



UNIVERSIDADE CATÓLICA PORTUGUESA

THE EU TEMPORARY PROTECTION DIRECTIVE

**The Directive in Practice - An analysis of its
implementation to protect those fleeing the war in Ukraine**

Camila Aby-Azar Façanha

Mestrado em Direito

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À minha família, que sempre confiou em mim e me apoiou na realização de todos os meus sonhos.

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ABSTRACT

The present study analyzes the European Union Temporary Protection Directive and compares it with other instruments of the Common European Asylum System. While studying the Directive, it will be examined the differences between the instruments, specifically the circumstances in which each instrument is applied and what kind of protection is granted to the individuals in each situation. Furthermore, it will use a case study to analyze and understand the actual effectiveness of the Directive. The Temporary Protection Directive was enacted for the first time by the European Commission on the 3rd of March 2022, seeking to ensure immediate protection for Ukrainian citizens and short-term nationals residing in Ukraine who had to find refuge in the European Union in the face of Russian attacks on the country. Its implementation was widely celebrated, and many individuals benefited from the instrument. However, many questions and concerns remain about the effective application of the Directive: does it offer real solutions that fill the gaps and vulnerabilities of the international regime, or does it merely seek an immediate remedy to an urgent problem? This study will analyze the practical consequences of Temporary Protection, aiming, in particular, to understand the long-term implications and consequences for those who seek and need such protection.

Keywords: Temporary Protection Directive; Common European Asylum System; Ukraine; European Union.

RESUMO

O presente estudo analisa a Diretiva de Proteção Temporária da União Europeia e compara-a com os demais instrumentos do Sistema Europeu Comum de Asilo. Ao estudar a Diretiva, serão examinadas as diferenças entre os instrumentos, especificamente as circunstâncias em que cada instrumento é aplicado e que tipo de proteção é concedida aos indivíduos em cada situação. Além disso, abordará um estudo de caso para analisar e compreender a real eficácia da Diretiva. A Diretiva de Proteção Temporária foi ativada pela primeira vez pela Comissão Europeia em 3 de março de 2022, buscando assegurar proteção imediata aos cidadãos ucranianos e nacionais de curto prazo residentes na Ucrânia que tiveram de encontrar refúgio na União Europeia em face aos ataques russos ao país. Sua implementação foi amplamente celebrada, e muitos indivíduos se beneficiaram com o instrumento. Entretanto, muitas perguntas e preocupações permanecem em relação à aplicação efetiva da Diretiva: ela oferece soluções reais que preenchem as lacunas e vulnerabilidades do regime internacional, ou apenas busca uma solução imediata para um problema urgente? Este estudo analisará as consequências práticas da Proteção Temporária com o objetivo, em particular, de compreender as implicações e consequências a longo prazo para aqueles que buscam e necessitam de tal proteção.

Palavras Chaves: Diretiva de Proteção Temporária; Sistema Europeu Comum de Asilo; Ucrânia; União Europeia.

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GLOSSARY

CEAS – COMMON EUROPEAN ASYLUM SYSTEM

ECRE – EUROPEAN COUNCIL ON REFUGEES AND EXILES

EU – EUROPEAN UNION

EUAA – EUROPEAN UNION AGENCY FOR ASYLUM

GPD – GROSS DOMESTIC PRODUCT

ICMPD – INTERNATIONAL CENTRE FOR MIGRATION POLICY
DEVELOPMENT

NACPU – NATIONAL CENTRE FOR HELP AND ASSISTANCE TO UKRAINE

NATO – NORTH ATLANTIC TREATY ORGANIZATION

OECD – ORGANISATION FOR ECONOMIC CO-OPERATION AND
DEVELOPMENT

OHCHR – OFFICE OF THE UNITED HIGH COMMISSIONER FOR RIGHTS

TFEU – TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

TEU – TREATY ON EUROPEAN UNION

TPD – TEMPORARY PROTECTION DIRECTIVE

TP – TEMPORARY PROTECTION

UNHCR – UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

UNHR – UNITED NATIONS HIGH

INTRODUCTION

The European Union (EU) is an economic and political union committed to sharing the same fundamental values and common goals. It was constituted after World War II, and one of its main objectives was to create a single market, which basically consists of an area without borders that allows people, goods, services, and capital to move freely between its 27 Member States. The EU is based on the harmonization of standards and rules and cooperation among 27 European countries, where all maintain their sovereignty but still adopt principles, rights, and policies that are common to all the Member States and their citizens.

In addition to equal treatment for all European citizens, the EU is committed to having a shared responsibility towards third-country nationals seeking refuge or international protection. In other words, the EU is engaged in being “an area of protection for people fleeing persecution or serious harm in their country of origin.”¹

The Common European Asylum System (CEAS) was derived from Article 78 of the TFEU, which determines an EU common policy on asylum, subsidiary protection, and temporary protection for third-country nationals. According to the European Union Agency for Asylum (EUAA):

The [CEAS] is a legal and policy framework developed to guarantee harmonized and uniform standards for people seeking international protection in the EU. It is based on the understanding that the EU, an area of open borders and freedom of movement where countries share the same fundamental values, needs to have a common approach to implement transparent, effective and equitable procedures.²

Established in 1999, the idea behind the CEAS is that those seeking asylum, subsidiary protection, or temporary protection should receive the same rights and treatment in all Member States of the EU - without discrimination - guaranteeing equal and fair treatment for all. “This ensures that, no matter where an applicant applies, the outcome will be similar. Procedures must be fair, effective throughout the EU, and impervious to abuse.”³

¹ European Commission, Migration and Home Affairs, “Common European Asylum System”, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en, accessed 09/11/2022.

² European Union Agency for Asylum, Major developments in asylum in the European Union in 2019, “The Common European Asylum System and current issues”. <https://euaa.europa.eu/asylum-report-2020/21-common-european-asylum-system-and-current-issues>, accessed 09/11/2022.

Despite its importance, a lot is discussed about the flaws and weaknesses in the CEAS, raising a great debate on the need for a reform of the current system. The fragilities became even more apparent in the face of humanitarian crises experienced by European countries over the years, such as the increased arrival of an unprecedented number of displaced people and asylum seekers between 2014-2016, when the EU was unable to deal with the situation and almost faced a collapse in the system. It became clear that, in the words of Leila Hadj Abdou (2021), “[c]ompliance with the CEAS was thus doomed to fail if pressures on the national system increased, as happened during the 2015 ‘migration crisis’”.⁴

More recently, in February 2022, the world witnessed the rise of a new refugee emergency caused by Russian attacks on Ukraine, which again exposed the fragilities of the international protection system. According to the Organisation for Economic Co-operation and Development (OECD), the attacks “created the greatest refugee surge to OECD countries since World War II ... [and] led to over 5.3 million refugees across Europe.”⁵

Given that in past emergency situations the CEAS was unable to create a quick and effective response to a large number of asylum seekers, the EU had to find an alternative measure, which led to the activation of the EU Temporary Protection Directive for the first time since its creation in 2001.

The Temporary Protection Directive was triggered in March 2022 due to the mass arrivals of displaced people from Ukraine after Russia’s military invasion on 24 February 2022. According to the data collected by the UNHCR, the invasion led to over 5.3 million refugees across Europe.⁶ Furthermore, “the United Nations estimated that nearly one Ukrainian child per second had become a refugee. That translated to over two million children by the end of March.”⁷

³ European Commission, Migration and Home Affairs, “Common European Asylum System”. https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en, accessed 09/11/2022.

⁴ ABDU, Leila Hadj, Bridge Working Paper, “From the Migration Crisis to the New Pact on Migration and Asylum – The Status Quo Problem”, (02/2021). <https://ssrn.com/abstract=3786906>, accessed 10/11/2022.

⁵ OECD, Policy Responses: Ukraine, “The Ukrainian Refugee Crisis – Support for teachers in host countries”, (03/08/2022). <https://www.oecd.org/ukraine-hub/policy-responses/the-ukrainian-refugee-crisis-546ed0a7/>, accessed 10/11/2022.

⁶ UNHCR, Operational Data Portal, Ukraine Refugee Situation. <https://data.unhcr.org/en/situations/ukraine>, accessed (10/11/2022).

⁷ OECD, Policy Responses: Ukraine, “The Ukrainian Refugee Crisis – Support for teachers in host countries”, (03/08/2022). <https://www.oecd.org/ukraine-hub/policy-responses/the-ukrainian-refugee-crisis-546ed0a7/>

Temporary protection is a mechanism designed to deal with emergency situations related to a large influx of refugees, and its creation was derived from a combination of successful measures adopted in emergency situations in the past. However, temporary protection - as the name implies - is a temporary measure adopted in an urgent situation to deal with a current crisis.

While it is effective in addressing the situation in the immediate term, its activation raises numerous questions and concerns in the long term, especially regarding its consequences and the future of those who have benefited from such protection.

The purpose of this study is to provide an in-depth analysis of the CEAS and the EU Temporary Protection Directive, seeking to understand whether the solutions adopted by the Directive are truly effective and aimed at filling the gaps and vulnerabilities of the CEAS or whether they serve only to mask the failures of that instrument at a time of crisis, postponing the adoption of a truly definitive solution.

I. COMMON EUROPEAN ASYLUM SYSTEM – AN OVERVIEW OF THE ASYLUM POLICY IN THE EUROPEAN UNION

The right to asylum is expressly recognized by the Charter of Fundamental Rights of the EU as a fundamental right. As stated by the European Commission, “[t]he [EU] is an area of protection for people fleeing persecution or serious harm in their country of origin.”⁸ The European Parliament also declares that “[a]sylum is a fundamental right and granting it to people who comply with the criteria set in the 1951 Geneva Convention relating to the status of refugees is an international obligation for States parties.”⁹

It was based on these principles that the need to create a Common European Asylum System (CEAS) emerged in the EU more than 20 years ago.

According to Georgios Anagnostaras (2020), the EU common asylum policy “purports to guarantee high standards to persons in need of international protection in

[crisis-546ed0a7/](#), accessed 10/11/2022.

⁸ European Commission, Migration and Home Affairs, “Common European Asylum System”, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en, accessed 09/11/2022.

⁹ European Parliament, About Parliament, “Guaranteeing the right to asylum”. <https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu/guaranteeing-the-right-to-asylum>, accessed 10/11/2022.

accordance with the principle of solidarity and fair sharing of responsibility between the Member States”.¹⁰

Moreover, the European Commission defined the CEAS as:

[A] framework of agreed rules which establish common procedures for international protection and a uniform status for those who are granted refugee status or subsidiary protection based on the full and inclusive application of the Geneva Refugee Convention and Protocol and which aims to ensure fair and humane treatment of applicants for international protection, to harmonise asylum systems in the EU and reduce the differences between Member States on the basis of binding legislation, as well as to strengthen practical cooperation between national asylum administration and the external dimension of asylum.¹¹

In other words, the CEAS is a regime that sets common criteria and procedures relating to international protection in the EU. Created to harmonize the interpretation and application of asylum law among EU Member States, the system aims to develop and achieve a common approach for those who are granted refugee or subsidiary protection status, thus guaranteeing fair, effective, and equal treatment for all the people seeking international protection throughout the EU.

“The CEAS was born out of the recognition that, in an area without internal frontiers, asylum needed harmonized regulation at the EU level.”¹² The idea is that the same standards of protection and rights will be applied in all Member States. In this way, people will receive the same treatment throughout the EU, regardless of where they seek to apply for asylum.

The system was referred to for the first time in the Tampere Conclusions in 1999 when the EU Member States agreed to establish – or work towards it - a common asylum system. According to the International Centre for Migration Policy Development (ICMPD), the establishment of the CEAS “was based on the full and inclusive application of the 1951 Geneva Refugee Convention, thus ensuring that

¹⁰ ANAGNOSTARAS, Georgios, German Law Journal, Vol. 21, 1180-1197, “The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection”, (10/09/2020). <https://doi.org/10.1017/glj.2020.72>, accessed 15/02/2023.

¹¹ European Commission, Migration and Home Affairs, Glossary, “Common European Asylum System (CEAS)”. https://home-affairs.ec.europa.eu/pages/glossary/common-european-asylum-system-ceas_en, accessed 20/11/2022.

¹² European Asylum Support Office, Publications Office of the European Union, “An Introduction to the Common European Asylum System for Courts and Tribunals – A Judicial Analysis”, (23/08/2016). <https://data.europa.eu/doi/10.2847/695557>, accessed 12/12/2022.

nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.^{13,14}

The system's implementation was divided into two phases: the Tampere Programme (1999-2004) and the Hague Programme (2005-2009). The first phase was dedicated to negotiating and adopting minimum standards "in connection with the reception of asylum-seekers; qualification for international protection and the content of the protection granted; and procedures for granting and withdrawing refugee status."¹⁵ Important legislation was created and adopted in that phase, such as the Dublin II Regulation; the Qualification Directive; the Asylum Procedures Directive; and the Temporary Protection Directive.

The second phase of the CEAS was detailed in the Treaty on the Functioning of the European Union (TFEU), one of the most important EU treaties that sets the constitutional basis of the EU. It was the first time that the CEAS was explicitly referred to in an EU primary law. Article 78(1) of the TFEU "provides the legal basis for an EU common policy on asylum, subsidiary protection and temporary protection which must be in accordance with the Refugee Convention and other relevant treaties,"¹⁶ while Article 78(2) determines that measures for a common European asylum system must be adopted by the European Parliament and the Council. The second stage of the CEAS was completed in 2013.

Furthermore, as stated by Evangelia (Lilian) Tsourdi (2021):

Legislative harmonization is not the only element of a CEAS. The actors that are meant to implement these rules equally form part of the asylum system. The CEAS is both rules and their implementation. In view of this understanding, the goal in article 78 (2) TFEU to establish a 'common system' arguably creates a legal

¹³ "Under international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm." (United Nations Human Rights, Office of the High Commissioner, "The principle of non-refoulement under international human rights law", (05/07/2018). <https://www.ohchr.org/en/documents/tools-and-resources/technical-note-principle-non-refoulement-under-international-human>, accessed 12/12/2022).

¹⁴ International Centre for Migration Policy Development, "In search for a vision of the Common European Asylum System (CEAS)", (19/06/2019). <https://www.icmpd.org/blog/2019/in-search-for-a-vision-of-the-common-european-asylum-system-ceas>, accessed 12/12/2022.

¹⁵ European Asylum Support Office, Publications Office of the European Union, "An Introduction to the Common European Asylum System for Courts and Tribunals – A Judicial Analysis", (23/08/2016). <https://data.europa.eu/doi/10.2847/695557>, accessed 12/12/2022.

¹⁶ Treaty on the Functioning of the European Union, Article 78(1).

obligation to institutionalize deeper integration, not merely through legislation but also through institutional cooperation.¹⁷

In the same vein, Violeta Moreno Law (2017) complements:

According to paragraph 2 [of article 78], the system should comprise a ‘uniform status of asylum’ and a ‘uniform status of subsidiary protection’ for those who, ‘without obtaining European asylum, are in need of international protection’. In addition, a series of common standards on reception and procedural conditions must be adopted. Partnership and cooperation with third countries for the purpose of managing refugee flows and a common system of temporary protection for cases of mass influx or emergency situations are also contemplated.¹⁸

However, the mere creation of minimum standards was not sufficient to establish EU-wide harmonization and could still lead to significant disparities in the adoption of procedures, reception, and treatment of asylum seekers between the Member States, which went against the equal access to international protection that the CEAS intended to develop.

In fact, one of the biggest flaws of the system is the number of divergences among the Member States upon the implementation of the standards and common procedures set in the CEAS. According to the European Commission, “[i]nconsistencies between national asylum and return systems, as well as shortcomings in implementation, have exposed inefficiencies and raised concerns about fairness.”¹⁹ The wide variations in reception conditions and asylum procedures, for instance, have contributed to secondary movements of asylum seekers to only a few European countries, placing huge pressure and overload on certain Member States and, as a consequence, causing a migration crisis – which is exactly what the CEAS aims to avoid.

Unfortunately, the system has shown many structural deficiencies and weaknesses over the years, especially in the face of major humanitarian crises that have generated a mass influx of people seeking asylum in the EU. In 2014 and 2015, for example, “as more than 1 million asylum seekers traveled to Europe in search of safety, national reception systems faltered, the European Union failed to coordinate a rapid and

¹⁷ TSOURDI, Evangelia (2021) - “Regional Refugee Regimes: Europe”, in *The Oxford Handbook of International Refugee Law*, pp. 352-370.

¹⁸ MORENO-LAX, Violeta (2017) - *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*. United Kingdom: Oxford Studies in European Law, pp. 371.

¹⁹ European Commission, “Communication From the Commission on a New Pact on Migration and Asylum”, Brussels (23/09/2020). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609>, accessed 15/02/2023.

effective response, and many asylum and social-support systems reached a breaking point.”²⁰

Moreover, some Member States chose to ignore international responsibilities and, instead of adopting standard EU measures, opted to deal unilaterally with asylum seekers and even caused conflicts and impacts to other Member States. For instance, as noted by Yves Pascouau (2015):

[T]he remarkable German decision to examine the asylum applications of Syrian refugees, applying the humanitarian clause of the Dublin regulation, has heavily affected the routes asylum seekers are taking and has thus put partner countries under strain. Chancellor Merkel’s decision was obviously the right one, but in a common area such decisions should at least be discussed with partners.²¹

Because of that, “disagreements deepened between Member States over how to share responsibility for processing and offering protection to those in need,” which evidenced that the CEAS “was not up to the task of coordinating a rapid and effective response to large inflows of asylum seekers.”²²

Such failures show that there is a big gap between law and practice, and no matter how well-elaborated the system seems to be, it is of no use if, when facing an emergency, it is not effective. In fact, the European Commission itself stated that “[c]ommon rules are essential, but they are not enough.”²³ This has made the CEAS the subject of much debate and criticism, particularly regarding the need for legislative and institutional reforms.

Therefore, it is not surprising that the lack of efficient response in the face of emergencies has caused a widespread loss of confidence in the CEAS, and its inefficiency is even recognized by European institutions, including the European Commission.

²⁰ BEIRENS, Hanne, Migration Policy Institute Europe, “Cracked Foundation, Uncertain Future: Structure Weaknesses in the Common European Asylum System, Brussels: (03/2018). <https://www.migrationpolicy.org/research/structural-weaknesses-common-european-asylum-system>, accessed 05/01/2023.

²¹ PASCOUAU, Yves, *Heads buried in the sand: member states block solutions to the refugee crisis*, (15/09/2015). <https://www.epc.eu/en/Publications/Heads-buried-in-the-sand-memb~1cf804>, accessed 19/03/2023.

²² BEIRENS, Hanne, Migration Policy Institute Europe, “Cracked Foundation, Uncertain Future: Structure Weaknesses in the Common European Asylum System, Brussels: (03/2018). <https://www.migrationpolicy.org/research/structural-weaknesses-common-european-asylum-system>, accessed 05/01/2023.

²³ European Commission, “Communication From the Commission on a New Pact on Migration and Asylum”, Brussels (23/09/2020). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609>, accessed 15/02/2023.

Based on that, the European Commission proposed a reform package for the CEAS in 2016.²⁴ In this event:

[T]he Commission underlined how large-scale, irregular arrivals of people looking for international protection over 2015-2016 had exposed major weaknesses in the design and implementation of the CEAS and of the Dublin system in particular. It also underlined how the CEAS is still characterised by wide divergences in positive recognition rates, as well as on aspects such as the length of asylum procedures and reception conditions of asylum seekers across the EU.²⁵

In addition, in September 2020, a New Pact on Migration and Asylum was launched by the European Commission, which included the negotiations around the CEAS reform package that had been ongoing since 2016.²⁶ Especially in light of the challenges and shortcomings faced by the CEAS, the New Pact seeks to reform the current system with the aim of better managing migration in the EU, focusing on solidarity between Member States, border procedures, and integration measures.

However, despite announcements and discussions around a New Pact and a reform package for the CEAS, there seems to be no progress in the negotiations. Consequently, the EU had to seek alternative measures to deal with humanitarian emergencies, which is what led to the activation of the EU Temporary Protection Directive in the face of the invasion of Ukraine, as we will see below.

II. THE EU TEMPORARY PROTECTION DIRECTIVE

1. THE ORIGINS OF TEMPORARY PROTECTION

The Temporary Protection Directive was drafted in the 1990s in response to the Balkan Wars, an event that led to a large displacement of people seeking asylum in the EU and a period when there were no harmonized EU asylum rules or a CEAS. However, as stated by Guy S. Goodwin-Gill (1996), “[t]he practice of temporary refuge,

²⁴ European Commission, Communication from the Commission to the European Parliament and the Council, “Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe”, Brussels: (06/04/2016). <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A52016DC0197>, accessed 05/01/2023).

²⁵ AA. VV., “The European Commission’s legislative proposals in the New Pact on Migration and Asylum”, (30/07/2021). [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)697130](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)697130), accessed 15/02/2023.

²⁶ European Commission, “Communication From the Commission on a New Pact on Migration and Asylum”, Brussels (23/09/2020). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609>, accessed 15/02/2023.

of admission and protection, that is, asylum, on a temporary basis, has a long history, even if the attempt at conceptualization was relatively novel in the early 1980s.”²⁷

As defined by the European Commission, this exceptional measure seeks to “provide immediate and temporary protection in the event of a mass influx or imminent mass influx of displaced persons from non-EU countries who are unable to return to their country of origin.”²⁸

The largest refugee influx in Europe (since World War II) was caused by the outbreak of war in the former Yugoslavia in the 1990s. More than 3.2 million people had to move within and outside Yugoslavia’s borders, causing a huge influx of people seeking refuge in European countries - Germany alone admitted more than 350,000 refugees. The same happened in 1999 as a result of the Kosovo war, when the EU admitted more than 200,000 asylum seekers, mostly going to Germany and Switzerland.

Consequently, European governments had to search for temporary protection measures to respond to this sudden arrival of thousands of asylum seekers without leading to a huge collapse in the national asylum systems. As stated by Olga Mitrovic (2015):

At the time, member states had to rely on ad hoc measures to provide an adequate humanitarian response. And yet, Bosnian refugees in 1992-95 and Kosovar refugees in 1999 were offered protection, flows were managed and lessons were learned. These practices were later standardized and embedded in the Temporary Protection Directive.²⁹

Even though the Member States were able to engage in different temporary protection practices on their own, the European Commission wanted to find a way to deal with these conflicts in a collective and harmonized way.

Therefore, after these experiences - and seeking to be an area EU acknowledged the need to create a European Asylum System - the CEAS, as detailed in the previous

²⁷ GOODWIN-GILL, Guy S. (1996) - The Refugee in International Law. United States: Oxford University Press, pp. 196.

²⁸ European Commission, Migration and Home Affairs, “Temporary Protection”, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en, accessed 15/01/2023.

²⁹ MITROVIC, Olga, “Used during the Balkan crises, the EU’s Temporary Protection Directive may now be a solution to Europe’s refugee emergency”, (22/12/2015). <https://blogs.lse.ac.uk/euoppblog/2015/12/22/the-eus-temporary-protection-directive-as-a-solution-to-europes-refugee-crisis/>, accessed 15/01/2023.

chapter - and one of the first directives adopted within the system was the Temporary Protection Directive.

2. THE TEMPORARY PROTECTION DIRECTIVE AND ITS HISTORY OF NON-IMPLEMENTATION

The EU Temporary Protection Directive (“TPD”) was adopted and entered into force on July 20, 2001, and as established in its preamble, has as its main objective “to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons” and “to take measures to promote a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons.”³⁰

According to Jean-François Durieux (2021):

The Temporary Protection Directive attempts to meet two goals, namely solidarity and consistency. The first objective is to ensure that, in future refugee emergencies, Member States will act in concert and in a ‘spirit of solidarity’” and the second objective “is to harmonize the practice of all Member States faced with the same emergency, as regards the contents and duration of the temporary protection granted to the incoming ‘displaced persons’.”³¹

Due to its effectiveness in the past, this legal instrument was developed to “serve as principal framework in the event of a major refugee crisis and it envisaged a series of necessary measures that enhance the protection of asylum seekers during their stay in host countries.”³²

In other words, the mechanism was designed to respond immediately and effectively to situations involving the arrival of large numbers of displaced people - usually from the same country or area - seeking refuge in the EU. As explained by Evangelia Tsourdi (2021):

The Temporary Protection Directive stipulates conditions for the grant of a protection status – a maximum two-year duration in cases of ‘mass influx’ or ‘imminent mass influx’. It guarantees a minimum level of rights; contains

³⁰ European Union, 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 consequences thereof.

³¹ DURIEUX, Jean-François (2021) - “Regional Refugee Regimes: Europe”, in *The Oxford Handbook of International Refugee Law*, pp. 678-695.

³² MITROVIC, Olga, “Used during the Balkan crises, the EU’s Temporary Protection Directive may now be a solution to Europe’s refugee emergency”, (22/12/2015). <https://blogs.lse.ac.uk/europpblog/2015/12/22/the-eus-temporary-protection-directive-as-a-solution-to-europes-refugee-crisis/>, accessed 15/01/2023.

arrangements for accessing an asylum determination procedure; and incorporates provisions on solidarity and balancing of efforts.³³

Furthermore, this protection is extended until the event that led to the people's displacement ceases, that is until they are able to return safely to their country of origin.

The instrument could - and should - be used to deal with emergency situations - like the one experienced by European countries in the 1990s - as the major purpose of its creation was indeed to provide an *exceptional* legal instrument to be adopted in response to situations that could lead to a possible refugee crisis. Contrary to the regular asylum system, the TPD does not require an individual asylum assessment before granting the protection status, resulting in a faster procedure when dealing with a large number of displaced people.

According to the UNHCR (2022):

This initial non-exhaustive compilation of practices, drawing from examples of how Temporary Protection applications have been assessed, aims to provide guidance and inspiration to governmental and non-governmental actors on how protection and assistance needs may be assessed in a timely, fair and efficient manner.³⁴

Furthermore, the TPD was designed to be a *flexible* mechanism that could be used to cope with a wide range of emergency situations – more specifically, situations that would involve a *mass influx* of people seeking international protection in the EU. According to Jean-François Durieux (2021), “[t]he rationale for recommending a ‘flexible system’ in the face of obvious humanitarian needs was found in the *emergency* and *temporary* nature of such needs.”³⁵

Meltem Ineli-Ciger (2018) defined temporary protection as “an umbrella concept which described a range of policies providing forced migrants protection from refoulement and at least basic minimum treatment until durable solutions are available.”³⁶ Once activated, the Directive provides “a temporary protection status that confers temporary residence permits, emergency health care, shelter, social benefits,

³³ TSOURDI, Evangelia (2021) - “Regional Refugee Regimes: Europe”, in *The Oxford Handbook of International Refugee Law*, pp. 352-370.

³⁴ United Nations High Commissioner for Refugees, Regional Bureau for Europe, “The EU Temporary Protection Directive in Practice 2022”, (15/06/2022). <https://data.unhcr.org/en/documents/details/93633>, accessed 05/02/2023.

³⁵ DURIEUX, Jean-François (2021) - “Regional Refugee Regimes: Europe”, in *The Oxford Handbook of International Refugee Law*, pp. 678-695.

³⁶ INELI-CIGER, Meltem (2018) - *Temporary Protection in Law and Practice*, v. 10, pp. 149-167. Netherlands: Brill. https://doi.org/10.1163/9789004327535_008, accessed 22/01/2023.

education for minors as well as limited access to the labour market and a limited right to family reunification.”³⁷

In addition, the instrument is intended to be a complementary tool, and not an alternative measure, to the international protection system. In summary, some of the main differences between temporary protection and other international protection instruments are (a) its temporary nature, as the TPD grants protection status for a limited and not definitive period; (b) temporary protection is not only addressed to refugees, being a more flexible system in order to cover a larger number of humanitarian emergency situations; (c) the system is intended to provide protection to a large number of people, and not only to individuals, thus it does not require an examination of the individual profile to confer the status, as opposed to the international protection regime that conducts an individual and careful examination.

However, while the TPD is one of the pillars of the CEAS, for unknown reasons the instrument was not used in the past years. Even though the mechanism was referred to several times over the years – as in response to the large migration flow from North Africa in 2011 and the huge migration event that happened between 2014 and 2016 – it was never really activated.

Its non-implementation has nothing to do with there being no need for it. Since the adoption of the TPD in 2001, the EU has experienced several migratory conflicts. For instance, in 2015 approximately 1.5 million migrants applied for asylum in the Member States, leading to one of the largest migration flows experienced by the EU. The situation was so severe that nearly a million refugees tried to reach the European continent by sea, and according to the UNHCR, more than 4,000 people - including children - tragically lost their lives while trying to reach the coast.³⁸

At the time, while the pressure at the borders was enormous and a migratory crisis was imminent, the TPD was still not activated - even though the Directive was designed precisely to deal with situations like these. Contradictorily, “[t]he idea of granting temporary protection [was] not even mentioned in the European Agenda for Migration,

³⁷ INELI-CIGER, Meltem (2018), Chapter 5 “EU Temporary Protection Directive”, in *Temporary Protection in Law and Practice*, v. 10, pp. 149-167. https://doi.org/10.1163/9789004327535_008, accessed 22/01/2023.

³⁸ CLAYTON, Jonathan; HOLLAND, Hereward, The UN Refugee Agency, “Over one million sea arrivals reach Europe in 2015”, (30/12/2015). <https://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>, accessed 22/01/2023.

a document adopted by the Commission in May 2015 that should serve as a blueprint for all future migration related measures.”³⁹

On the other hand, this also does not mean that nothing has been done to deal with situations like the above-mentioned one. In fact, several alternative measures have been implemented to address situations that could lead to high pressure on the borders and to a potential migratory crisis, both at the national and/or EU level. As stated by the European Commission (2016):

[S]ince 2001, several Member States’ asylum systems have significantly evolved, including a surge in and subsequent consolidation of experience and knowhow on how to deal with situations of pressure. Moreover, at EU level, the legal and political context in the field of asylum has significantly changed ... including also the tools available at EU level that aim to assist Member States in handling large influxes.⁴⁰

Nevertheless, no one seems to truly understand why the instrument that was designed to deal with these situations was not being put into practice. In this regard, several studies and reports have been developed discussing the evolution of the TPD and its absence over the years, and all of them seem to raise the same reasons for its non-implementation, which we will see in detail below.

3. REASONS FOR THE TPD’S LACK OF IMPLEMENTATION

While the real reasons why the TPD was never implemented are still unclear, many theories have been raised over the years - some of them being a) political aspects (and the lack of political will for its activation); b) the huge discussion around burden sharing; c) the lack of a clear definition of "mass influx"; and d) the long and bureaucratic procedure for its activation.

In Jean-François Durieux's (2021) words:

There are various reasons for the Directive’s non-implementation, including the procedure for the institution of a temporary protection scheme; the indeterminacy of the concept of ‘mass-influx’; and the political fear that its instatement would

³⁹ MITROVIC, Olga, “Used during the Balkan crises, the EU’s Temporary Protection Directive may now be a solution to Europe’s refugee emergency”, (22/12/2015). <https://blogs.lse.ac.uk/europpblog/2015/12/22/the-eus-temporary-protection-directive-as-a-solution-to-europes-refugee-crisis/>, accessed 26/02/2023.

⁴⁰ AA. VV., Directorate-General for Migration and Home Affairs (European Commission), “Study on the Temporary Protection Directive: Final Report”, (04/10/2016). <https://op.europa.eu/en/publication-detail/-/publication/1c753fe9-9aab-11e6-868c-01aa75ed71a1>, accessed 22/01/2023.

create a so-called pull factor, ‘inviting’ to the EU refugees and displaces persons qualifying for its protection.⁴¹

The possible reasons identified by most authors will be examined in detail below:

a) **The Burden-Sharing Mechanism**

One of the main obstacles to the implementation of Temporary Protection that was identified by the authors is in relation to the **burden-sharing mechanism**, which may explain why the activation of the Directive was not even considered in the face of possible migration crises in recent years: as many of these potential crises affected only a few Member States, the others were possibly unwilling to get involved.

Indeed, burden-sharing is something that raises great concerns and discussions among the States, not only regarding the Directive but all instruments involving international protection. As stated by Marnie Jane Thomson (2022):

In the global humanitarian realm, there is much discussion and concern for the burdens that states endure when it comes to refugee populations. The word “burden” appears in the Preamble of the 1951 Refugee Convention in reference to placing “unduly heavy burdens” on specific host countries and compels the international community to intervene in such situations. While there have been attempts to change the language from burden-sharing to responsibility-sharing, the emphasis on states assuming the “burden” of hosting and providing for refugee populations continues.⁴²

In the Directive, the burden-sharing mechanism is built around solidarity and balance between Member States. Article 25 specifically states that “[t]he Member States shall receive persons who are eligible for temporary protection in a spirit of **Community solidarity**.”⁴³ Based on criteria of GDP, population, and territory size, this solidarity mechanism aims to relieve the pressure on just a few states by balancing the efforts between Member States. It is basically divided into *financial burden-sharing* – in which Member States contribute financially to help with the basic care and maintenance of refugees - and *physical burden-sharing* – which means that refugees are dispersed among states to create a balance between them.

⁴¹ TSOURDI, Evangelia (2021) - “Regional Refugee Regimes: Europe”, in *The Oxford Handbook of International Refugee Law*, pp. 352-370.

⁴² THOMSON, Marnie Jane, *Frontiers in Human Dynamics*, “The Invisible Burdens of Burden-Sharing”, (06/04/2022 <https://doi.org/10.3389/fhumd.2022.668321>, accessed 10/01/2023).

⁴³ European Union, 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 consequences thereof.

Although it is based on solidarity, the mechanism still carries a negative connotation - mainly involving the word "burden". For this reason, it is believed that this is one of the obstacles to the implementation of the TPD.

b) The Vague Definition of “Mass Influx”

Another possibility for its non-implementation revolves around the **legal term** adopted by the Directive to justify the activation of Temporary Protection, or more specifically, the lack of a clear definition about the term. To be clearer, Article 1 of the TPD states that “the purpose of [the] Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced person from third countries who are unable to return to their country of origin and to promote a balance of effort between the Member States in receiving and bearing the consequences of receiving such persons.”⁴⁴

As Meltem Ineli-Ciger (2018) notes:

An analysis of the relevant literature reveals the following indicators of mass influx situations: a) large scale arrival of persons seeking refuge, b) a rapid rate of arrival, c) an overwhelmed reception capacity of the host states, d) inability of the national asylum systems to absorb the arrival of persons seeking refuge and e) the situation is considered by some to present a threat to the national security of the host state.⁴⁵

However, although it is possible to delineate some of the possible situations that would characterize a "mass influx" of displaced people, there seems to be no clear and definite definition of the term in international law - which is the key concept of Article 1 - leading to a great deal of discussion around it.

It is evident, therefore, that the lack of a clear definition of this particular key concept in the Directive, “which is, in the words of the European Commission (2013, p-19), ‘the heart of the system’”,⁴⁶ has left a wide room for discussion and even for the avoidance of its implementation.

⁴⁴ European Union, 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 consequences thereof, Article 1.

⁴⁵ INELI-CIGER, Meltem (2018) - *Temporary Protection in Law and Practice*, v. 10, pp. 149-167. Netherlands: Brill. https://doi.org/10.1163/9789004327535_008, accessed 22/01/2023.

⁴⁶ GENÇ, H. Deniz; ÖNER, N. Aslı ŞİRİN, *International Journal of Political Science & Urban Studies*, “Why not Activated? The Temporary Protection in the European Union”, (27/03/2019). <https://doi.org/10.14782/ipsus.539105>, accessed 12/01/2023.

In fact, in 2016 the European Commission developed a *Study on the Temporary Protection Directive*, and one of its objectives was to identify and analyze the TPD's strengths and weaknesses. According to the Study, the definition of "mass influx" is both a strength and a weakness of the TPD. It is a strength as its broad definition covers "a wide range of different types of inflows and related pressure on the national asylum system(s) (not confined to numerical threshold / indicators)."⁴⁷ On the other hand, it is a weakness as the "lack of clear definition and indicators of 'mass influx' resulted in high threshold and strict interpretation (measured at EU level) which underpin the non-application of TPD".⁴⁸

Nevertheless, the aforementioned study also notes that perhaps the definition of "mass influx" was purposely kept vague and broad by the legislator as it would "allow to cover different types of inflows and types of pressure, not confined to numerical thresholds or linked to specific indicators," which is what the Study identifies as one of the TPD's strengths.

In other words, the definition of the legal term that would justify the activation of the TPD was kept broad precisely to follow one of the main characteristics of the instrument: its flexibility. This means that the Directive is not tied to a particular scenario but can be invoked on a case-by-case basis since the reasons for its activation are not limited to a predefined set of conditions.

However, on the other hand, it seems that such lack of definition is precisely what makes this flexibility one of the system's weaknesses: if there is no will to activate the TPD, there is also no predefined situation or set of conditions that force its activation.

c) The Lengthy and Complex Activation Process

Another possible reason why the TPD was not invoked for more than 20 years is mainly due to the complex procedure for its implementation. More specifically, the European Commission's *Study on the Temporary Protection Directive* (2016) noted that "the procedure to activate and implement the temporary protection mechanism is unclear, lengthy, and cumbersome",⁴⁹ and also proceeded to state that, even if the TPD

⁴⁷ AA. VV., Directorate-General for Migration and Home Affairs (European Commission), "Study on the Temporary Protection Directive: Final Report", (04/10/2016). <https://op.europa.eu/en/publication-detail/-/publication/1c753fe9-9aab-11e6-868c-01aa75ed71a1>, accessed 22/01/2023.

⁴⁸ Id.

⁴⁹ AA. VV., Directorate-General for Migration and Home Affairs (European Commission), "Study on the Temporary Protection Directive: Final Report", (04/10/2016). <https://op.europa.eu/en/publication-detail/-/publication/1c753fe9-9aab-11e6-868c-01aa75ed71a1>

was ever activated in the future, this procedure “may potentially undermine its very objectives, i.e. to *rapidly relieve* the pressure on national asylum systems affected by a mass influx of applicants for international protection and to provide *immediate* access to those applicants (in clear need of international protection).”⁵⁰

In fact, the European Commission (2016) identified that in several of the migration/refugee emergency situations that occurred between 2001-2014, alternative measures were preferred precisely because the Member States and the Commission itself decided that the TPD was not the best instrument to handle these situations, stating that activating the Directive would not really be beneficial for refugees given the long time it would take to be implemented.

d) The rights guaranteed by the Directive and a possible “pull factor” for other migrants

As already mentioned, the TPD provides minimum standards regarding conditions and refugees' rights, which is pointed out by some authors as another possible reason for its non-implementation. Studies discuss the possibility that the rights guaranteed by the Directive to beneficiaries of Temporary Protection and the related duties involving the Member States may be seen as an obstacle to its activation.

This also leads to a common belief that the activation of the TPD could create a “pull factor”, attracting more refugees and migrants to the EU. As stated by the European Commission (2016):

Some Member States expressed concern that activating the TPD would create another “**pull factor**”: A shift from individual-based determination to group-based protection is here perceived as potentially giving (extra) motivation to refugees in neighboring countries to travel to the EU and “try their luck in accessing temporary protection”. This would in turn escalate the number of people seeking protection in the Union, exacerbating the pressure on its Member States.⁵¹

In conclusion, the aforementioned can be summarized by the final considerations brought by H. Deniz Genç and N. Asli Sirin Oner (2019) in their study, as quoted:

The study indicates that the TPD has become obsolete for legal and political reasons. The most notable legal factors preventing the activation of the TDP are the complicated legal assessment and the lengthy, strenuous political process needed to

[detail/-/publication/1c753fe9-9aab-11e6-868c-01aa75ed71a1](#), accessed 22/01/2023.

⁵⁰ Id.

⁵¹ Id.

reach agreement between Member States on the decision to activate the TPD. Reaching the necessary political agreement between Council members has been particularly difficult, exacerbated by QMV with the very high threshold of a two-thirds majority to trigger activation. In addition, the activation process itself is unacceptably time-consuming for refugee crises. Finally, ambiguity over the key concept in the TPD – ‘mass influx’ – has led Member States to adopt different, particularly narrow interpretations and a wide appreciation margin for the EU Council.⁵²

e) Political Factors

Finally, another point that has been raised regarding the non-implementation of the Directive over the years is related purely to political aspects. In fact, many believe that the lack of activation in the face of past emergencies did not occur simply because there was no political will to justify it, in addition to concerns related to the burden-sharing mechanism and fears among member states that TPD activation would attract more refugees to the EU.

In this sense, H. Deniz Genç and N. Asli Sirin Oner (2019) also summarize:

Member States have had deep concerns especially about burden-sharing, as frequently expressed in the documents, with repetitive explanations by the EU institutions and reassurances about fair burden-sharing (...) Furthermore, our findings indicate a much deeper problem of confidence and solidarity among Member States (...) Solidarity has been a fundamental principle of European integration so expressed concerns about burden-sharing and guaranteeing balanced efforts (minimal in many cases) among Member States in providing temporary protection shows that they have deeper problems of confidence and trust each other and in the mechanisms of European integration. Thus, it would not be wrong to conclude that inactivation of the TPD indicates a crisis of the fundamental principles of European integration.⁵³

It is apparent, therefore, that the main reasons why the EU chose to adopt alternative measures to deal with emergencies and high-pressure situations at Member State borders instead of activating the TPD may have been the weaknesses identified in the Directive, as well as legal and political reasons - as briefly discussed above.

In fact, after its history of almost two decades of non-implementation and after several influxes of displaced people coming to the EU to seek asylum - many of which

⁵² GENÇ, H. Deniz; ÖNER, N. Asli ŞİRİN, *International Journal of Political Science & Urban Studies*, “Why not Activated? The Temporary Protection in the European Union”, (27/03/2019). <https://doi.org/10.14782/ipsus.539105>, accessed 02/02/2023.

⁵³ Id.

led to high pressure and overload at the borders of the Member States - the TPD was already being considered obsolete and forgotten.

However, this was overcome in March 2022, when the European Commission surprisingly surpassed all these obstacles and made the unprecedented decision to activate the Directive for the first time.

III. CASE STUDY: THE DIRECTIVE IN PRACTICE – 2022 RUSSIAN INVASION OF UKRAINE

1. BACKGROUND

In February 2022, Russian President Vladimir Putin declared the beginning of what later became known as “the biggest threat to peace and security in Europe since the end of the Cold War.”⁵⁴ The justifications to conduct a military operation were basically in terms of a security dilemma – primarily involving a threat of NATO expansion. But in reality, the decision was purely due to Russia's concerns about its own interests.

Vladimir Putin was long threatening a military attack, but no one seemed to believe that the Russian President would actually start a war. Unfortunately, he was underestimated. At around 5 am on February 24, 2022, residents of several Ukrainian cities, including its capital Kyiv, awoke to the sound of explosions and the destruction caused by the Russian military invasion.

In January 2023, almost a year since its inception, it is stated that, by scope, the Russia-Ukraine war could be the largest faced by Europe since 1945. The Office of the United High Commissioner for Rights (OHCHR) “verified a total of 7,068 civilian deaths during Russia's invasion of Ukraine as of January 22, 2023. Of them, 438 were children. Furthermore, 11,415 people were reported to have been injured.”⁵⁵ OHCHR also noted, however, that the actual numbers could be even higher.

Needless to say, the Russian invasion also caused one of the biggest humanitarian emergencies in recent years, as millions of people were forced to leave everything behind and flee their country, seeking refuge in the EU and neighboring countries.

⁵⁴ MANKOFF, Jeffrey, CSIS, “Russia’s War in Ukraine: Identify, History, and Conflict”, (22/04/2022). <https://www.csis.org/analysis/russias-war-ukraine-identity-history-and-conflict>, accessed 29/01/2023.

⁵⁵ Statista Research Department, “Number of civilian casualties during the war in Ukraine 2023”, (06/03/2023). <https://www.statista.com/statistics/1293492/ukraine-war-casualties/>, accessed 29/01/2023.

According to data collected by Statista, “[n]early 2.9 million refugees from Ukraine due to the Russian invasion were recorded in Russia as of October 3, 2022.”⁵⁶ Additionally, “approximately 1.6 million were reported to have fled to Poland as of January 17, 2023. In total, around eight million Ukrainian refugees were registered across Europe.”⁵⁷

Beyond the terror felt by the threat of a war, another feeling that dominated the European countries was how the EU would manage this huge influx of asylum seekers without facing a collapse in the Member States' national systems. However, this concern was soon resolved. On March 4, 2022, for the first time in history, the European Council unanimously – and surprisingly - decided to activate the Directive 2001/55/EC, granting those fleeing the war in Ukraine the right to **temporary protection**.⁵⁸

2. THE TEMPORARY PROTECTION STATUS

The decision to activate the TPD was welcomed all over the world. According to the UNHCR (2022), “[t]he application of temporary protection in Europe is unprecedented and its practical implementation demonstrates how to manage mass flows in a manner that provides recognition of international protection needs and guarantees swift access to safety, documentation and rights.”⁵⁹

The Directive was invoked to protect not only Ukrainian nationals residing in Ukraine (and their family members) but also individuals who were granted international protection or equivalent national protection. In addition, the protection was also extended to permanent residents of Ukraine who were unable to return to their home countries and stateless persons residing in Ukraine, and it excluded individuals who committed serious crimes or who pose a threat to security.

After the decision was announced by the European Commissioner of Home Affairs, each Member State - except Denmark⁶⁰ - had to quickly incorporate the

⁵⁶ Statista Research Department, “Number of Ukrainian refugees 2023, by country”, (21/02/2023). <https://www.statista.com/statistics/1312584/ukrainian-refugees-by-country/#:~:text=Nearly%202.9%20million%20refugees%20from,refugees%20were%20registered%20a ross%20Europe,> accessed 29/01/2023.

⁵⁷ Id.

⁵⁸ European Commission, Migration and Home Affairs, “Temporary Protection”. https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en, accessed 02/02/2023.

⁵⁹ United Nations High Commissioner for Refugees, “The EU Temporary Protection Directive in Practice 2022”, (15/06/2022). <https://data.unhcr.org/en/documents/details/93633>, accessed 05/02/2023.

⁶⁰ “Due to its EU opt-out on legal issues, Denmark is not bound by the recently activated EU Temporary Protection Directive.” (European Commission, European Website on Integration, “New Danish law for those fleeing Ukraine mirrors EU Temporary Protection Directive”, (16/03/2022).

Directive's rules into its national legislation. The Directive provided the scope and common standards and specified how the EU Member States should apply the rules for temporary protection but left it open to the Member States to include additional categories if they considered it appropriate – and many of them did.

Germany, for example, extended the benefits to Ukrainian nationals who were residing in Germany before the crisis began and who would have been unable to renew their residency permits because they no longer met the requirements. Slovenia, Luxembourg, and Portugal also extended the scope to third-country nationals with short-term residence permits in Ukraine who could not return to their countries of origin, and many other EU Member States adopted similar measures.⁶¹

Facing the many doubts raised by the decision, the European Commission also released an Operational Guideline⁶² and a Frequently Asked Questions document,⁶³ both intended to further explain and clarify the conditions of the TPD. The documents were not legally binding but provided additional clarification and guidance intended solely to assist the Member States in implementing the rules of the Directive.

As briefly mentioned above, the TPD contains a list of harmonized rights for the beneficiaries of temporary protection, including residency rights, access to the labour market, access to housing, and social welfare and medical assistance. Moreover, children and teenagers are also entitled to access to education, and those who were not accompanied by a guardian were entitled to legal guardianship. In addition, specific provisions were drawn for those who have suffered particularly traumatic experiences.

The complete list of rights is as follows.⁶⁴

https://ec.europa.eu/migrant-integration/news/new-danish-law-those-fleeing-ukraine-mirrors-eu-temporary-protection-directive_en, accessed 10/02/2023.

⁶¹ United Nations High Commissioner for Refugees, “The EU Temporary Protection Directive in Practice 2022”, (15/06/2022). <https://data.unhcr.org/en/documents/details/93633>, accessed 10/02/2023.

⁶² European Commission, Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 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/C 126 I/01, (21/03/2022). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XC0321%2803%29&qid=1647940863274>, accessed 10/02/2023.

⁶³ European Commission, “Frequently asked questions received on the interpretation of the Temporary Protection Directive and Council Implementing Decision 2022/382”. https://home-affairs.ec.europa.eu/system/files/2022-07/Frequently%20asked%20questions%20received%20on%20the%20interpretation%20of%20the%20Temporary%20Protection%20Directive%20and%20Council%20Implementing%20Decision%202022-382_en.pdf, accessed 10/02/2023.

⁶⁴ European Commission, Migration and Home Affairs, “Temporary Protection”, <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary->

1. Appropriate **information on temporary protection** (Articles 1-7);
2. A **residence permit** for the entire duration of the protection (Article 8-10);
3. Access to **employment**, subject to rules applicable to the profession and national Labour market policies and general conditions of employment (article 12);
4. Access to suitable **accommodation or housing**; to **social welfare** or means of subsistence, if necessary; access to **medical care**; and access to **banking services**, for instance opening a basic bank account (Article 13);
5. Access to **education** for persons under 18 years to the state education system (article 14);
6. Opportunities for **families to reunite** in certain circumstances (article 15);
7. Guarantees for access to the **asylum procedure** (Articles 17 – 19);

The Directive also stipulates that people entitled to temporary protection (hereinafter “TP beneficiaries”) should be granted a residence permit valid for the entire duration of the protection, which would depend on the situation in Ukraine - ranging from 1 year to 3 years. It was initially set for one year (until March 2023), but in October 2022 the protection was already extended until March 2024.⁶⁵

It is important to highlight that temporary protection is different from international protection, and individuals who are granted temporary protection are not considered refugees. In fact, it is for this reason that the TPD expressly avoids calling the TP beneficiaries "refugees". This does not mean, however, that these beneficiaries cannot apply for international protection. According to the European Commission:

The right to temporary protection is **in addition** to the right to apply for international protection. It is possible to apply for international protection under the Recast Qualification Directive (Directive 2011/95/EU) at any time. Temporary protection does not affect the rules for granting refugee status or subsidiary protection status under the Qualification Directive.⁶⁶

One of the things that distinguishes temporary protection from other instruments of international protection is its immediacy. The temporary protection mechanism was

[protection_en](#), accessed 10/02/2023.

⁶⁵ “On 14 October, at the meeting of the Justice and Home Affairs Council, the Commission announced that the temporary protection under the Directive will be extended, unchanged, for a period of one year.” (Government of the Netherlands, “European Commission extends Temporary Protection Directive”, (14/10/2022). <https://www.government.nl/latest/news/2022/10/14/european-commission-extends-temporary-protection-directive>, accessed 10/02/2023.

⁶⁶ European Commission, Migration and Home Affairs, Glossary, “Common European Asylum System (CEAS)”. https://home-affairs.ec.europa.eu/pages/glossary/common-european-asylum-system-ceas_en, accessed 10/02/2023.

developed to deal with humanitarian crises and to cope with a large influx of asylum seekers. It addresses precisely rapid admission at the reception stage, ensuring that people fleeing humanitarian crises will be safely admitted to a host State and receive protection in a quick and effective way.

Temporary protection is therefore a relief instrument of the international protection regime, a tool to be used by states to offer rapid, short-term protection to a large group of people fleeing crises. Now, after its actual implementation, it remains open to question whether the TPD was truly effective and has really achieved its main objective: to ensure immediate protection for a large number of displaced people in the face of a humanitarian emergency without leading to a collapse in the asylum system.

3. THE EFFECTIVENESS OF THE TEMPORARY PROTECTION REGIME

In comparison to international protection, one of the main differences of the temporary protection status is that it does not require an individual examination of the person beforehand, which makes it possible to grant protection to a certain group in a very short period of time, requiring only proof of which country you come from. The rights provided under both regimes are quite similar, however, the biggest difference is that the rights guaranteed by TPD are temporary in their nature and will last only as long as the situation that led to the people's displacement remains, unlike asylum, for example, which guarantees the path to a permanent residence and cannot be revoked in the same manner.

The TPD was developed from a compilation of rules and standards that were applied in the face of migration emergencies in the past and were effective at the time. However, after a two-decade history of non-implementation, little was known about the actual effectiveness of the Directive when put into practice.

As we know, the TPD aims to provide immediate protection to asylum seekers on a group level in the face of an emergency without putting pressure on Member States' borders and thus potentially leading to a collapse of national asylum systems. It was exactly this scenario that led to its activation in March 2022. However, did it work as expected?

Seeking to answer this question, the UNHCR developed a Report entitled “*The Implementation of the Temporary Protection Directive: Six Months On*”.⁶⁷ As the name implies, the Report, published in October 2022, sought to study the practical implementation of temporary protection after 6 months of its adoption, as well as to analyze the actual ability of TP beneficiaries to access and exercise their rights.

For this purpose, the UNHCR conducted research among the 26 Member States that implemented the TPD, analyzing all aspects of the Directive - from the procedures for registration and granting documentation by the Member States to the access and exercise of the rights provided to TP beneficiaries.

As a result, the Report found that all Member States were very cooperative and flexible, and the Directive did prove to be effective, especially considering the huge number of people seeking asylum at the same time and how quickly it had to be implemented.

However, it also identified that there were significant divergences among the Member States and that the standards were not implemented in a harmonized manner – as we will see below. In addition, the lack of clear information and guidance was also an issue, which was expected considering how quickly the Directive had to be implemented and the urgency of the situation.

Regarding the procedures, the first topic analyzed by the Report relates to the initial stages, that is, the registration process of TP beneficiaries upon entering the territory of a Member State. The research shows that, despite the difficulties encountered in the beginning, such as long queues and lack of accurate information, the registration practices adopted are now effective and performed in record time in most of the Member States. Many States introduced measures to expedite the process and there was a noticeable improvement over time.

The Czech Republic, for example, established the National Centre for Help and Assistance to Ukraine (NACPU) to help coordinate and expedite the procedure in an extremely effective way. According to the UNHCR (2022), “[a] network of regional assistance centres (KACPU) was set up across the country to facilitate the registration

⁶⁷ United Nations High Commissioner for Refugees, UNHCR Regional Bureau for Europe, “The Implementation of the Temporary Protection Directive: Six Months On”, (17/10/2022). <https://data.unhcr.org/en/documents/details/96266>, accessed 11/02/2023.

and assistance process for those arriving from Ukraine.”⁶⁸ Therefore, when refugees approach a KACPU, they are registered, have their documentation issued, are given health insurance and work permits, and are also offered accommodation.

Furthermore, many countries have adopted digitalized registration processes, which proved to be extremely effective for both local authorities and TP beneficiaries. For example, in Portugal, the TP can be requested digitally, and the applications can be filed either within or outside the Portuguese territory. Also, Slovakia, Greece, and Croatia have launched a website for applications to be made online.⁶⁹

Moreover, another important finding concerns the documentation provided to TP beneficiaries. As mentioned above, one of the obligations of the Member States was to grant residence permits to the TP beneficiaries for the duration of the protection. The Report found that all countries have met this obligation, however, the type of documentation issued by each Member State was different. In addition, delays in issuing the documents were also pointed out as a challenge in most States.

It is important to note that the celerity of these processes is of utmost importance, as a delay or difficulty in registering and issuing documents has a direct impact on the access and exercise of the rights derived from the Directive. As explained in the Report, “in certain countries the document issued to TP beneficiaries does not confirm their residency status in the host state, which can affect a TP beneficiary’s ability to exercise freedom of movement and to access certain rights enumerated under the Directive.”

Moreover, still in relation to freedom of movement, the Report also observed that another aspect that remains unclear is related to those TP beneficiaries who wish to visit Ukraine temporarily (to see family members, for example). In most countries, TP beneficiaries can travel – not only to Ukraine but to any third country - without losing their status. However, some States do not have clear guidance in this matter, leading to great insecurity for TP beneficiaries regarding the possibility of losing their status when leaving the host Member State. In addition, even in countries where it is guaranteed that traveling to Ukraine or another third country will not affect the status, beneficiaries have faced difficulties in entering other Member States or re-entering the country from which

⁶⁸United Nations High Commissioner for Refugees, UNHCR Regional Bureau for Europe, “The Implementation of the Temporary Protection Directive: Six Months On”, (17/10/2022). <https://data.unhcr.org/en/documents/details/96266>, accessed 11/02/2023.

⁶⁹Id.

they enjoy TP, contradicting the principle of freedom of movement guaranteed to TP beneficiaries.

Other issues raised were difficulties regarding the procedures for family reunification and special procedures for people with specific needs (including persons with disabilities, severe medical needs, the elderly, and separated or unaccompanied children). Some countries did not adopt specific procedures for these situations or did not have clear information about the procedure. Moreover, it is apparent that even in countries that adopted these specific procedures, there is a wide variation and lack of consistency from one Member State to another.

In addition, a particular challenge was noted regarding stateless persons. According to the Report, there were reportedly 35,900 stateless people in Ukraine by the end of 2021, and “[t]he total number of stateless persons from Ukraine who have sought temporary protection remains undetermined as there is a general lack of identification procedures in many countries.” These people are among the most vulnerable groups and are in a particularly difficult situation, especially given their lack of documentation and identification, which complicates their registration in the Member States.

Regarding implementation and access to rights by the TP beneficiaries, the Report examined how access to education and the labor market, social assistance, health care, and accommodation were being provided in each of the 26 Member States.

When it comes to the right to access education, the main barriers observed in the Member States were related to the lack of space in local schools (in 22 of the 26 countries), language barriers (in 17 of the 26 countries), and the lack of a permanent address (in 12 of the 26 countries).

The same issues led to challenges regarding access to the labour market. With no local schools, many parents found it difficult to find work because they had nowhere to leave their children (it was noted in 22 of the 26 countries). Language barriers were also an impediment (in 18 of the 26 countries). In addition, the lack of information and lengthy and complicated skills recognition procedures were also barriers in almost half of the 26 Member States.

As for social protection and healthcare, the identified barriers are related to the lack of information and language barriers, and, specifically for social protection, in some countries, the cost of living substantially exceeds the social assistance provided to the beneficiaries. According to the Report, this led to several TP beneficiaries making premature decisions to return to Ukraine because they were not financially capable of covering their basic needs in the host countries. As for healthcare, the limited capacity of healthcare facilities was also frequently reported.

Finally, the right to housing or accommodation seems to be the one with the least challenges among the Member States. According to the Report, “[a]ll the 26 countries monitored have a scheme in place to provide TP beneficiaries with accommodation or subsidies to that end.” Still, the type of accommodation differed significantly between countries, and all Member States appear to have adopted only short-term assistance schemes. This creates a long-term issue, as TP beneficiaries are now struggling to find alternative and affordable accommodations in the host state, which also makes it difficult for them to exercise other rights (such as access to local education and health care).

Fortunately, the Report shows that, despite the divergences and challenges faced, Member States were indeed willing to cooperate and help asylum seekers. Moreover, it also brought a compilation of positive initiatives adopted by some Member States that had a good impact on TP beneficiaries. For example, the Czech Republic relaxed its pedagogical requirements and hired Ukrainians as teacher assistants, creating employment opportunities while alleviating a shortage of teachers. Luxemburg is offering Luxembourgish, French, German, and English classes free of charge. In Austria, TP beneficiaries from Ukraine can access free medical services simply by presenting their identity documents. Many other Member States have adopted similar facilitation measures, and thousands of volunteers have supported the effort.

In summary, as rightly stated by the UNHCR (2022), the unprecedented application of the TPD “has not only demonstrated EU Members States’ solidarity and commitment towards the Ukraine refugee crisis, but also the ability to put in place fair and efficient systems that allow for expedited confirmation of status, and effective access to rights.”⁷⁰

⁷⁰ United Nations High Commissioner for Refugees, Regional Bureau for Europe, “The EU Temporary Protection Directive in Practice 2022”, (15/06/2022). <https://data.unhcr.org/en/documents/details/93633>,

4. THE TRANSITORY STATUTE

Fortunately, the Report's conclusions were very positive and the TPD proved to be effective and to have achieved its goal, especially considering that this was the first time it was being implemented after 20 years of its elaboration and considering how quickly the measures had to be adopted by the Member States.

In the words of the European Council on Refugees and Exiles (ECRE) (2021):

While the invasion of Ukraine has led to massive displacement and an immense humanitarian emergency across much of Europe, the political response from the EU has been very positive, with the rapid activation of the TPD and efforts to ensure access to protection (and territory) rather than to deny it.⁷¹

However, it is still important to note that the Directive provides a form of protection that is, in its nature, **temporary**.

The temporary nature of the TPD is linked to the idea of 'returning home', that is, the idea that those who are seeking asylum will not need protection once the event that led them to leave their country-of-origin ceases. "In the words of [Danièle Joly], 'it is semantically logical that temporary protection ought to be used for temporary crises or, in UNHCR's words, 'whenever safe return to the country of origin can be envisaged within a reasonable period.'"⁷²

The TPD establishes the basic standards and procedures for admitting displaced persons in the face of an emergency, but it does not provide long-term solutions and does not regulate the potential local integration of those individuals. In other words, the temporary mechanism is to be used as the name implies - temporarily.

That being said, an important question remains: what comes after the implementation of those measures? That is, what will be the long-term consequences for those who benefit from the Directive, especially considering that the crisis in Ukraine seems to be far from over and that temporary protection is granted for a limited period of time?

accessed 12/02/2023.

⁷¹ Europe Council on Refugees and Exiles, "Editorial: Asylum reforms: Ukraine Stimulates a Rethink at the Restart", (09/09/2022). <https://ecre.org/editorial-asylum-reforms-ukraine-stimulates-a-rethink-at-the-restart/>, accessed 20/02/2023.

⁷² GOODWIN-GILL, Guy S. (1996) - The Refugee in International Law. United States: Oxford University Press, pp. 201.

Mass influx situations can pose several challenges for host states. In situations such as that arising from the conflict in Ukraine, for example, the large-scale influx of displaced persons seeking asylum can exceed the reception capacities of states and lead to a huge collapse of national systems, and the TPD has indeed proven its effectiveness in dealing with such situations.

However, the activation of the Directive represents only the first step to be taken in an emergency situation. It does not mean that the problem is solved and definitely does not absolve the host country from the obligation of finding a satisfactory lasting solution after its implementation. The protection cannot end after the mere admission to the host country. On the contrary, Member States still need to work on long-term measures and on finding durable and reliable ways to integrate TP beneficiaries. It should be up to the EU institutions and the Member States to adapt the rights and obligations accompanying the temporary protection status to a long-term condition.

In fact, and not surprisingly, the temporary nature of the TPD has already proven to create insecurities and challenges regarding the protection status of the TP beneficiaries. As discussed above, many have made rushed decisions to return to Ukraine even before the situation in the country had normalized, as they could not afford the costs to live in the host Member State. Another example concerns temporary housing, which is also creating problems since many beneficiaries have difficulty finding long-term accommodation and establishing a life in the host country.

This negative aspect of the temporary protection concept had already been identified a long time ago. As noted by Jean-François Durieux (2021), “the ‘principle of temporary refuge’ addresses an issue related to the causes, rather than the consequences, of displacement”, and “it imposes a unilateral obligation on States, upon which the search for durable solutions through international solidarity has little, if any, bearing.”⁷³

Moreover, this is a particular problem identified not only among TP beneficiaries but generally among the beneficiaries of international protection, which implies that this is one of the flaws of international protection mechanisms. As explained by Idil Atak and François Crépeau (2021):

⁷³ ATAK, Idil; CRÉPEAU, François (2021) – “Refugees as Migrants”, in *The Oxford Handbook of International Refugee Law*, pp. 134-152.

Many refugees do not see a future for themselves in first countries of asylum or transit countries, given scarce livelihood opportunities, political and economic pressures, discrimination, and a lack of access to rights or to citizenship. This is why some move onwards in search of protection.⁷⁴

Therefore, the temporary protection mechanism, although it has proven to be an effective solution, should by no means be used as an alternative measure to international protection. On the contrary, it should be used as a **complementary** system to the international protection regime, being implemented as an emergency response to large-scale movements of asylum seekers. However, this does not mean that it is a definitive solution to the problem and that there should be no further examination of measures to be implemented after granting temporary protection status.

As explained by Jean-François Durieux (2021):

Temporary protection is affirmed as a ‘procedure of exceptional character’ to be applied in the event of a mass influx or imminent mass influx’. Emphasis on the procedural character of temporary protection is essential, as it discards the notion that temporary protection constitute an alternative or additional status.⁷⁵

In other words, this means to say that after the implementation of temporary protection and the initial control of the emergency situation that led to its activation, the EU should study the possibility of transitioning to a durable protection status, since TP beneficiaries are left in a limbo state that causes great insecurity and uncertainty.

However, as noted by Guy S. Goodwin-Gill (1996) “[t]he political and legal reality is that States generally have not undertaken, and foreseeably will not undertake, an obligation to grant asylum in the sense of a lasting solution.”⁷⁶ Apparently, this is exactly the path to which the activation of TPD is leading, since, more than a year after its implementation, little is being said about the transition from temporary protection to a lasting and definitive solution.

As stated by the ASILE, a project created to study the interactions between emerging international protection systems and the United Nations Global Compact for Refugees (2022):

⁷⁴ DURIEUX, Jean-François (2021) - “Regional Refugee Regimes: Europe”, in *The Oxford Handbook of International Refugee Law*, pp. 678-695.

⁷⁵ GOODWIN-GILL, Guy S. (1996) - *The Refugee in International Law*. United States: Oxford University Press, pp. 201-202.

⁷⁶ ASILE, Global Asylum Governance and the European Union’s Role, “Next Step after the Termination of Temporary Protection Regime: Transition to RSD Procedures?”, (12/09/2022). <https://www.asileproject.eu/next-step-after-the-termination-of-temporary-protection-regime/>, accessed 11/02/2023.

The circumstances leading to the declaration of TP regimes naturally require the host states to focus on covering the immediate needs of the displaced persons. However, the dynamics of the regime also necessitates the planning for the post-TP period, which is often neglected by the host states in their haste. The EU is not an exception to this trend. Currently, potential steps after the termination of the TP regime [are] not discussed – at least vocally – at the EU level.⁷⁷

One year after the activation of the TPD, the EU was expected to have transitioned from an immediate response to a long-term strategy, that is, a durable protected status. As noted by the ECRE, “[t]he war may continue for many years, with neither ceasefire nor settlement, and with continued occupation, violence and uncertainty.”⁷⁸ If this happens, even though they and their government may wish for it, millions of people will still be unable to return to their homes and will remain displaced across Europe.

However, we are not really seeing any movement or discussions in this direction.

Which leads to another important question: is the temporary protection mechanism being used as a “*camouflage*” to cover the deficiencies and weaknesses in the current asylum system? And more importantly, are these temporary solutions enough to fill the gaps and vulnerabilities and correct weaknesses of the international regime or do they just “mask” them until the problem no longer exists? This is an important aspect to be analyzed, as, unfortunately, the situation in Ukraine is not - and will not be - the first and last humanitarian emergency to be faced by the EU.

Safe and quick admission to the territory of a host country is one of the greatest concerns and needs of people fleeing humanitarian crises and persecution. On the other hand, this is also one of the main gaps in the international protection regime, especially in situations involving large numbers of asylum seekers. The admission process is the first and most important step and defines everything that follows, yet the international protection regime appears to be insufficient to effectively address this matter.

As Meltem Ineli-Ciger (2018) states:

The most immediate need of a person fleeing persecution is to be admitted into a safe territory though the 1951 Convention does not explicitly deal with admission.

⁷⁷ Europe Council on Refugees and Exiles, “Editorial: Asylum reforms: Ukraine Stimulates a Rethink at the Restart”, (09/09/2022). <https://ecre.org/editorial-asylum-reforms-ukraine-stimulates-a-rethink-at-the-restart/>, accessed 20/02/2023.

⁷⁸ RASCHE, Lucas, Hertie School – Jacques Delors Centre, “Implementing Temporary Protection in the EU”. <https://www.delorscentre.eu/en/detail/publication/temporary-protection>, accessed 23/02/2023.

Moreover, the 1951 Convention does not provide any guidance to states on how to cope with large-scale influx situations and address the financial, social and security related challenges that mass influx situations create. However, various initiatives have been adopted at the national, regional and international level to address the shortcomings of the 1951 Convention and one of these initiatives is temporary protection.⁷⁹

The flaw identified in the international protection mechanism particularly related to situations involving a massive influx of displaced persons and a quick and reliable admission process can be addressed through a temporary protection regime. That is precisely the scope of the TPD. It is in this sense that the temporary protection mechanism becomes an important tool of the international protection regime, as it is indeed capable of covering one of its major weaknesses.

However, in the words of Lucas Rasche (2022):

[It should be acknowledged] that activating the TPD is just the opening shot in a longer-term challenge to receive and integrate Ukrainian refugees – not another crisis response completed. Member states should now focus on addressing the challenges that have emerged from the decision to activate the Directive. They will further have to devise a forward-looking policy for making real the rights and entitlements that come with temporary protection status. This will require the EU's migration and asylum policy to shift from reactive to proactive.⁸⁰

The implementation of the TPD has definitely demonstrated that the EU is capable of handling an emergency situation with efficiency, cooperation, and solidarity, but this does not exclude the need to establish a common system that addresses refugee and asylum challenges both in normal times and in situations of pressure and potential crisis.

Furthermore, another flaw identified in international protection mechanisms, including the CEAS, is related to integration measures. According to Ulrike Brandl (2022):

Integration in European Union migration policy is a topic characterised by the gap between the lack of legislative competence of the EU and the essential importance of comprehensive, effective and targeted integration measures for a successful migration policy. Integration has always been a key element for a prosperous relation between citizens and immigrants and gained more importance in the

⁷⁹ INELI-CIGER, Meltem (2018) - *Temporary Protection in Law and Practice*, v. 10, pp. 149-167. Netherlands: Brill. https://doi.org/10.1163/9789004327535_008, accessed 22/01/2023.

⁸⁰ Europe Council on Refugees and Exiles, "Editorial: Asylum reforms: Ukraine Stimulates a Rethink at the Restart", (09/09/2022). <https://ecre.org/editorial-asylum-reforms-ukraine-stimulates-a-rethink-at-the-restart/>, accessed 20/02/2023.

aftermath of the so-called refugee crisis in 2015 and 2016, when even the cohesion of societies seemed endangered by the increase of refugees and migrants intending to take up long-term residence in Member States.⁸¹

This issue has been identified for some time: integration measures were listed as one of the topics to be addressed in the New Pact, and some other efforts have been made in the past to try to promote more effective integration of beneficiaries of international protection in the host state.⁸² As stated by Ulrike Brandl (2022):

[The New Pact] repeats the enumeration of obvious deficits in various areas. These include unemployment, lack of educational or training opportunities and limited social interaction. The Commission then stresses that the integration of migrants should be a key element in the general EU agenda to promote social inclusion.⁸³

However, as previously discussed, the same integration deficits that were listed in the Pact are already causing TP beneficiaries to face several challenges, which further demonstrates that the TPD is not sufficient to cover the gaps and weaknesses of the CEAS and its activation does not eliminate the need for a reform of the system.

As assertively stated by the ECRE (2020):

The Ukraine displacement crisis shows the approaches and tools that work. The TPD is part of the Common European Asylum System, and it was activated in order to ensure that the system continues to function in the face of a major influx of people. Some of the efforts, resources, unity, and focus on protection need to be applied to the ongoing management of the system as a whole.⁸⁴

In fact, this is exactly what the New Pact on Migration and Asylum aimed to achieve. As stated by the European Commission when announcing the New Pact:

[The] New Pact on Migration and Asylum sets out the end-to-end approach needed to make migration management in Europe fair, efficient and sustainable. The EU

⁸¹ BRANDL, Ulrike (2022), “Integration in the New Pact on Migration and Asylum: A Key Element of a Successful Migration Policy, but no EU Legislative Competence” in *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, pp. 289-299.

⁸² Such as the European Partnership for Integration, developed in 2017 between the European Commission and European Social and Economic Partners “to create opportunities for integrating refugees and other migrants into the EU labour market”. Confederation Syndicat European Trade Union, *Joint statement by the European Commission and Economic and Social Partners on a renewal of the European Partnership for Integration*. <https://www.etuc.org/en/document/joint-statement-european-commission-and-economic-and-social-partners-renewal-european>, accessed 19/03/2023.

⁸³ BRANDL, Ulrike (2022), “Integration in the New Pact on Migration and Asylum: A Key Element of a Successful Migration Policy, but no EU Legislative Competence” in *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, pp. 289-299.

⁸⁴ European Commission, “Communication From the Commission on a New Pact on Migration and Asylum”, Brussels: (23/09/2020). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609>, accessed 23/02/2023.

will now have to show the will to make the New Pact a reality. This is the only way to prevent the recurrence of events such as those seen in Moria [in 2020]: by putting in place a system to match the scale of the challenge. A common European framework for migration management is the only way to have the impact required. Bringing policies together in this way is essential to provide the clarity and results needed for citizens to trust that the EU will deliver results that are both robust and humane.⁸⁵

The EU's response to dealing with people who fled Ukraine after the Russian invasion was extraordinary and proved to be effective, despite the challenges that were faced. Now, it remains to be seen how the EU will handle the consequences that come after the implementation of temporary protection, and more importantly, whether it will use the lessons and tools learned from this episode to reform the CEAS so that it can benefit all those in need of international protection, not just a portion of them.

CONCLUSION

The activation of the Temporary Protection Directive for the first time in its history was a surprising and remarkably positive response from the European Union, averting what could have been a devastating humanitarian crisis.

Member States and the population, in general, proved to be extremely cooperative and supportive of those who needed help at such a desperate time. It was a great example of solidarity and humanity, and the European Union demonstrated that it has all the necessary tools to deal with asylum seekers in a quick and effective way.

What is not known, however, are the real reasons behind the activation of the temporary protection mechanism. While it was expressly stated that the event did meet the legal requirement for triggering the TPD - that is, a mass influx or an imminent mass influx of asylum seekers at the same time - there have been other situations in the past in which the temporary protection was clearly needed and yet was not used.

So, what has changed? In other words, what was different about this event from the others in the past?

Some authors believe that the reasons behind the implementation of temporary protection to help Ukrainians were purely due to political and even discriminatory factors. In fact, we cannot pretend that there is not a huge contrast between the

⁸⁵European Commission, "Communication From the Commission on a New Pact on Migration and Asylum", Brussels (23/09/2020). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609>, accessed 15/02/2023.

treatment given to the TP beneficiaries and to other refugees, like those coming from Syria, for example.

While people fleeing Ukraine enjoyed a mechanism that granted almost immediate protection and with minimum requirements, every year thousands of people seeking protection are barred at European borders for "lacking legal means" and are treated unreasonably and even violently, having to find irregular and dangerous ways to enter the countries, as seen between 2014-2016, when many people - including children - lost their lives at sea.

Unfortunately, different treatment was observed even during this event, when people of different races fleeing Ukraine were treated with violence and reprisals, clearly evidencing the racial discrimination suffered by them.

The sad and undeniable truth is that there is indeed different treatment given to those seeking protection on the basis of race and nationality, and this is seen in the overall asylum and refugee systems. Therefore, we must not forget that the activation of the Temporary Protection Directive in the face of the Ukrainian invasion was an exceptional measure adopted in an exceptional event.

However, regardless of the reasons behind its implementation, it is undeniable that the mechanism was essential to protect millions of people, standing out for its effectiveness and promptness. Now, it remains to be seen what comes after its activation, since the problem is far from being over.

Temporary Protection is an interim between the admission and registration of a large group of people seeking asylum and the actual granting of international protection status. The system should be used as a "port of entry", effective and immediate, and not as a way to mask the flaws and weaknesses in the asylum system until the problem ceases to exist - because it won't.

Once the emergency situation has been contained, that is, after the temporary protection has been implemented and a large group of asylum seekers has been safely and quickly admitted to the host country, it is up to the State to start working on durable solutions and the transition of the temporary protection to a long-lasting status.

The activation of the TPD was important to show that the EU does have all the necessary tools to deal with refugees and humanitarian emergencies in an effective way.

Moreover, it has also shown that there can be great cooperation and solidarity between Member States when they share a common goal. Now, it is up to the EU institutions to take the lessons learned from the implementation of the Temporary Protection Directive and turn it into a definitive reform of the international protection system.

Providing safe and legal ways to help and support asylum seekers and refugees in rebuilding their lives should be the norm, not the exception. The activation of the temporary protection mechanism has shown that it is possible to develop and achieve a comprehensive and effective response to situations involving a mass influx of displaced persons, and it is also possible to incorporate this instrument into a durable regime.

Once its effectiveness has been proven, the Temporary Protection should be used as a relief instrument until the emergency situation is under control and can be dealt with permanently by the international protection regime. Now, with the tools and lessons learned in hand, it is time to move forward with the negotiations of the CEAS reform package, using the Temporary Protection Directive as a temporary and complementary mechanism - as it should be - and no longer as an alternative system.

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