



Mass influx of people from Ukraine: social entitlements and access to the labour market

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2

The unprecedented granting of temporary protection in Europe. Grounds for issuing Directive 2001/55 and reasons for its activation *just now*. Nuria Arenas-Hidalgo*

1. Introduction. 2. Origins: adoption of Directive 2001/55 as a tool in the service of the Common European Asylum System in the event of a mass influx of displaced persons. 3. First activation of Directive 2001/55. Beyond compliance with the legal framework in the case of the large-scale refugee displacement from Ukraine. 4. Conclusions.

1. Introduction.

The Russian war on Ukraine has led to the forced displacement of a population on such a scale that, as the Secretary-General of the United Nations stated, it has become Europe's worst humanitarian and refugee crisis in decades.¹ If we consider the speed and dimension of the exile, it is undoubtedly the fastest-growing forced migration crisis since the Second World War.² The particularities of the invasion, and the mass displacement it has provoked, have given rise to comprehensive and united support from the European Union (EU) and inspirational solidarity displayed by individual Europeans.³ Within this framework of solidarity, the Temporary Protection Directive⁴ has played a special role.

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¹ UN – Secretary General, *United Nations Secretary-General's remarks to the General Assembly Emergency Special Session on Ukraine*, 28 February 2022, available at <https://www.un.org/sg/en/content/sg/speeches/2022-02-28/remarks-general-assembly-emergency-special-session-ukraine> (accessed 24 April 2023).

² UNHCR, *News Comment: Without international solidarity, Ukraine's displacement crisis could turn into catastrophe*, 24 March 2022, available at <https://www.unhcr.org/news/press/2022/3/623ce1e44/news-comment-international-solidarity-ukraines-displacement-crisis-turn.html> (accessed 24 April 2023).

³ European Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: European solidarity with refugees and those fleeing war in Ukraine, COM (2022), 107 final, 8.3.2022.

⁴ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal of the European Communities, L 212/12-23, later on as: Directive 2001/55.

Directive 2001/55 is a procedure of exceptional character of the Common European Asylum System (CEAS). It was adopted following the large-scale displacement due to the war in the former Yugoslavia to provide temporary protection in the event of a mass influx of displaced persons from third countries. It also tries to balance efforts between Member States (MS) in receiving and bearing the consequences of receiving such people.⁵ Against all the odds and in record time, overcoming all the obstacles that had been considered insurmountable for activation over the years, the European Commission proposed initiating the procedure on 2 March 2022.⁶ Only two days later, Council Implementing Decision (EU) 2022/382⁷ was adopted. It acknowledged the mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and resulted in the introduction of temporary protection. More than 20 years after it came into force, the first norm adopted at the outset of the construction of the CEAS has finally demonstrated its worth by providing temporary protection to almost five million people while simultaneously avoiding the collapse of national systems of international protection.⁸

This study analyses the context in which Directive 2001/55 was adopted to understand the ultimate aim of this legal instrument and how it provides essential support to the CEAS. Given that it had never been activated before, this study looks at the obstacles that hindered its implementation in the previous displacement crises that have affected Europe in recent years and how the crisis in Ukraine fits with the instrument's conditions for activating the temporary protection. The contribution concludes with the hope that the EU's response will be seen as a paradigm shift in European asylum policy and not a confirmation of its drift towards restriction.

2. Origins: adoption of Directive 2001/55 as a tool in the service of the Common European Asylum System in the event of a mass influx of displaced persons.

The cornerstone of International Refugee Law – the 1951 Convention on the Status of Refugees and its 1967 optional Protocol⁹ – permits the granting of refugee status to entire groups of displaced persons (*prima facie*).¹⁰ Nevertheless, States have regularly rejected this

⁵ See Article 1 of Directive 2001/55.

⁶ European Commission. Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection. COM (2022) 91 final. Brussels, 2 March 2022. Proposal Implementing Decision.

⁷ Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, Official Journal of the European Union L 71/1-6, later on as: Decision 2022/382.

⁸ According to UNHCR, 5,008,482 refugees from Ukraine have been registered for Temporary Protection or similar national schemes in Europe. Last updated 28 March 2023. See <https://data.unhcr.org/en/situations/ukraine> (accessed 24 April 2023).

⁹ United Nations, Treaty Series, 189, 137.

¹⁰ A *prima facie* approach means the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum seekers, their

possibility, resorting instead to formulas that provide temporary refuge. Temporary protection has a long history at national and international levels, yet there is no internationally accepted definition or agreement on its minimum content or the situation or people to whom it could apply.¹¹ International legal instruments specifically dedicated to confronting large-scale displacements are lacking, and there is considerable reliance on *ad hoc* responses.¹²

The first appearance of the then-called “temporary refugee” came shortly after the adoption of the Geneva Convention, with the displacement of populations from Hungary and Czechoslovakia. Around 2% of the Hungarian population fled to Austria and Yugoslavia, where they were granted interim protection in accordance with the national legislation of those two States.¹³ Later, mass displacements in Southeast Asia led to the need to provide refuge in such circumstances. Experience in dealing with the “temporary refugee” led to the establishment of a clear distinction between permanent and temporary asylum, which is not granted under the Geneva Convention, but which is based on the principle of *non-refoulement* as its basic legal foundation. A significant consensus on the characteristics of admission and the basic status of rights coalesced around the famous High Commission Executive Committee’s Conclusion N° 22, later widely applied, even serving as a control parameter in preparatory work for Council Directive 2001/55.¹⁴

The 1990s saw a new phase in the evolution of this form of protection, as a consequence of the war in former Yugoslavia. Before the conflict broke out, the United Nations High Commissioner for Refugees (UNHCR) insisted that the nature of the conflict was such that a flexible system of temporary protection would respond adequately to the emergency.¹⁵ Despite initial resistance from some countries, European states hosted these populations, thus confirming the general obligation of all States to allow entry and, at least, temporary refuge, whenever the principle of *non-refoulement* could be affected in the case of mass influx.

In the absence of the necessary legal basis that would enable a common European approach, the MS adopted national measures that varied so greatly that it led to a significant imbalance in the granting of protection. The application of different regimes started to produce visible undesired effects, e.g., large discrepancies between the numbers of people

country of former habitual residence. UNHCR. Guidelines on International Protection n° 11: *Prima Facie* Recognition of Refugee Status, HCR/GIP/15/11, 25 June 2015, 2.

¹¹ UNHCR, *Discussion Paper – Roundtable on Temporary Protection*, International Institute of Humanitarian Law, San Remo, 20 July 2012, 1.

¹² Arenas-Hidalgo N., *El sistema de protección temporal europeo. El resurgimiento de una renovada acogida territorial como respuesta a los desplazamientos masivos de población*, in *Revista Española de Derecho Internacional*, 56, 2003, 747.

¹³ Legislation approved in Austria in 1968 can be considered among the first antecedents. See Hartman J.F., Perluss D., *Temporary Refuge: Emergence of a Customary Norm*, in *Virginia Journal of International Law*, 26, 1986, 559.

¹⁴ UNHCR, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, 22, 1981, available at: <https://www.unhcr.org/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html> (accessed 24 April 2023).

¹⁵ UNHCR, *Statement of the United Nations High Commissioner for Refugees to the International Meeting on Humanitarian Aid for Victims of the Conflict in the Former Yugoslavia*, Geneva, 29 July 1992, available at: <https://www.unhcr.org/admin/hcspeeches/3ae68fac1a/statement-mrs-sadako-ogata-united-nations-high-commissioner-refugees-international.html> (accessed 24 April 2023).

seeking refuge in the different MS, as well as secondary movements. It also revealed the dire need for harmonisation.¹⁶

The experience in granting temporary protection to the populations of Bosnia and Kosovo, with its successes and failures, pointed to the need for a common approach.¹⁷ With the entry into force of the Treaty of Amsterdam and the convening of the Tampere European Council, legal conditions changed to the extent that would lead to the adoption of a Directive on this issue, and with it came the first phase of the construction of the CEAS.¹⁸ Directive 2001/55 was a response to the need for a coordinated approach, and it was to play an essential role in conforming the general obligation to grant asylum in these cases, as well as a legal reference for the international context.

Temporary protection as defined in Directive 2001/55, is a procedure for tackling the mass displacements of people, from the perspective of protective refuge in the MS territories. It uses an exceptional instrument that was initiated at the behest of the EU and which provides temporary protection based on sharing the responsibility for this influx. It aims to act as a support in an exceptionally grave situation that requires the attention of the EU, which, in these cases, provides immediate protection for a group of subjects considered to be beneficiaries of the statute foreseen in Directive 2001/55. It is thus the essential complement that enables the system to guarantee the right of international protection, regardless of the context in which the exile has occurred.

The argument put forward by the Commission for the creation of a new asylum system has been borne out by the very survival of this new medium of protection. As the MS had rejected the possibility of recognising refugee status for entire groups of people *prima facie*, it could have meant that the procedures for determining individual cases of asylum, in line with European traditions, would have been inoperable in the face of a mass influx. This would be against the interests not only of States but also of other people seeking protection outside the mass influx. Consequently, as a complementary measure to safeguard the European asylum system, a new instrument was created to provide a legal basis for dealing with the problem of mass exodus. This instrument was intended to serve the CEAS and facilitate the full operation of the Geneva Convention.¹⁹ According to van Selm, a major intention of

¹⁶ Beirens H., Maas S., Petronella S., van der Velden M., *Study on the Temporary Protection Directive. Final Report. European Commission, Directorate-General for Migration and Home Affairs*, January, 2016, 5, available at: <https://op.europa.eu/en/publication-detail/-/publication/1c753fe9-9aab-11e6-868c-01aa75ed71a1> (accessed 24 April 2023).

¹⁷ On the experience of granting temporary protection in light of the former Yugoslavia crisis, see: van Selm-Thorburn J., *Refugee Protection in Europe. Lesson from the Yugoslav Crisis*, Martinus Nijhoff, Leiden, 1998.

¹⁸ The TPD was the first asylum Directive adopted by the Council based on art. 63 para. 2 lit. a) and b) TEC (now art. 78 paras. 1 and 2 lit. c) and g) TFEU.

¹⁹ European Commission. Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Explanatory Memorandum/* COM/2000/0303 final - CNS 2000/0127, 31 October 2000, para. 1.4. The specific aims of the Directive are listed in the Commission proposal: To avoid a total blockage in national asylum systems in the event of a mass influx, which would have negative effects on the Member States, the persons concerned and other persons seeking protection outside the context of the mass influx, and thereby support the viability of the common European asylum system; To secure immediate access to protection and fair rights to the persons concerned; To clarify the link between temporary protection and the Geneva Convention, safeguarding the full application of the Convention; To contribute to achieving balance between the efforts made by the

Directive 2001/55 is the idea that Temporary Protection should not be an alternative to refugee status (as it had been cast during the 1990s) but an administrative prelude to the application of the Convention.²⁰ The Commission failed to explain sufficiently the refusal of States to use the determination of group *prima facie* in the Geneva Convention framework. In my opinion, tradition, reasons of personal convenience, the need for harmonisation and having a system of shared responsibility weighed on the decision to opt for a specific mechanism.²¹

In effect, as a result of its exceptional character, Directive 2001/55 incorporates the obligation to promote a balance of efforts between Member States in receiving such people and bearing the consequences thereof. The mandate of the Treaty of Amsterdam supposed that MS would go beyond mere cooperation to achieve community solidarity. Hence, a **specific chapter, entitled “solidarity”, was added to enable a fair sharing of responsibilities** – not only financially but also in the numbers of displaced people, with the aim of distributing the burden associated with granting protection. Financial solidarity had already been institutionalised (by the European Refugee Fund); however, no predetermined formula had been established to deal with the potential distribution of those entitled to refugee status among MS. Instead, it was left to be determined during the implementation phase of Directive 2001/55. The Secondary Law includes two conditions for this distribution to take place: the consent of both the States granting refuge and the people displaced, and **the “rule of double voluntarism” (art. 25 of the Directive 2001/55)**. Undoubtedly, the principle itself, and the binding nature of establishing interstate solidarity, was a novel aspect compared to the rest of the CEAS. It amounted to a transcendental shift in the assumption that crises of such magnitude should be the responsibility of the EU as a whole. Nevertheless, its dependence on the expressed will of the MS case by case would blunt its advance. Solidarity is compulsory, but only with the activation of Directive 2001/55 would it become clear how deep that solidarity was and who would provide it.

Member States to receive the persons concerned by offering coordination facilities in the event of a mass influx in the European Union and in implementing temporary protection; To give practical expression to solidarity in the reception of the persons concerned by means of financial solidarity and the double voluntary action in receiving them (5.1).

²⁰ Van Selm J., *Temporary Protection for Ukrainians: Learning the Lessons of the 1990s?*, in Carrera S., Ineli-Ciger M. (eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine. An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy*, European University Institute, Brussels, 2023, 367, 368. According to Skordas, though it is often said that temporary protection is not a third form of protection, along with refugee status or subsidiary protection, it cannot be denied that the Directive 2001/55 creates a temporary legal status for the protected group, reflecting rights and benefits on the persons concerned under European Law. See also Skordas A., *Temporary Protection Directive 2001/55*, in Hailbronner K. (ed.), *EU Immigration and Asylum Law*, Nomos, Baden-Baden, 2010, 820.

²¹ Arenas-Hidalgo N., *El Sistema de Protección Temporal de Desplazados en la Europa Comunitaria*, Universidad de Huelva Publicaciones, Huelva, 2005, 101.

3. The first activation of Directive 2001/55. Beyond compliance with the legal framework in the case of the large-scale refugee displacement from Ukraine.

Considering the objectives set out in the Directive 2001/55, it could well have been framed as the logical response to the war in Ukraine, but nothing presaged its application in this case. After all, Europe had lived through years of recurrent migratory crises, some specifically characterised by the European Court of Justice as a “**massive inflow of nationals of third countries**”. Nevertheless, they did not lead to the activation of this regulation.²² Various initiatives to do so, in 2011 and 2014, or within the framework of the particularly dramatic crisis of 2015, had been frustrated, either because they supposedly failed to meet the necessary presuppositions²³ or because the characteristics of this procedure in relation to particular case hindered the provision of an effective response.²⁴ In reality, the lack of political will to take advantage of the potential of the Directive 2001/55 to provide protection and encourage solidarity made it seem inoperable, obsolete, excessively dependent on political will, and scarcely effective, to the extent that its derogation was foreseen in the New Pact on Migration and Asylum presented in 2020.²⁵

However, the crisis in Ukraine radically changed the situation. A policy based on measures for *non-entrée*, the externalisation of migration control, and the criminalisation of search and rescue gave way to a policy of open doors and the immediate granting of refuge. Geographic and cultural proximity, the history of migration in recent years, and the geopoliticisation of

²² ECJ, Judgement 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, (c-643/15 y C-647/15, ECLI:EU:C:2017:235).

²³ Following the displacement of more than 650,000 people from Libya in 2011, some members of the European Parliament, and the Italian and Maltese governments, called on the Commission to propose the activation of Directive 2001/55. However, Commissioner Malmström responded: “It is still premature to activate the Temporary Protection Directive and there are other ways to help Malta and Italy”. In 2014, despite a 277 % increase in arrivals in Italy compared to 2013, Commissioner Avramopoulos considered that: “In view of the scale of the influx and the manner in which these persons’ asylum applications have been handled, the Commission considers that a proposal to trigger the EU wide temporary protection regime provided by the TPD would not be justified in the present circumstances”. Likewise, in 2015, and after the displacement of more than one million people, European Parliament member Gardini asked the Commission if the conditions were now right to activate the device; once again, however, the procedure was not activated. Ineli-Ciger M., *Time to Activate the Temporary Protection Directive. Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe*, in *European Journal of Migration and Law*, 18, 2016, 13. See also Ineli-Ciger M., *5 Reasons Why: Understanding the Reasons behind the Activation of the Temporary Protection Directive in 2022*, EU Immigration and Asylum Law and Policy, 7 March 2022, available at <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/> (accessed 24 April 2023); Beirens H., Maas Sh., Petronella S., van der Velden M., nt. (16), 14.

²⁴ ECJ, Judgement 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, nt. (22).

²⁵ The greatest difficulties for activation were the failure to determine the concept of “mass influx”, the supposedly long and complex procedure of activation, the difficulty in obtaining a qualified majority in the Council, the device’s potential to attract more migrants to Europe, the broad standard of rights, and the double willingness requirement of States and displaced persons in order for it to take effect. Ineli-Ciger M., *Temporary Protection in Law and Practice*, Brill, Leiden, 2018; Beirens H., Maas S., Petronella S., van der Velden M., nt. (16), 34-36. The Proposal for a Regulation addressing situations of crisis and force majeure states that it has been almost impossible to achieve Member State agreement on the possible activation of the Directive 2001/55. Thus, “the Staff Working Document therefore concludes that the Temporary Protection Directive no longer responds to Member States’ current reality and needs to be repealed”. European Commission. Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum. COM (2020) 613 final. 23 September 2020, 10.

asylum are some of the reasons that explain this change in perspective.²⁶ Although welcome, it is open to criticism for the double standards applied by the EU compared to previous migratory crises.²⁷

In any case, it needs to be asked whether the basic requirements for activating this type of procedure were met and what reasons were put forward by the Decision 2022/382 in doing so.

For the purposes of Directive 2001/55, “**temporary protection**” means, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, an exceptional procedure to provide immediate and temporary protection to such persons, in particular, if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the people concerned and other people requesting protection (art. 2a).

Thus, Directive 2001/55 requires a complementary norm by which there is verification of a mass influx or imminent mass influx of displaced persons fleeing specific harms. This verification should be carried out in relation to a certain time and geographical coordinates and should consider potential adverse effects on the asylum system and the people affected. All this would cause the temporary protection procedure to be initiated.

In terms of the “mass influx” requisite, Decision 2022/382 states: “The existence of a mass influx into the EU of displaced persons who have had to leave Ukraine as a consequence of an armed conflict is hereby established.” However, Directive 2001/55 does not define with sufficient precision what is understood as a “mass influx”. Article 2d) only indicates that it will be a “large number of displaced persons”, which renders it an indeterminate legal concept whose application to a specific case adds to the margin of appreciation enjoyed by the Council.²⁸ No further data are provided to help us understand when a displacement attains the quality of a *mass* displacement or when these numbers are considered to be *large*.

²⁶ Various news media and political leaders have alluded to how “These are not the refugees we are used to... These people are Europeans”, marking a clear difference that references geographic and cultural connection (Bulgarian Prime Minister Kiril Petkov told journalists about the Ukrainians, as reported by the Associated Press). At the same time, it is true that Ukraine citizens have been traditional – and welcome – economic migrants to the EU, which has allowed them to travel visa-free throughout the territory and to create a network of welcoming fellow citizens in several MS. In addition, this crisis has reignited the geopoliticisation of the issue of asylum. In other words, the question is not only one of guaranteeing the right to asylum and doing so for those whom European states perceive as more deserving. The question is also one of showing the world that the West, in particular the EU, is founded on a guarantee of freedoms and rights in the face of illiberal and autocratic regimes. As in the second half of the 20th century, asylum becomes a tool of moral and ideological competition. Garcés Mascareñas, B., *¿Por qué esta crisis de refugiados es diferente?*, CIDOB Opinión, March 2022, available at:

https://www.cidob.org/es/publicaciones/serie_de_publicacion/opinion_cidob/2022/por_que_esta_crisis_de_refugiados_es_distinta (accessed 24 April 2023).

²⁷ Various academic works have analysed the EU response to displacement from Ukraine compared to previous migratory crises, seeing it as an example of discrimination and institutionalised racism in the guarantee of asylum in Europe. See chapters 1, 24 and 25 in: Carrera S., Ineli-Ciger M. (eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine. An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy*, European University Institute, Brussels, 2023.

²⁸ Arenas N., *The Concept of “Mass Influx of Displaced Persons” in the European Directive Establishing the Temporary Protection System*, in *European Journal of Migration and Law*, 7, 2005, 438.

In the preparatory work for Directive 2001/55, the Commission had already announced that the gradual arrival of asylum-seekers, refugees or displaced persons from a single country or region of origin cannot justify the introduction of such temporary protection, and except that the number of people must be substantial, it is impossible to quantify in advance precisely what constitutes a mass influx.²⁹ Thus, there is an express refusal to establish a pre-defined set of conditions confined to numerical thresholds or linked to specific indicators. So, it comes down to the Institutions that participate in the decision-making that will establish, case by case, whether these circumstances have been met and the variables on which it is based. This *ad hoc* dependence is one of the singularities of this procedure.³⁰

The decision of the Institution is to be based on data from contrasting sources previously determined by Directive 2001/55 (art. 5.4), and which oblige the Council to be in possession of this information and to have dialogued with such sources to commit to the motivation that these acts demand. Thus, the Decision will be based on: (a) an examination of the situation and the scale of the movements of displaced persons; (b) an assessment of the advisability of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such measures; (c) information received from the Member States, the Commission, the UNHCR, and other relevant international organisations.

In the case of Ukraine, the Council examined the situation and magnitude of the displacement in recital 5. It stated that, as of 1 March 2022, more than 650,000 displaced persons had arrived in the EU, and it calculated that those numbers were expected to increase (to between 2.5 million and 6.5 million, according to recital 6). An assessment of the convenience of initiating temporary protection can be found in recital 16, which states that this was the most appropriate instrument for the current situation, given the extraordinary and exceptional situation, including the **Russian Federation's** military invasion of Ukraine and the scale of the mass influx of displaced persons. The Council must undertake this assessment considering the potential for emergency aid and action on the ground or the inadequacy of such measures. However, there is no mention of these conditions.

The speed and substance of the displacements made it impossible to adopt preventive measures *in situ* that, to some extent, would have avoided the adoption of the decision to initiate the procedure. Within a few days of the Russian invasion, people were amassing on the border, and there was no alternative but to enable immediate refuge. The humanitarian aid that had already been activated, as a complementary action, to attend to those affected by the war, was made possible by a package of immediate humanitarian finance. Food, water, medicines, healthcare capacity, refuge and protection were provided through the Union Civil Protection Mechanism.³¹ However, there was mention of the information communicated by

²⁹ European Commission. Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Explanatory Memorandum/* COM/2000/0303 final - CNS 2000/0127, 31 October 2000, art. 2 d).

³⁰ Arenas N., nt. (28), 438.

³¹ European Commission, *Communication European solidarity with refugees and those fleeing war in Ukraine*, 9 March 2022, 3, 4.

the MS. The High Commissioner (as stated in recital 6) did provide some estimates of displacement numbers, and there was also an urgent call for humanitarian aid by the United Nations for protection and assistance needs in Ukraine. Furthermore, a Regional Refugee Response Plan for Ukraine was established that provided details on the numbers of people in need and those to be targeted by assistance (recital 8).

Since Directive 2001/55 does not have the necessary indicators to measure the magnitude of the influx, the Council can exercise discretionary authority. The procedure holds certain guarantees that allow compliance with rules of control, i.e., **the Commission's proposal** contains basic content that limits the capacity of the Council to avoid a proposal that is sufficiently detailed; the Council must assess the data issued by certain subjects and that it is not a question of freedom of disposition but one of compulsory compliance; and, finally, **in terms of the motivation behind the Council's decision, there is the supposition of a guarantee** that it had understood the information provided and had entered into dialogue concerning this information.³² Yet recent experience shows that these guarantees are relative, given that the Commission seems unwilling to present a proposal without prior majority support on the Council. Consequently, the latter is not in a position where it has to substantiate a decision against the European Commission's proposal or the reports issued by the specialist Institutions. Without devaluing the fact that clearer indicators would limit discretionary capacity, I do not believe the Council is willing to deny itself the wide margin of appreciation conceded.

In the case that concerns us here, both the Commission and the Council place great importance on the cause behind the displacement. For the former, the probability that the EU is facing a situation characterised by a mass influx is not only based on figures but also on the gravity of the war and its proximity to external EU borders.³³ On the other hand, the Council insists that the decision to activate temporary protection be based on the extraordinary and exceptional situation caused by **the Russian Federation's military invasion** of Ukraine and the scale of the mass influx of displaced persons (recital 16). This leads to consideration of the doctrine of the aggressor, Russia – a determining factor in the activation of the Directive 2001/55.³⁴

Regarding the time and geographical coordinates, Decision 2022/382 applies to different categories of people displaced from Ukraine on or after 24 February 2022, as a result of the military invasion by Russian armed forces that began on that date (art. 2.1). In effect, Directive 2001/55 demands that the influx must be from the same country or geographical **area. Cases of "cumulative influx" from different geographical regions should not fall under** Directive 2001/55. This Directive does not restrict geographical origin to the European setting. However, the reluctance to initiate the instrument in previous crises and the fact that the first case of activating the norm was Ukraine could lead to this conclusion.

³² Arenas, N., nt. (28), 446, 449.

³³ European Commission. Proposal Council Implementing Decision, 2.

³⁴ Ineli-Ciger M., *5 Reasons Why: Understanding the Reasons behind the Activation of the Temporary Protection Directive in 2022*, EU Immigration and Asylum Law and Policy, 7 March 2022, available at: <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>

While drafting Directive 2001/55, the Economic and Social Committee warned that the **norm should not be a “Balkan Directive” but a “geographically neutral” instrument to be deployed as and when it is needed.** Directive 2001/55 was not conceived as an urgent protection response for direct neighbours. The **“proximity argument” has no legal basis in Directive 2001/55.**³⁵

Apart from these variables, Directive 2001/55 also refers to the **“consequences” of this mass displacement.** Article 2a) establishes that immediate temporary protection will be guaranteed, particularly if there is also a risk that the asylum system will be unable to process this influx without **“adverse effects”** for its efficient operation, in the interests of the people concerned and other people **requesting protection.** Considering the **“adverse effects”** on the proper functioning of the asylum system, this condition is coherent with the creation of an instrument whose main aim was to guarantee the functioning of the system and to avoid its collapse in the face of mass influx. In any case, it is unclear what is understood by **“adverse effects”** to the proper functioning of the asylum system and to those concerned. Nothing in Directive 2001/55 suggests that something must cause a collapse in MS capacity.³⁶ And given that the mechanism incorporates a system that promotes a balance of efforts between MS, it would be logical for it to be sufficient that only one State suffer adverse effects.³⁷

Decision 2022/382 establishes that introducing temporary protection is also expected to benefit MS. The rights that accompany temporary protection limit the need for displaced persons to immediately seek international protection, and thus the risk of overwhelming their asylum systems, as they reduce formalities to a minimum because of the urgency of the situation (recital 16). At the time of adopting the decision, nothing seems to indicate that the capacity to provide refuge is compromised. On 8 March 2022, the capacity to provide refuge was sufficient, as those who arrived moved on quickly to join friends or family. Hungary, Slovakia, Poland and Romania stated that they had sufficient capacity.³⁸ A reading of Decision 2022/382 shows that the adverse effects variable has acquired a certain singularity. It has become an indicator that must be checked when contrasting migration data to justify activating the instrument. However, uncertainty around the nature of a displacement for it to be considered on a mass scale or how it could trigger adverse effects in the asylum system or in the people affected still requires greater clarification.

Finally, Directive 2001/55 demands that exile be associated with flight from certain **“harms” specified by the norm.** From its definition of a displaced person, and linked to the

³⁵ van Selm suggests that a major reason why the Directive was not applied in 2015 was that the situation was not an immediate displacement crisis that required the urgent protection response of direct neighbours; van Selm J., nt. (20), 371. However, the proximity argument does not correspond to the letter and spirit of the Directive and would conceal differential treatment based on geography that would be contrary to European and international obligations. Arenas-Hidalgo N., *The Eternal Question. What does “Mass Influx” Really Mean? Reflections After the First Activation of the Temporary Protection Directive 2001/55*, in Carrera S., Ineli-Ciger M. (eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine. An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy*, EU Migration Policy Centre, 2023, 89.

³⁶ Ineli-Ciger M., *Time to Activate the Temporary Protection Directive. Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe*, in *European Journal of Migration and Law*, 18, 2016, 15.

³⁷ Gluns D., Wessels J., *Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current “Refugee Crisis”*, in *Refugee Survey Quarterly*, 36, 2017, 63.

³⁸ European Commission, nt. (31), 3.

conclusions drawn from articles 2a), d), 3.4, 7 and 28, it can be deduced that the procedure will be aimed at: 1. People who are potential refugees (people displaced from third countries that could be considered refugees, according to article 1 A 2 of the Refugee Convention); 2. People who may fall within the scope of other international or national instruments giving international protection; 3. Particular cases: people who have fled areas of armed conflict or endemic violence or have been at serious risk of systematic or generalised violations of their human rights.

As seen here, the scope of application intended for Directive 2001/55 goes beyond the classic protection categories of the 1951 Convention or even the current definition of “subsidiary protection”,³⁹ especially when considering systematic or generalised violations of their human rights not directly associated with an armed conflict. Nor does it demand a specific degree of discrimination associated with such conflicts. In this case, Decision 2022/382 alludes to the existence of an “armed conflict” as the harm that lies in the origin of the existence of a mass influx of displaced persons who had to abandon Ukraine (art. 1). Both the Proposal of Council Implementing Decision and Decision 2022/382 itself state clearly that: a) the armed conflict is a consequence of a large-scale invasion of Ukraine from the Russian Federation and Belarus; b) it is an unprovoked and unjustified military aggression; c) it is a gross violation of International Law and the principles of the UN Charter; and d) it seeks to undermine European and global security and stability.⁴⁰ Mention of the gravity of the illegal act and the direct involvement of the EU are not inconsequential. Nor is the fact that armed conflicts are one of the serious harms that qualify a person for international protection in Europe. It remains to be seen whether, in circumstances involving systematic or generalised human rights violations not directly related to the traditional grounds for granting refugee status or subsidiary protection, the EU would respond in the same manner as contemplated by Directive 2001/55.

³⁹ Remember that, given that art. 2 f) of Directive 2011/95 of the European Parliament and of the Council of 13 December 2011 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 (recast), person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. According to art. 15, serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. OJ L 337, 30.12.2011.

⁴⁰ See recitals 1, 2 and 3 of the Council Decision. The European Commission alludes specifically to how the aim of this invasion was to destabilise the European security architecture. European Commission. Communication European solidarity with refugees and those fleeing war in Ukraine, *op. cit.*, 1. Both the Proposal and Council Implementing Decision 2022/382 mostly allude to the fact that the ultimate reason for the armed conflict is the military invasion by Russian armed forces, and that it is not an armed conflict caused by the action of both parties. Council Implementing Decision 2022/382 clearly states that the armed conflict – these two words are mentioned less – is a consequence of the illegal invasion and is the ultimate responsibility of the Russian Federation.

4. Conclusions.

The activation of Directive 2001/55 in the case of mass displacement of people obliged to uproot as a consequence of the invasion of Ukraine has resulted in a positive paradigm shift in the granting of refuge in Europe to large groups of forcibly displaced citizens.

The lack of sufficient political consensus to initiate this procedure in the past undermined the virtues of an instrument that allows for the granting of immediate protection and guaranteed legal status, prevents the collapse of asylum structures, and provides support in the sharing of efforts to accommodate displaced persons among all MS. Nevertheless, there is no doubt that this procedure represents an abuse of concepts that remain undefined and leaves the Council with a wide margin of manoeuvre. This prevents us from anticipating the conditions in which the effects of this instrument, as an essential complement to the CEAS, could unfold. Except in the case of the threats from which displaced persons must flee and whether this enables a greater degree of precision, the other requisites, such as the dimensions of the influx or how adverse effects could influence the asylum system, are decisions subject to discretionary interpretation. The dimensions of the influx from Ukraine show that this procedure was conceived for truly exceptional crises, but we cannot forget that there have been other similar crises in the past. The potential geopolitical deployment of asylum somewhat tarnishes what should have been a logical EU response. The response aligns not only with the legal obligations that the MS have undertaken but also with international obligations that call for the granting of protection, at least temporarily, alongside commitment to the principle of *non-refoulement* in cases of mass influx.