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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

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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

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Abstract

This Book examines the European Union's policy responses to large-scale displacement of refugees fleeing the war in Ukraine and the activation and implementation of the Temporary Protection Directive from interdisciplinary perspectives. The activation of the EU's Temporary Protection Directive for the first time in European history to receive nearly 5 million people fleeing the war in Ukraine begs the following question: Does it represent a new era or a turning-point in EU asylum policy? The various chapter contributions assess this question by first analysing central issues related to the scope, implementation and debates raised by the Temporary Protection Directive. In particular, various chapters focus on the implementation of the Temporary Protection Directive across various European countries, its medium and long-term impacts, as well as 'lessons learned' from policies adopted by non-EU states hosting large-scale refugee communities. The Book then studies the extent to which the Temporary Protection Directive represents a game-changer in the wider EU asylum policies by comparing the EU's temporary protection policy covering Ukrainian refugees with the one driving the EU Pact on Migration and Asylum and Member States' asylum policies towards non-European refugees, which put especial emphasis on contained mobility, responsibility shifting and externalisation. This includes an assessment of the relationship and compatibility of EU asylum policies with international and EU rights and principles, with particular attention to those related to non-discrimination, solidarity, and justice.

Key words

Temporary protection, solidarity, mass influx, war in Ukraine, mass displacement from Ukraine, registration, exclusion, data protection, asylum, discrimination

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Chapter 3

The Eternal Question: What Does “Mass Influx” Really Mean? Reflections After the First Activation of the Temporary Protection Directive 2001/55

Prof Nuria Arenas-Hidalgo*

1. Introduction

The unprecedented activation of Directive 2001/55 (TPD) has reopened the debate on the real meaning of mass influx, especially as its aim is to provide protection when human mobility on a large scale occurs. The interest in defining this phenomenon as precisely as possible, in terms of when exile is deemed to be occurring on a huge scale, is nothing new; it is a concern that is consubstantial to the adoption of the legal norm. The aim of this scholarly interest in the subject has changed over time. In the historical context of the adoption of the Directive, research on mass influx coalesced around concern that the temporary protection scheme could be used to the detriment of international obliga-

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tions of asylum. A definition of “mass” that was too flexible could lead to the application of an instrument that implied temporary suspension of the right to asylum. The application of temporary protection was welcome, provided it was used only in exceptional cases. Some of us were concerned about the arbitrary use of the procedure, and we sought legal instruments that would enable this discretionary aspect to be controlled.¹

We were still far from the reality that would later erupt in which the application of temporary protection was non-existent, even in cases of clear necessity. Despite successive surges in migratory flows since 2014 in Europe², thus far the procedure that allows the Common European Asylum System (CEAS) to move towards completion (Opinion Advocate General Mengozzi³, case *Diakité*, para. 60) and covering any situation in which a third-country national or a stateless person who cannot obtain protection in his or her country of origin requests international protection in the territory of the European Union, has failed to materialize. With the lack of political will to apply this instrument in the past, it was not expected to be used even when one million citizens crossed the Ukrainian border. All hope had been lost that Institutions and Member States (MS) would at least respond logically and inspired by the desire to offer secure protection.

The fact that the numbers of migrants required for the surge to be classified as a mass influx had not been reached was a reason that had been aired in the past. For example, at the start of 2015, EU Commissioner Avramopoulos stated⁴ that in view of the scale of the influx and the manner in which these persons’ asylum applications have been handled, a proposal to trigger the EU-wide temporary protection regime provided by the TPD would not be justified (this despite the fact that more than 170,000 migrants had arrived in Italy alone, representing an increase of 277% compared to 2013: recital 10, Council Decision [EU] 2015/1523). However, shortly afterwards we were faced with the biggest migration crisis ever to hit the EU (in 2015, the number of irregular entries by nationals of third countries at the external borders of the

1 Nuria Arenas, ‘The Concept of Mass Influx of Displaced Persons in the European Directive Establishing Temporary protection’ (2005) 7 EJML, pp. 435-450.

2 Joined Cases C-643/15 and C-647/15 *Slovakia v Council* [2017] ECLI:EU:C:2017:63.

3 Case 285/12 *Aboubacar Diakité v. Commissaire general aux réfugiés et aux apatrides* [2014] ECLI:EU:C:2014:39.

4 Answer given by Mr Avramopoulos on behalf of the Commission (28 January 2015) <https://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/10_e_008507_2014_answer/10_e_008507_2014_answer_en.pdf> accessed 1 December 2022.

EU reached more than 1.8 million, whereas that number had been 285,532 in 2014, representing an increase of 546% in 2015), and the European Court of Justice (ECJ) did not demur in classifying it as “a mass influx of migrants” (judgment of 6 September 2017, *Slovakia and Hungary v Council*,⁵ expressly described as “mass influx” in paras. 115, 117, 123, 218, 235). When the Slovak Republic, supported by Poland, cynically questioned the need to adopt the Relocation Council Decision (EU) 2015/1601 of 22 September 2015, instead of less burdensome measures within the framework of existing instruments, including Directive 2001/55, the ECJ focused on the difficulties inherent in the mechanism of solidarity in the system of temporary protection, which the ECJ deemed to be incapable of providing an effective response, in this case to the complete saturation of reception facilities and the need to relieve MS as quickly as possible (para. 256).

2. What can we deduce from the Directive? In support of an indeterminate legal concept

There are other weightier reasons why this instrument has not previously been activated, although the lack of definition of the mass influx concept has always been considered one of the main handicaps for its implementation.⁶ Even though the Directive dedicates a specific article to the definition of mass influx, the truth is that it is an indeterminate legal concept whose application to a specific case adds to the margin of appreciation enjoyed by the Council. In effect, article 2 d), indicates that it will only refer to “a *large number* of displaced persons who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation program”. Three aspects stand out. What is striking is the mass influx does not need to have already occurred, but that it is seen to be a possibility in the near future (art. 2 a: mass influx or *imminent* mass influx). On the other hand, mass displacements that are *spontaneous or controlled* are also considered, as in evacuation programs. And the influx must be from the *same country or geographical area*. Cases of “cumulative influx” from different geo-

5 Joined Cases C-643/15 and C-647/15 *Slovakia v Council* [2017] ECLI:EU:C:2017:63.

6 Meltem Ineli-Ciger, ‘*Temporary Protection in Law and Practice*’ (Brill 2018); Hanne Beirens and others, ‘Study on the Temporary Protection Directive’ (2016), p. 35 <https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf> accessed 1 December 2022.

graphical regions should not fall under the TPD. The Directive does not restrict geographic origin to the European setting, although the reluctance to initiate the instrument in previous crises, and that the fact the first case of activation of the norm was Ukraine, could lead to this conclusion. During the drafting of the Directive, the Economic and Social Committee⁷ already warned that the norm should not be a “Balkan Directive”, but a *geographically neutral* instrument, to be deployed as and when it is needed. The TPD was not conceived as an urgent protection response for direct neighbours. The “proximity argument” has no legal basis in the regulations. As other chapters to this collection have indicated, the EU’s double standards in applying the TPD could be considered an institutionalized form of discrimination and racism towards non-European asylum seekers and refugees.⁸ The so-called proximity trap would conceal differential treatment based on geography that would, in reality, amount to global apartheid⁹, contrary to European and international obligations.

But apart from these questions, the Directive does not define large numbers. The problem is that it is not impossible to define. The lack of definition of the concept is no anomaly but a conscious decision on the part of the Directive. There is an express renunciation to establish in precise quantitative terms, or any reference threshold, of how large or sudden a mass exile must be in order to be characterized as a “mass influx”. There is neither a minimum number, nor speed of arrival for a mass influx. Some authors have defended the definition that refers to certain numbers of persons.¹⁰ Yet the flexibility of the concept

7 Economic and Social Committee, ‘Opinion of the Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council modifying Directive 94/25/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft’ [2001] OJ C 155/01, p. 24.

8 Sergio Carrera and Others, ‘the EU Grants Temporary Protection for people Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ (CEPS 2022-09), p. 32 <<https://www.ceps.eu/ceps-publications/eu-grants-temporary-protection-for-people-fleeing-war-in-ukraine/>> accessed 1 December 2022.

9 Rodrigo Bueno Lacy and Henk Van Houtum, ‘The proximity trap: how geography is misused in the differential treatment of Ukrainian refugees to hide for the underlying global apartheid in the EUropean border regime’ in this collection.

10 Meltem Ineli-Ciger, ‘Has the Temporary Protection Directive Become Obsolete?: An Examination of the Directive and its Lack of Implementation in view of the Recent Asylum Crisis in the Mediterranean’ in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer, and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union* (Brill 2015), p. 245.

could actually be its strength¹¹, enabling it to adapt to different circumstances (sudden influx, gradual rise, in the wake of an evacuation program or a combination of both), although this will depend on the political will to stretch this instrument as far as possible. At least there should be parameters to enable an evaluation of what “massive” means (such as absolute numbers of asylum applications, relative increases in asylum applications, the ratio of total asylum applications to MS population size, unemployment rate or GDP, etc).¹²

All this points to the circumstances in which this call to activate temporary protection occurs, as being in wholly exceptional situations (as the ECJ observed in its judgment of 21 December 2011, *N. S. and others*, para. 93).¹³ On the one hand, we observe that it aims to tackle a situation that is so serious that it requires EU attention. The Directive does not override national regimens of temporary protection but rather creates one that is different and complementary, specifically designed for situations that make action on a supranational level essential. On the other hand, and in reference to art. 5.4.b), the Council must base its decision to activate TPD on the potential for emergency aid and action on the ground, or the inadequacy of such measures. Consequently, it is an instrument subsidiary to preventive initiatives.

Aside from these variables, what needs to be considered is that the Directive also refers to the *consequences* of mass influx. Article 2 a) establishes that immediate and temporary protection is guaranteed 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 persons concerned and other persons requesting protection. During the drafting of the Directive, various institutions requested that the European Commission consider that temporary reception be used exclusively in cases in which the capacity of the asylum system to cope with the sheer size of the influx

11 Hanne Beirens and others, ‘Study on the Temporary Protection Directive’ (2016) p. 15 < https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf > accessed 1 December 2022.

12 Beirens and others, ‘Study on the Temporary Protection Directive’, pp. 38-50.

13 Case 411/10 *N. S. and Others* [2011] I-13905.

would be overwhelmed (UNHCR¹⁴, ECRE¹⁵). This request was coherent with the bases of this instrument. Temporary protection enables the system to operate smoothly and not collapse under a mass influx.¹⁶ Finally, considering that certain governments (France, Germany, Austria, Italy, and the United Kingdom)¹⁷ were against the establishment of an absolute dependence between the activation of temporary protection and the adverse effects on national asylum procedures, a consensus formula was reached that included the words “in particular”, thus enabling initiation, especially in these cases, but which is not a requirement *sine qua non*, rather one more indicator of the magnitude of the displacement. In my opinion, this link will inexorably reduce the potential of the instrument to be at the service of those asylum crises that occur in places that are geographically remote from Europe, by means of evacuation programs (a good thing but quite unrealistic based on recent years’ experience, imagining that the EU could adopt such a possibility), and would not, in principle, affect national protection systems.

In addition, it is unclear what adverse effects really means in terms of the asylum system, nor how many states’ national asylum systems must be overburdened for a mass influx situation to exist. Nothing in the Directive suggest that MS asylum capacity should be unable to absorb the flow.¹⁸ In view of the responsibility-sharing aspects, it would seem logical that it is sufficient that *one* MS is particularly affected.¹⁹

14 UNHCR, UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx (2000) < <https://www.refworld.org/docid/437c5ca74.html#:~:text=Accordinging%20to%20the%20draft%20Directive,return%20in%20safe%20and%20humane> > accessed 1 December 2022.

15 European Council on Refugees and Exiles, ‘Observations of the European Council on Refugees and Exiles on the European Commission’s draft directive on temporary protection and responsibility sharing.’ (2001) < <http://briguglio.asgi.it/immigrazione-e-asilo/2001/febbraio/ecre-protez.-temporanea.html> > accessed 1 December 2022.

16 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 [2000] OJ C 311E.

17 Beirens and others, ‘Study on the Temporary Protection Directive’.

18 Meltem Ineli-Ciger, ‘Time to activate the Temporary Protection Directive: Why the Directive can play a key role in solving the migration crisis in Europe’ (2016) 18(1) EJML 1, p. 15 < https://brill.com/view/journals/emil/18/1/article-p1_1.xml?language=en > accessed 1 December 2022.

19 Danielle Gluns and Janna Wessels, ‘Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current “Refugee Crisis” (2017) 36 RSQ, p. 63.

If we definitively pursue the case for maintaining a flexible definition of mass influx, there is no doubt that certain indicators are needed to help evaluate the different concepts, as well as consultation of a range of contrasted sources. It is important to recall that the Directive establishes a duty to consult the UNHCR and other relevant international organizations (art. 3.3) and that the Council Decision shall be based on the information received from the MS, the Commission, UNHCR and other relevant international organizations (art. 5.4). The duty to consult the UNHCR, though its opinion is not binding, is especially important in terms of controlling the discretion that institutions can exercise in this context.

3. What conclusions can be drawn from the initial experience of TPD application?

The Council Implementing Decision (EU) 2022/382²⁰ establishes, for the first time, the existence of a mass influx into the Union of displaced persons (art. 1) in order to provide temporary protection for them (recital 10). As we have observed, although the Directive does not provide specific elements for measuring migrant flows, it does contain some defining ideas (large numbers, exceptional situation, subsidiary character, adverse effects) which, following the initial experience of the activation of the instrument, can be assessed to see whether they have been truly determinant or whether they provide others.

The numbers are incontestable. The displacement of migrants from Ukraine has been the biggest and fastest since the register began. In just 10 days following the 24 February 2022 invasion, 1.8 million people had fled the war in Ukraine.²¹ Firstly, the Council Implementing Decision was armed with facts on the ground. Since the Russian invasion began, more than 650,000 displaced persons had arrived in the Union from Ukraine through Poland, Slovakia, Hungary and Romania (recital 5). Some 100,000 arrivals were counted daily just at Polish border crossings.²²

20 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 [2022] OJ L 71.

21 Commission, 'Communication from the Commission to the European Parliament, the European 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, p. 2.

22 *ibid.*

This was the starting point for estimates to be made. Depending on how the conflict evolves, the Council states that the Union is likely to be faced with a very large number of displaced persons, potentially between 2.5 million and 6.5 million, of whom it is anticipated that between 1.2 and 3.2 million would be persons seeking international protection. With these data in hand, the Council concluded that the Union is likely to be faced with a situation characterized by a mass influx of displaced persons (recital 7). Reality confirmed the predications. By 17 August, 6,657,918 refugees from Ukraine had been recorded across Europe; 3,840,568 had been registered for TP or a similar national protection scheme in Europe.²³

The Decision reflects UNCHR estimates (4 million, recital 6), and the numbers provided by the UN’s Regional Refugee Response Plan for Ukraine (recital 8), complying with the mandate set out in art. 5.4, by which the Council Decision shall be based on information received from UNHCR and other relevant organizations.

Possessing effective means for making an up-to-date evaluation of migratory crisis situations that enables the EU to provide an adequate response, and in accordance with the principles of good governance, has handicapped the CEAS, as the crisis in 2015 clearly highlighted. Twenty years after the adoption of the first CEAS Directive, the system now has risk analysis mechanisms in place that have been rolled out in the case of displacement from Ukraine. The framework of the New Pact on Migration and Asylum includes a Commission Recommendation (EU) 2020/1366 on a Migration Preparedness and Crisis Blueprint that establishes how one of its priorities is to contribute to more efficient migration management by monitoring and anticipating migration flows, building resilience and preparedness as well as organizing a response to a migration crisis (recommendation 1). It has set up an EU Migration Preparedness and Crisis Management Mechanism Network, which has been the body responsible for providing data on the potential magnitude of displacements from Ukraine. Likewise, the predictions issued by the UN agencies on internal displacements and the information gathered on movements that have occurred since 2014, as well as the size and composition (Russian / non-Russian) of the population affected, are all examples of evidence-based policy making.

Both the Commission and Council have emphasized the reasons that underlie mass displacements. For the Commission, the probability that the Union faces a mass influx is not only based on figures but also on the gravity of

23 UNHCR, ‘Ukraine Refugee Situation’ <<https://data.unhcr.org/en/situations/ukraine>> accessed 4 October 2022.

the war and its proximity to EU external borders (p. 2). The Council has insisted that the decision to activate temporary protection is based on the extraordinary and exceptional situation produced by the scale of mass influx *and* the military invasion of Ukraine by the Russian Federation (recital 16). Some authors state that if the aggressor was a State other than Russia, it is doubtful whether the EU would have activated the TPD.²⁴

In terms of the adverse effects requirement, the Council, to justify implementation of the instrument, alludes to the fact that the influx will probably be of such a magnitude that there “also” exists a clear risk that the MS asylum systems will be unable to process the arrivals without adverse effects on their efficient operation and on the interests of the persons concerned, and on those of other persons requesting protection (recital 7 practically reproduces art. 2 a) of the TPD). More specifically, it establishes that introducing temporary protection is also expected to benefit MS, as the rights accompanying 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). In these circumstances, it seems that risk has nothing to do with reception capacity when it is stated that it has not been compromised. To 8 March 2022, reception capacity was adequate, given that many arriving move on swiftly to join family or friends. Poland, Romania, Hungary and Slovakia continue to report available capacity.²⁵ The idea is that thanks to the activation of TPD the asylum system remains unaffected. A reading of the Decision shows that the adverse effects variable has acquired a certain singularity. It has become an indicator that must be checked when contrasting migration data in order to justify activating the instrument.

To sum up, one may conclude that the Council, when determining the existence of a mass influx situation, took into account: a) the number and rate of arrivals, b) the potential migratory pressures, c) Ukrainians not needing a visa to arrive in the MS, d) the potential inability of MS asylum systems to cope

24 See Meltem Ineli-Ciger, ‘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) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022.

25 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.

with the mass arrivals.²⁶ And all this, with special emphasis on specifying the sources consulted, which is especially important in motivating the decision.

4. The New Pact on Migration and Asylum proposal. Adverse effects cease to be an option and are broadened

In the *fresh start* framework of the New Pact on Migration and Asylum²⁷ presented in 2020, it was proposed to adopt a Regulation addressing situations of crisis and force majeure in the field of migration and asylum²⁸, which assumed the repeal of Directive 2001/55. In its place, this crisis instrument is expected to confront exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State. We do not believe that the current experience following TPD implementation signifies any change in the need to substitute the Directive or, at least, modify it. So, it is interesting to check how this proposal treats the concept of mass influx.

From art. 1.2.a), which defines what is understood as a “crisis situation”, we deduce that there are three elements that the Commission has to consider in its evaluation, and which could reduce the broad margin of discretion that it holds: a) the exceptional situation of mass influx or an imminent risk of such a situation must be of a specific “scale and nature” that will be identified in proportion to the population and GDP of the MS concerned; b) the mass influx must affect the MS’s asylum, reception or return system in such a way that it ceases to function; c) it can have serious consequences for the functioning the CEAS or the Common Framework, due to unauthorized movements and the lack of capacity in the MS of first entry to process the applications for international protection of such third-country nationals (recital 6). Some ideas on these three variables.

As in the TPD, a merely quantitative measurement would be avoided in order to continue vouching for a subjective evaluation in accordance with the

26 Ineli-Ciger, ‘5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’.

27 European Commission, ‘A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity’ (2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706> accessed 1 December 2022.

28 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.

particularities of the MS affected, but now with the specific understanding that this evaluation must respect two variables that relate directly to the States' wealth and health: the population and GDP of the MS (the LIBE Committee²⁹ has proposed including the rate of unemployment in the MS concerned). Ineli-Ciger states that this means clearer and more precise indicators compared to the vague definition of mass influx in the TPD, which will make it easier to determine the existence of a crisis.³⁰

Regarding the “adverse effects” requirement, this is no longer a preferred indicator –as in the TPD– but compulsory and broader in two senses. On the one hand, it has now become clear that a mass influx of persons may lead to a situation of crisis in a particular MS (recital 6), although, according to the European Commission, such situations are covered by the proposal *only* if it is demonstrated that they would have serious consequences for the functioning of the CEAS or the Common Framework (p. 13). Thus, the scope of adverse effects is broadened in a way that a mass influx must have consequences for the functioning of the asylum and migration system not only in that MS but in the Union as a whole. On the other hand, adverse effects can influence not only a *MS's asylum and reception system*, but also its *return system*. Some authors have questioned why a dysfunction in the return system must be accepted as a relevant factor.³¹ It is worrying that, when assessing the strength of a system of international protection, they give similar importance to the potential faults in the asylum and reception system to capacity for returning people. Incorporating this variable undermines the true meaning of adverse effects and the objective to activate a crisis response mechanism in asylum that ought to help MS ensure compliance with the principle of non-refoulement (see the mandate in art. 78.1 TFEU) and protect the rights of applicants and beneficiaries of international protection. In addition, the solidarity principle (art. 80 TFEU) requires a reading of the expression “mass influx” that is informed, in particular, by the capacity of states to host refugees more than other variables.³² The

29 Crisis and force majeure Regulation 2020/0277(COD).

30 Meltem Ineli-Ciger, ‘What a difference two decades make? The shift from ‘temporary to immediate protection in the new European Pact on Asylum and Migration’ (*EU Immigration and Asylum Law and Policy*, 11 November 2020) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>> accessed 1 December 2022.

31 *ibid.*

32 Esin Küçük, ‘The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?’ (2016) 22 EULJ 465.

adverse effects requirement should focus on the aspects that affect the interests of the persons concerned and other persons requesting protection (art. 2 a TPD). From this perspective, dysfunction in the return system should not be considered a variable. The Directive does not provide the key parameters for identifying these situations, as occurs in cases of migratory pressure.³³ The two conditions, “rendering a system non-functional” and “serious consequences”, are too vague and allow (again) ample discretion to remain in the hands of the Commission and EU Agencies³⁴, in a context that would permit the lowering or derogation of protection standards.

However, it is important that it includes the sources on which the decision is to be based (art. 3.8). The Commission shall determine whether there is a situation of crisis based on *substantiated information*, in particular the information gathered by the Commission pursuant to the EU mechanism for Preparedness and Management of Crises related to Migration, by EASO, FRONTEX, and the Migration Management report referred to in the RAMM Proposal. The decision taken by the Commission will have to cite the sources consulted, though it would have been preferable to also include the obligation to consult data provided by UN agencies and in particular the UNHCR, as expressly mentioned in the TPD (art. 5.4.c, art. 3.3).

5. Conclusion

The concept of the mass influx of displaced persons is an indeterminate legal concept that is within the margin of appreciation exercised by Institutions. In these times, there is no consensus on establishing an objective concept that could potentially cause automatic activation of the Directive. Neither do I believe this to be desirable, for automatic activation could well limit the different situations to which the instrument could be applied. However, I believe it is important to incorporate indicators and contrasting sources of information that must be consulted in any decision. A list of indicators will not diminish the politicization of the decision to grant or withhold protection in the case of mass influxes, but I believe that incorporating some variables would force the Institutions to adopt a “motivated” decision, and this would assist future

33 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]’ COM/2020/610 final art. 50.3.

34 Sergio Carrera, ‘Whose Pact?’ (CEPS, 25 September 2020) < <https://www.ceps.eu/ceps-publications/whose-pact/> > accessed 1 December 2022.

judicial control. I realize that this might disappoint some readers, but I do not have my own list of indicators. I have always trusted (albeit illusory) in the benefits of maintaining a flexible concept of mass influx that could be applied to providing protection (temporary, immediate or, better still, automatic group protection that avoids the devaluation of persons' rights) in diverse crisis situations. The absence of political will to exploit to the maximum the advantages of temporary protection in the past has inclined me to favor the adoption of risk assessments –agreed upon by the Council and the European Parliament– in any future regulation, but more than the types of risk assessment adopted, what interests me is their precise nature and the obligation that they must be consulted by entities outside the EU. Such indicators, among which would be adverse effects as one of the key elements, must be coherent with this instrument's protection objectives, and benefit the interests of the persons concerned and other persons requesting protection. What is needed is a protection-driven approach to “adverse effects”.

I think it is unfeasible to strike out concepts such as “mass influx” or “crisis” from the regulations in these times when the CEAS is evolving. While the Dublin allocation system, and its inequity, continues to be the corner stone of the CEAS, what is required is the definition of situations in which solidarity can become an obligation, as automatic as possible. The opposite would require a complete (and wholly desirable) change of paradigm that I think is unlikely in the short term.

Finally, it is important that the definition of mass influx is not necessarily linked to direct entry into European territory; instead, protection could also be activated when evacuation programs are in operation. This is a potential benefit of the TPD that has vanished in the new crisis regulation proposal, with the loss of an instrument that could be used for international solidarity.

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