup>; (3) a decision adopted at the border or in the transit zones of a Member

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<sup>31</sup> Article 33 section 2. Member States may consider an application for international protection as inadmissible only if: a) another Member State has granted international protection; b) a country which is not a Member State is considered as a first country of asylum for the applicant,

State: (4) a decision not to perform an examination pursuant to article 39<sup>32</sup>. It must also be possible to appeal against a refusal to reopen the examination of an application after its discontinuation pursuant to articles 27 and 28, and to appeal against a decision to withdraw international protection pursuant to article 45.

The Member States will establish reasonable time limits and other rules necessary for the applicant to be able to exercise their right to an effective remedy. The time limits must not render said exercising of their right impossible or excessively difficult. During the appeals procedure and, in any event, until the final date on which they can exercise their right to an effective remedy has passed, the Member States will allow applicants to remain in the territory. The courts of the Member State have the power to decide whether or not the applicant may or may not remain in the territory, either upon the request of the relevant applicant, or acting *ex officio*, if such a decision removes the applicant's right to remain in the Member State and when, in such cases, the right to remain in the Member State pending the outcome of the appeal is not provided for in domestic Law.

### **3.3. Consolidated legislation on the reception of persons applying for international protection**

The *minimum standards for the reception* of applicants for international protection were governed by Directive 2003/9/EC, of 27<sup>th</sup> January, recast by Directive 2013/33, of 26<sup>th</sup> June (*Recast Reception Directive*). The aim of this regulation is to ensure that the people concerned have a dignified standard of living and to establish living conditions that are comparable in

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pursuant to Article 35; c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38; d) it is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.

<sup>32</sup> This provision refers to the concept of a safe third country. - 1. Member States may provide that no, or no full, examination of the application for international protection and of the safety of the applicant in his or her particular circumstances as described in Chapter II shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant is seeking to enter or has entered illegally into its territory from a safe third country according to section 2. A third country can only be considered as a safe third country for the purposes of section 1 where: a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations; b) it has in place an asylum procedure prescribed by law, and c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.

all Member States. In this sense, the harmonisation of the conditions for the reception of applicants for international protection also covers applicants of subsidiary protection; with the aim of preventing unequal treatment of persons who fall within the scope of Directive 2011/9/EU of 13<sup>th</sup> December.

Regarding the personal scope of the regulation, it is applicable to all third-country nationals and stateless persons who submit an application for international protection (including subsidiary protection) at the border or in the territory of the Member State, provided that they are allowed to remain in the territory as an applicant, and to their family members if they are covered by the application for international protection under domestic Law. The Directive is not applicable to applications that fall within the scope of Directive 2001/55/EC of 20<sup>th</sup> July 2001, regarding minimum standards for providing temporary protection in the event of a mass influx of displaced persons. However, the Directive does not prevent the competent authorities from classifying any application for international protection as an asylum application for procedural purposes, unless the applicant expressly requests another form of protection. In any event, the Member States may establish more favourable conditions regarding reception conditions and may apply the same conditions to the applicants of forms of protection for which there are no provisions in the *Geneva Convention*.

The conditions established by the Directive relate, on the one hand, to the duty to inform applicants and, on the other, to recognising the applicant's right to free movement within the national territory. The asylum seeker may only be detained to verify their identity. Under exceptional circumstances, movement may be restricted to a part of the territory. In any event, the applicant must be able to appeal against such restrictions.

The Member States must guarantee certain material reception conditions. In particular, accommodation, food and clothing, in addition to the cost of financial allowances which are sufficient to prevent the applicant from becoming destitute. The applicant is entitled to maintain their family unity and access medical and psychological care and the education system (for minors, in addition to language courses where necessary). If the applicant's financial situation so permits, the Member State may ask them to fully cover or contribute towards the cost of the material reception conditions and the medical and psychological care. These benefits may be limited under certain circumstances. However, the benefit relating to emergency medical care may not be limited under any circumstances, nor may the applicant be deprived of it. Regarding employment and residence rights, asylum seekers must not be forbidden from entering the labour market or accessing professional training. This right comes into force when there is no decision on an asylum application within six months. According to the consolidated text, the applicant is entitled to enter the labour market within a period no greater than 9

months after their application was submitted. However, Member States maintain complete control over their domestic labour market, so they may determine the types of jobs which asylum seekers can access, the number of hours or days per month or year for which they are authorised to work, the qualifications that they must have, among other things.

The biggest problem posed by applying this Directive was the possibility of Member States “detaining/confining” applicants. The detention conditions are comprehensively governed by the 2013 consolidated text, establishing the general principle that “a person should not be held in detention for the sole reason that he or she is seeking special protection”, not even for the purpose of transferring that person in accordance with the Dublin Regulation.

A duty to inform applicants is established to ensure that the applicant knows under which circumstances they can be detained (grounds) and for how long they can be deprived of freedom (States are required to adopt specific, significant measures to ensure that the time necessary to verify the grounds for detention is as short as possible. Both guarantees highlight the exceptional nature of this measure. In this sense, “any detention for confinement must be necessary and comply with the principle of proportionality”.

Regarding justifiable grounds for detention, the recast Directive establishes six defined grounds (notwithstanding criminal grounds for detention) and the requirement to establish alternatives to detention. Of equal importance is the right to a remedy to immediately review the legality of the detention and to information regarding the mechanisms in place to appeal against it. Furthermore, the detention order must be issued by a competent judicial or administrative authority, indicating the reasons in fact and in law that justify it. The consolidated regulation also requires suitable conditions during the detention, including access to the premises for the UNHCR or any organisation that works in the territory of the Member State in question “on behalf of the UNHCR” under an agreement with that State. Finally, the confinement/detention of vulnerable persons and minors (including unaccompanied minors) is limited to exceptional circumstances (as a *measure of last resort*).

#### **4. Conclusions**

1. The so-called “asylum legislative package” of 2013 moves towards achieving the objective of an asylum status that is valid throughout the

EU, a uniform status for subsidiary protection and common procedures for granting and withdrawing those statuses. All within the requirements of the Treaty on the Functioning of the European Union.

2. The amended legislation affects two Regulations and two directives that make up the core of the current legislation on this matter.
3. Regarding the recast Dublin II Regulation, it is worth highlighting the progress of the new mechanism for monitoring, early warning and crisis management. Its main functions are to monitor the asylum situation in the Member States and establish a context within which it is possible to establish a structured and well-organised policy framework which can help to identify the problems that arise in specific situations of migratory pressure. Furthermore, the application of the Dublin II system is improved by the new obligations established in the Regulation for Member States, relating to interviews being held with the applicant with the aim of facilitating the process of establishing the responsible Member State.
4. Regarding the Procedures Directive, the rules have been simplified to facilitate its application, in particular when a large number of applications are being processed at the same time. In this sense, the rules on accessing the asylum procedure, conducting personal interviews and the maximum duration of asylum procedures have been revised. Additionally, the making of first instance decisions has been improved with more practical measures that help applicants to understand the procedure and ensure proper training for the personnel who examine the applications and make decisions on them.
5. Regarding the guarantees for access to protection, the preliminary steps that must be taken in the asylum procedure are explained for border guards, police officers and other authorities who first come into contact with people who request protection. The recast Directive clarifies the rules if asylum seekers submit a new application when their circumstances change, and to prevent possible abuses of the system.
6. Finally, the task has been set to achieve the utmost consistency with the EU's other asylum acquis instruments, such as the European Asylum Support Office (EASO). A more specific role has been established for the EASO in the provisions on training and access to the asylum procedure.
7. The recast Directive on reception conditions aims to provide Member States with a regulatory framework with mechanisms that offer greater clarity and flexibility in their implementation. For example, ensuring clear rules that strictly delimit the options for detaining asylum seekers. The Directive's conditions regarding detention remain strict; the right to free movement should only be restricted with clear, common and

comprehensive justifications and only when it is justified and proportionate. It aims to give asylum seekers access to employment while offering Member States flexibility during the initial stage of examining applications, or when a large number of asylum applications have to be processed at the same time.

8. The task of transposition now falls upon the Member States. If these provisions are implemented into national laws correctly and applied properly, in accordance with the governing principles of the CEAS and the interpretation of the Court of Justice, this new legislation may result in greater efficiency in the asylum systems, with quality standards and respect for the fundamental rights of the applicants.