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## A SEEMINGLY OBSOLETE MECHANISM ACTIVATED

Temporary protection for forcibly displaced Ukrainians - a paradigm change of the European Union on how to deal with future mass influx situations?

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## ABSTRACT

The European Union faced an extreme mass influx situation, after Russian armed forces launched a large-scale aggression in Ukraine on 24 February 2022. The European Union reacted promptly with the activation of the temporary protection mechanism on 2 March 2022 for Ukrainians fleeing the war in order to ensure a high protection standard. However, this mechanism has so far been never used since its implementation within the Temporary Protection Directive 2001 - despite the fact that the European Union faced several mass influx situations in the past. This research aims to answer the question if the activation of the Directive can be considered as a paradigm shift of the European Union on how to deal with the predicted mass influxes of the future, stemming from European as well as non-European countries - or if the activation of the Directive can be seen as circumstantial and only applicable in the Ukrainian case. The study sheds light on the temporary protection regime, its challenges and advantages and aims to answer the question if temporary protection in the concrete form is a promising approach to deal with future mass influx situations. Furthermore, it elaborates on the previous mass influx situations since the implementation of the Directive, the failed activation requests of the past and on the EU's approach to deal with these previous mass exodus situations. The study further focuses particularly on the question why the Temporary Protection Directive has been seemingly obsolete for the last 21 years and compares these reasons to the prompt activation in 2022. Taking all these aspects into account, recommendations to overcome the challenges and ensure a high protection standard for all future mass influx situations are developed at the end of the research.

## TABLE OF ABBREVIATIONS

CEAS	Common European Asylum System
EASO	European Union Agency for Asylum
EU	European Union
Europol	EU Agency for Law Enforcement Cooperation
GDP	Gross Domestic Product
IOM	International Organization for Migration
NATO	Nord Atlantic Treaty Organization
NGO	Non-governmental Organization
RSD	Refugee Status Determination
TEC	Treaty Establishing the European Community
TFEU	Treaty of the Functioning of the European Union
TPD	Temporary Protection Directive
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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## I. INTRODUCTION

### 1. Context and Relevance

The European Union (EU) is facing another extreme mass influx situation, after Russian armed forces launched a large-scale aggression in Ukraine on 24 February 2022.<sup>1</sup> In only five days the number of people fleeing Ukraine to neighboring EU countries grew rapidly to half a million people.<sup>2</sup> Almost immediately after the Russian invasion of Ukraine, the European Union reacted to the already foreseen displacement of Ukrainian people with an extraordinary Justice and Home Affairs Council meeting to discuss the possibility of activating the Temporary Protection Directive 2001 (TPD).<sup>3</sup> On 2 March 2022 the Commission proposed the activation to the Council<sup>4</sup> and only one week after the invasion started - while the number of displaced persons had already reached one million people - the Council of the European Union unanimously decided on the existence of a mass influx situation and the necessity to activate temporary protection for persons fleeing the war in Ukraine.<sup>5</sup> This promptly implemented temporary protection mechanism for displaced people from Ukraine aims to administer special measures of protection for refugees, such as residency permits, employment rights, housing access, medical and social welfare as well as access to education, in “the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin.”

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<sup>1</sup> Meltem Ineli-Ciger, ‘5 Reasons Why: Understanding the Reasons behind the Activation of the Temporary Protection Directive in 2022 – EU Immigration and Asylum Law and Policy’ <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 16 March 2022.

<sup>2</sup> UNHCR, ‘News Comment: UNHCR Welcomes EU Decision to Offer Temporary Protection to Refugees Fleeing Ukraine’ (*UNHCR Press Releases*) <<https://www.unhcr.org/news/press/2022/3/6221f1c84/news-comment-unhcr-welcomes-eu-decision-offer-temporary-protection-refugees.html>>.

<sup>3</sup> Council of the European Union, ‘Extraordinary Justice and Home Affairs Council, 27 February 2022’ (*Council of the European Union - Meetings*) <<https://www.consilium.europa.eu/en/meetings/jha/2022/02/27/>>.

<sup>4</sup> European Commission, ‘Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001 and Having the Effect of Introducing Temporary Protection’ (2 March 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2022:91:FIN>> accessed 16 March 2022.

<sup>5</sup> Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022.

(Article 1 Temporary Protection Directive).<sup>6</sup> Nevertheless, this mechanism - which was adapted after the enormous displacement during the Yugoslav wars, in order to harmonize a certain standard for temporary protection in the case of mass influx situations - has never been activated since its implementation in 2001.<sup>7</sup> The European Union did however face several situations of a high influx of refugees and displaced persons in the last decade, especially in 2015, when more than one million, mostly Syrian refugees, requested asylum in the European Union.<sup>8</sup> A declined activation request of the temporary protection mechanism of Italy and Malta in 2011<sup>9</sup> and the rejected call of the European Parliament to activate the Directive in 2015, have led many scholars to the conclusion that the Temporary Protection Directive was already obsolete.<sup>10</sup> A study of the European Commission, which examined the reasons for non-activation of the Directive in 2016, indicates that political reasons as well as legal problems are the main reasons why the Directive has not been considered as a solution to ensure a high level of protection for displaced persons during these previous mass influx situations.<sup>11</sup>

The outstandingly fast reaction of the European Union to activate this before never used mechanism, the solidarity of all the EU Members as well as the extremely well-organized protection for such an extreme mass of persons fleeing the unprovoked and unjustified invasion of Russia on Ukraine was not only warmly welcomed by different international organizations

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<sup>6</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof 2001.

<sup>7</sup> Deniz Genç and Aslı Şirin Öner, 'Why Not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union' [2019] *International Journal of Political Science & Urban Studies* 1.

<sup>8</sup> Eurostat, 'Asylum Applicants by Type of Applicant, Citizenship, Age and Sex - Annual Aggregated Data (Rounded) 2015, 2016' (*Statistics | Eurostat*)

<[https://ec.europa.eu/eurostat/databrowser/view/MIGR\\_ASYAPPCTZA\\_\\_custom\\_1142314/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/MIGR_ASYAPPCTZA__custom_1142314/default/table?lang=en)> accessed 16 March 2022.

<sup>9</sup> Meltem Ineli-Ciger (ed), 'Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean', *Seeking Asylum in the European Union* (Brill | Nijhoff 2015)

<<https://brill.com/view/book/edcoll/9789004290167/B9789004290167-s008.xml>> accessed 6 March 2022.

<sup>10</sup> European Parliament, European Parliament resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP)) 2015 4.

<sup>11</sup> European Commission - Directorate General for Home Affairs, 'Study on the Temporary Protection Directive: Final Report.' (Publications Office 2016) <<https://data.europa.eu/doi/10.2837/561426>> accessed 16 March 2022.

such as United Nations High Commissioner for Refugees (UNHCR)<sup>12</sup> and other Non-governmental organizations (NGOs) but raises hope for a paradigm change on the European Union's approach to deal with future mass displacements. *"This should now become the model for dealing with future mass displacements of people, such as we have also seen in Syria, Afghanistan and elsewhere,"* said for example Róisín Pillay, the Director of the International Commission of Jurists Europe and Central Asia.<sup>13</sup> Since current socioeconomic predictions estimate a mass influx of 20 million persons from North Africa and the Middle East towards the European Union in the next 10-20 years, such a paradigm change would be more than crucial to ensure a security and protection for every person fleeing towards Europe.<sup>14</sup> However, the European Union's approach to deal with these previous mass influx situations mostly focused - besides certain emergency relocation mechanism to relieve the immense pressure on the national asylum systems of first reception countries such as Italy and Greece<sup>15</sup> - on measures to strengthen the EU border control system.<sup>16</sup> This approach seems to be still foreseen for future influx situations and is especially reflected in the budgetary developments of the border control agency FRONTEX, which stocked up the budget from 142 million Euro in 2015 to 460 million Euro in 2020.<sup>17</sup>

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<sup>12</sup> UNHCR, 'News Comment: UNHCR Welcomes EU Decision to Offer Temporary Protection to Refugees Fleeing Ukraine' (n 1).

<sup>13</sup> International Commission of Jurists, 'EU/Ukraine: Temporary Protection Directive Should Provide Effective Protection for All Fleeing the Hostilities in Ukraine | International Commission of Jurists' <<https://www.icj.org/eu-ukraine-temporary-protection-directive-should-provide-effective-protection-for-all-fleeing-the-hostilities-in-ukraine/>> accessed 16 March 2022.

<sup>14</sup> Hannes Tretter, 'Eine Alternative Zur „Festung Europa“?' <[https://international.or.at/wp-content/uploads/2021/10/International\\_5\\_2021-Tretter.pdf](https://international.or.at/wp-content/uploads/2021/10/International_5_2021-Tretter.pdf)>.

<sup>15</sup> Genç and Şirin Öner (n 6).

<sup>16</sup> Council of the European Union, 'Strengthening the EU's External Borders - Concilium' (*Council of the European Union - Policies*) <<https://www.consilium.europa.eu/en/policies/strengthening-external-borders/>> accessed 16 March 2022.

<sup>17</sup> Euro-Med Human Rights Monitor, 'Frontex: Accountability Declined' (2021) <<https://euromedmonitor.org/uploads/reports/frontexrep.pdf>>.



## **2. Objectives and scope of this thesis**

The developments mentioned in the respective chapter raise the question of the reasons to activate the Directive for Ukrainian displaced people, as the refugee influx of 2015 recorded a similar number of refugees crossings the borders of the European Union. Considering the differences between these situations and the previous emergency approach of the European Union to deal with a high influx of refugees from non-European states, calls into question which challenges would have to be overcome to ensure the same immediate and high protection for other - non-European - refugee waves of the future. Under these aspects it seems to be necessary to change the Directive in a way which ensures compliance with the international refugee protection framework and eventually guarantees the highest protection for individuals fleeing within a mass influx situation.

Therefore, this study aims to answer the first research question if the activation of the Directive can be considered as a paradigm shift to tackle *all* mass influx waves of displaced persons of the future. In other words, if the Temporary Protection Directive is a promising solution to cope with the predicted future mass influx situations, especially with influxes stemming from non-European regions. The research furthermore tries to answer, which challenges would have to be overcome to ensure an activation of the temporary protection mechanism in all mass influx situations of the future. More precisely, which potential changes of the Temporary Protection Directive should the EU take into consideration to guarantee a similar immediate and high protection standard for all groups of displaced persons entering the European Union within mass influx situations – independently of the region they are coming from.

To answer these questions, the research elaborates on why the Temporary Protection Directive has been seemingly obsolete for the last 21 years, even though the European Union faced several mass influx situations, especially in the years 2011 and 2015/2016. Taking into consideration the already available information published on the reasons for the non-activation of the Temporary Protection Directive, this research will go beyond the existing research and will furthermore discuss the approach of the European Union to deal with these high influx situations. The thesis then sheds light on the rather unexpected and extremely prompt decision

of the Council to declare the Ukrainian influx into the European Union as mass influx situation and activate the so far never used temporary protection mechanism and elaborate on the reasons why the Directive got so easily activated in 2022, while it has never been close to activation in previous situations. In a last step, the research concludes the findings of the study and tries to answer the main research questions if the Directive in the concrete form will be able to cope with the mass influx situations of the future and if the activation of the Directive can be seen as something circumstantial applied only for the Ukrainian refugees and proposes recommendations in this regard.

### **3. Methodology**

This thesis mainly uses qualitative methodology tools in form of an explanatory and reform orientated approach. Since the research questions mostly aim to gain an understanding, if the current European approach for mass influx situations will be able to deal with future incoming refugee flow and asks the question how to overcome the challenges in this regard, an explanatory and reform orientated approach will be mostly used. The qualitative approach includes secondary desk research through a literature review of existing studies and academic papers. For the first part of the research, the Study of the European Commission on temporary protection is especially important since it outlines the main reasons for non-activation. Furthermore, to elaborate on the question how the European Union dealt with previous mass influx situations the number of mechanisms will get analyzed through the legal framework as well as academic papers. For the fourth part of the thesis, the activation of the temporary protection Mechanism and the differences between previous mass influx situations and the situation in 2022, the above-mentioned academic papers will be part of the analysis, while a focus is set on elaborating the differences from an empirical point of view. On basis of the outcome of these just explained parts policy recommendations will be developed.

The explanatory research design of this thesis will add a new perspective to the previous discussion in the field of temporary protection, as it elaborates beyond the already extensively researched reasons for the non-activation of the Temporary Protection Directive and sheds light on the current and prompt reaction of the European Union in the case of Ukrainian refugees.

Furthermore, this research will elaborate on the clearly existing challenges of the European Union to deal with future mass influx situations and add new perspectives on how to deal with these future mass influx situations through policy recommendations.

## **II. THE TEMPORARY PROTECTION DIRECTIVE – A TOOL TO DEAL WITH MASS INFLUX SITUATIONS**

The Temporary Directive 2001/55/EC was implemented in 2001 as a response to the large number of displacements due to the Yugoslav wars, especially from Bosnia and Kosovo. During that time, it became clear, that there was a need to harmonize the policy of temporary protection in the European Union and to adopt a minimum standard for giving temporary protection to displaced persons from third countries, who are unable to return to their country of origin due to an armed conflict or generalized violations of human rights.<sup>18</sup> The Directive provides an EU wide model of immediate group-based protection in the case of a mass influx of refugees into the European Union. The activation of the temporary protection mechanism is time-bound for an initial period of one year with the possibility of extension in six-month periods up to two years if the reason for the implementation persists.<sup>19</sup> The Temporary Protection Directive is one of the five Directives constituting the Common European Asylum System (CEAS) and was adopted based on Art 63 (2) of the Treaty Establishing the European Community (TEC) - today Art 78 (1) and (2) (c) and (g) Treaty of the Functioning of the European Union (TFEU). It aims to assist the asylum systems of the Member States, which especially suffer from large inflows of refugees, while promoting a fair sharing system of responsibility between the Member States,<sup>20</sup> as well as providing consistent rights to beneficiaries, such as residency permits, employment rights, access to education, housing access and social welfare.<sup>21</sup>

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<sup>18</sup> Karoline Kerber, 'The Temporary Protection Directive 4' (2002) 4 *European Journal of Migration and Law* 193, 195f.

<sup>19</sup> Sergio Carrera and others, 'The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy' 10 <<https://cadmus.eui.eu/handle/1814/74394>> accessed 3 May 2022.

<sup>20</sup> Marco Di Scaria, 'Temporary Protection Directive, Dead Letter or Still Option for the Future? An Overview on the Reasons behind Its Lack of Implementation' 7.

<sup>21</sup> Achilles Skordas, 'Temporary Protection Directive 2001/55/EC', *EU Immigration and Asylum Law* (2nd edn, Nomos Verlagsgesellschaft mbH & Co KG 2016) 1058f.

## **1. Historical background and conception of the Directive**

As just mentioned, the initiating event for the European Union to discuss the harmonization of temporary protection was the outstandingly high refugee flows caused by the conflicts in former Yugoslavia. The sudden displacement of more than 500.000 Bosnians in the years 1992-1993 appeared to be a situation that could not be resolved through the legal framework of the 1951 Refugee Convention<sup>22</sup> since the Convention was implemented for the case of displacement of small groups of political refugees<sup>23</sup> and was not created to give protection to millions of refugees fleeing from a conflict in a short amount of time.<sup>24</sup> Already in 1992, the European Union stressed the importance to offer protection on a temporary basis. This led to formalizing the first commitments of the EU Member States in the “Resolution on certain common guidelines as regards to the admission of particularly vulnerable persons from the former Yugoslavia”, which was a conceptual framework for future cases of mass influx situations of a regional character- without an obligation of the Member States to grant temporary protection as an individual right and without setting a common standard of treatment of persons protected by temporary measures within the EU.<sup>25</sup> However, the Treaty of Amsterdam 1997 eventually required the Council in its Art 63 to adopt measures on temporary protection. The first proposal for a new temporary protection regime of the Commission in 1997 brought resistance from several Member States, especially regarding the issue of burden-sharing.<sup>26</sup> Another sudden and extreme flow of half a million Kosovar refugees seeking shelter in EU countries due to the Kosovo war in 1998-1999<sup>27</sup> was eventually the wakeup call for the Member States and the European Council to acknowledge the need for an agreement on a harmonization of the temporary protection issues based on solidarity between the Member States - which finally led

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<sup>22</sup> Medina Dzibur, ‘Temporary Protection Status: A Yugoslavian Precedent’ (2020) 27 *Indiana Journal of Global Legal Studies* 391, 396 f.

<sup>23</sup> Khalid Koser and Richard Black, ‘Limits to Harmonization: The “Temporary Protection” of Refugees in the European Union’ (1999) 37 *IOM* 521, 525f.

<sup>24</sup> Medina Dzibur, ‘Temporary Protection Status: A Yugoslavian Precedent’ (2020) 27 *Indiana Journal of Global Legal Studies* 391, 396 f.

<sup>25</sup> Skordas (n 20), 1059, 1060.

<sup>26</sup> Walter Kälin, ‘Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism’, *German Yearbook of International Law* (44th edn, Duncker & Humblot GmbH, Berlin 2001) 204 <<https://www.jstor.org/stable/j.ctv1q6b9sr>> accessed 22 March 2022.

<sup>27</sup> Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Volume 10, Brill 2018 2018) 142 <<https://brill.com/view/title/33781?language=en>> accessed 30 April 2022.

to the adoption of the Temporary Protection Directive on the 20 of July 2001 within the Common European Asylum System.<sup>28</sup>

The regional systems of Africa and Latin America implemented an expansion of the refugee definition to a broader category for (especially mixed) mass influx situations in their regional asylum systems. These regional temporary protection mechanisms serve the main purpose to close the gap between the narrow approach of the refugee definition of the 1951 Refugee Convention, since the Convention does not generally offer protection for every person fleeing armed conflicts and generalized violence. The European Union, however, seemed to have a different main motivation. The Explanatory Memorandum of the Proposal of the Temporary Protection Directive 2001 as well as Art 2(a) of the Directive highlighted the necessity to implement an interim instrument for situations of mass influx in order to prevent the danger of overburdening the European Union's asylum system. Therefore, the main objective was the creation of a mechanism that contributes to solidarity and burden-sharing within the regional asylum system of the EU through physical reception of displaced persons as well as financial support between the Member States.<sup>29</sup>

## **2. Procedural requirements**

### **2.1. Activation**

According to Art 5 (1) of the Temporary Protection Directive, the existence of such a mass influx of displaced persons and the activation of the directive needs to be established by a decision of the Council adopted by a qualified majority. This decision of the Council is based on a proposal of the Commission, which must at the very least include a description of the specific groups of persons who are to be beneficiaries of temporary protection, the date on

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<sup>28</sup> Jean-François Durieux, 'Temporary Protection and Temporary Refuge', *The Oxford Handbook of International Refugee Law*, Edited by Cathryn Costello, Michelle Foster, and Jane McAda (Oxford University Press 2021) 8,9 <<https://www.oxfordhandbooks.com/view/10.1093/law/9780198848639.001.0001/law-9780198848639>> accessed 30 April 2022.

<sup>29</sup> Kälin (n 24) 208.

which the temporary protection will be in place and an estimation of the scale of displaced persons (Article 5 (2)).<sup>30</sup> Such a proposal can be also triggered by a Member State through a formal request directed to the Commission, which the Commission needs to assess and decide if the proposal should be forwarded to the Council.<sup>31</sup> The Council has eventually the exclusive authority to determine the estimated number of people and the specific group upon an examination of the situation through information received from the Commission, the Member States (especially on their reception capacity), UNHCR, and other relevant (international) refugee organizations (Art 5 (4)). However, the decision of the Council does not bindingly distribute a certain number of persons to the different Member States.<sup>32</sup>

## 2.2. Beneficiaries of temporary protection

Art 2 (c) of the Directive defines the beneficiaries of temporary protection and determines that “displaced persons” should mean “third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organizations, and are unable to return in safe and durable conditions because of the situation prevailing in that country”.<sup>33</sup> This definition should particularly include persons who have fled areas of armed conflict or endemic violence and persons at serious risk of - or who even have been already the victims of - systematic or generalized violations of their human rights. These individuals may furthermore be protected by Article 1a of the Geneva Convention or other regional or national instruments giving international protection.<sup>34</sup> Art 7 of the Directive clarifies, however, that the Member States may expand the protection mechanism to further groups of displaced persons that were not included in the

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<sup>30</sup> Kerber (n 17) 198f.

<sup>31</sup> Lara Krayem, ‘The EU Response to the 2015 Refugee Flows: A Missed Opportunity to Use the Temporary Protection Directive?’ (2020) Volume 7, Issue 1, Spring 2020 *IALS Student Law Review is licensed* <<https://doi.org/10.14296/islr.v7i1.5123>>.

<sup>32</sup> Kerber (n 17).

<sup>33</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof 2001 Article 2 (c).

<sup>34</sup> *ibid.*

Decision of the Council when they are displaced from the same region or country of origin and for the same reasons.<sup>35</sup>

### 2.3. Definition of Mass influx

The Directive defines a mass influx situation in Art 2 (d) as the “arrival in the community of a large number of displaced persons, who came from a specific country or geographical area, whether the arrival in the Community was spontaneous or aided, for example through an evacuation program.”<sup>36</sup> Generally, Art 2 clarifies that the mass influx can be spontaneous or the arrival of the displaced persons can be controlled through for example evacuation programs.<sup>37</sup> According to the Annex of the Councils Directive, the determination of a situation as a mass influx, therefore, requires three elements: (i) the displaced person's origin is from the same area or country, (ii) it needs to be a large number of such displaced persons entering the European Union and (iii) a sudden arrival of these large numbers of displaced persons.<sup>38</sup> This definition in the Directive of a mass influx situation is however very vague, as it does not quantitatively nor qualify clarify the existence of such a situation.<sup>39</sup> UNHCR provided in its Executive Committee Conclusion No. 100 on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations some elements that should be further considered for the identification of a mass influx situation: “(i) considerable numbers of people arriving over an international border, (ii) a rapid rate of arrival, (iii) inadequate absorption or response capacity in host States, particularly during the emergency, (iv) individual asylum procedures being not able to deal with the assessment of such large numbers.”<sup>40</sup> Each situation should be examined on a case-by-case basis with the help of these elements.<sup>41</sup> While some scholars like Durieux and McAdam argue

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<sup>35</sup> Kerber (n 17) 206.

<sup>36</sup> Temporary Protection Directive 2001 Article 2 (d).

<sup>37</sup> Nuria Arenas, ‘The Concept of “Mass Influx of Displaced Persons” in the European Directive Establishing the Temporary Protection System’ (2005) 7 European Journal of Migration and Law - EUR J MIGR LAW 435, 440.

<sup>38</sup> Annex to Council document 8871/00 ASILE 26 (COM (2000) 303), 16.

<sup>39</sup> Dzubur (n 22) 403.

<sup>40</sup> UNHCR Excom Conclusion No 100 ‘Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations’ (2004).

<sup>41</sup> Meltem Ineli-Ciger, ‘Revisiting Temporary Protection as a Protection Option to Respond to Mass Influx Situations’ [2015] Exploring the Boundaries of Refugee Law: Current Protection Challenges 197, 202.



that the suddenness of the influx is a very distinctive feature of a mass influx situation<sup>42</sup>, Meltem Ineli-Ciger indicates in her dissertation, that the meaning of the definition in Art 2 can be clarified to a certain extent through the proposal of the Commission for the Directive. She argues that also a gradual arrival of a large number of persons can indicate the existence of a mass influx situation<sup>43</sup> since the proposal notes that “a point may come at which the movement of people, gradual at the outset, intensifies in such a way that it becomes massive and the normal asylum system is unable to absorb the flow”.<sup>44</sup> The main indication for the existence of a mass influx situation would therefore be the sudden *or gradual* arrival of a high number of persons seeking international protection in the Member States from the same region or country and that the national asylum systems are endangered to be unable to cope with the refugee flows.<sup>45</sup> Meltem Ineli-Ciger’s line of argumentation can be followed since this is very much in line with the initial concept and purpose for drafting the Directive as explained above. This argumentation is moreover in line with Skoda's analysis of Art 2 (d), as he argues that the suddenness of the situation is one of the main indicators but not the key ingredient of the whole temporary protection concept. He further indicates, that the suddenness of the influx can justify the existence of a mass influx by a lower number of displaced people seeking protection – in comparison to a slower but higher number of displaced persons seeking protection in the European Union.<sup>46</sup> This whole line of argumentation is especially also in accordance with the UNHCR summary observations on the Commission's proposal for the Temporary Protection Directive, which clarified that the determination of mass influx situations can only be assessed in relation to the Member States' capacity to receive refugees.<sup>47</sup>

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<sup>42</sup> Jean-Francois Durieux and Jane McAdam, ‘Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16 IJRL 17.

<sup>43</sup> Ineli-Ciger, *Temporary Protection in Law and Practice* (n 26) 151f.

<sup>44</sup> Commission of the European Communities ‘Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between the Member States in receiving such persons and bearing the consequences thereof’ Brussels, 24 May 2000, COM (2000) 303 final 2000/0127 (CNS), 14.

<sup>45</sup> Ineli-Ciger, *Temporary Protection in Law and Practice* (n 26) 155.

<sup>46</sup> Skordas (n 20).

<sup>47</sup> UNHCR summary observations the Commission proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status (COM(2000) 578 final, 20 September 2000), 13.

In a study of the European Commission on the Temporary Protection Directive in the year 2016, the Commission summed up the necessary considerations to declare a mass influx situation as follows: increase in arrival as opposed to previous periods, absolute number of asylum seekers arriving each day, each week or each month, the number of asylum applications to be processed compared to the sum of the available caseworkers, the occupancy rate of reception facilities as well as population, the gross domestic product (GDP) and the unemployment rate of the Member States receiving the arrivals.<sup>48</sup>

#### 2.4. Termination

Temporary protection ends with the termination of the maximum duration and could reach three years in total (Art 4 and Art 6 TPD). Initially, the duration of temporary protection is one year, but it can be extended by another year through the renewal of six months at a time. After the passing of this year, a proposal of the Commission and a qualified majority decision of the Council can offer the temporary protection regime for another year. Art 6 of the Directive further determines that temporary protection can end at any time by a qualified majority adopted Council decision upon a proposal of the Commission, which again can be perused by a Member State's proposal. Such a premature termination needs to be based on the fact that the situation in the country of origin for temporary protection beneficiaries has changed to enable a safe and durable return for everyone who qualified for temporary protection. This termination decision can only be taken with respect to the Member States' obligations for non-refoulement as well as the respect for all the international human rights obligations.<sup>49</sup>

#### 2.5. Transposition of Directive

Art 32 of the Temporary Protection Directive sets the deadline for the transposition of the Directive into the national law of the Member States for the 31 December 2002. According to the study on temporary protection of the European Commission, the majority of the states transposed the Directive into already existing legislation (mostly into asylum acts or aliens'

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<sup>48</sup> European Commission - Directorate General for Home Affairs (n 10) 38f.

<sup>49</sup> Kerber (n 17).

acts). Some Member States, such as France, Greece, Italy, Portugal, and Spain, have established a new act to transpose the directive into national law.<sup>50</sup> A study conducted by the Odysseus Network indicated furthermore that almost all the Member States encountered severe difficulties transposing the Directive and only five Member States had fully transposed all provisions by 2006. Especially crucial in this regard is, as indicated by the Odysseus Study, that some states did not transpose for example the right to family reunification or some states, such as Italy implemented a wider exclusion standard in national legislation- just to mention a few examples. Such discrepancies do not comply with the aim of the TPD 2001 to harmonize the standard of temporary protection.<sup>51</sup>

### **3. Protection Standard**

First of all, it is vital to mention that the protection content of the Directive is in principle in line with the international refugee law and human rights law standards. The Directive explicitly states in the omnibus clause<sup>52</sup> of Art 3 (2) that the Member States need to respect their international human rights obligation of non-refoulement during the application of temporary protection.<sup>53</sup> The text of the Directive furthermore guarantees another key human rights obligation, through the clarification that the Refugee Convention cannot be suspended during the implementation of temporary protection.<sup>54</sup> Therefore, the Directive reflects the situations in which many or even most beneficiaries of temporary protection are individually persecuted and would be considered convention refugees. Art 17 of the Directive, therefore, determines that beneficiaries of temporary protection “must be able to lodge an application for asylum at any time”, while Art 19 guarantees that the Member States must allow persons who are not granted refugee status to enjoy temporary protection again.<sup>55</sup>

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<sup>50</sup> European Commission - Directorate General for Home Affairs (n 10) 12.

<sup>51</sup> Academic Network for Legal Studies on Immigration and Asylum in Europe, ‘Directive 2001/55 Temporary Protection Synthesis Report’ (2006) <<https://odysseus-network.eu/wp-content/uploads/2015/03/2001-55-Temporary-Protection-Synthesis.pdf>>.

<sup>52</sup> Kälín (n 24).

<sup>53</sup> Temporary Protection Directive 2001 Art 3 (2).

<sup>54</sup> Durieux (n 26) 10.

<sup>55</sup> Temporary Protection Directive 2001 Art 17 and Art 19.

The Directive establishes “minimum standards” for beneficiaries of temporary protection in chapter III of the Directive (Art 8-16). As a consequence, states cannot lower the set of rights<sup>56</sup> but have the possibility to implement standards more in favor of the displaced persons falling under the temporary protection regime.<sup>57</sup> The Directive describes the chapter as obligations of the Member States towards the beneficiaries of temporary protection, not as rights of temporary protection beneficiaries, which implies that the beneficiaries of temporary protection have no subjective and judicially enforceable rights towards the Member State. The Directive therefore only sets out the international obligations of the States to grant the persons concerned a certain minimum level of protection in line with the international human rights and refugee protection obligations.<sup>58</sup>

One of the main protection standards is the obligation of the Member States to provide residency permits for the beneficiaries of temporary protection (Art 8). However, the Directive induces besides inter alia rights to data protection and visa rights, also other basic economic and social rights, such as the access to employment as well as self-employment activities, access to suitable housing, access to social welfare as well as equal access to education for minors.<sup>59</sup> More precisely, Member States can in the case of access to suitable accommodation and housing (Art 13) provide either provisional reception centers, public accommodation, single living units, or even the means to obtain housing for individuals. For social welfare, the states minimum standard should be the access to medical care, including at least the essential treatment of illnesses as well as emergency care.<sup>60</sup> The Member States have been reluctant during the drafting of the Directive in regards to the access to broad educational facilities during the activation of temporary protection due to the fear that training and education would eventually bear the risk that displaced persons are discouraged to voluntarily return after the termination of the temporary protection. This is the reason why the Directive has opted for a minimum standard to grant educational system for under 18-year-old beneficiaries “under the

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<sup>56</sup> Carrera and others (n 18) 10.

<sup>57</sup> Kerber (n 17) 198.

<sup>58</sup> Ineli-Ciger, *Temporary Protection in Law and Practice* (n 26) 155f.

<sup>59</sup> *ibid.*

<sup>60</sup> Kerber (n 17) 203.

same conditions as nationals of the host country” (Art 14).<sup>61</sup> Therefore, there are no obligations for the Member States to grant access to the educational system for adults.<sup>62</sup>

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<sup>61</sup> Kälin (n 24) 226.

<sup>62</sup> Kerber (n 17) 204.

### **III. THE TEMPORARY PROTECTION DIRECTIVE AS AN OBSOLETE INSTRUMENT – AN ASSESSMENT OF 21 YEARS OF NON-ACTIVATION**

#### **1. Previous mass influx situations since the implementation of the TPD 2001**

##### 1.1. Attempts of activation and the political debate

During the two decades after the mass influx of refugees due to the Yugoslav wars, which initiated the Temporary Protection Directive, the European Union faced several further mass influx situations. In 2011, during the Arab Spring the connected political insurgencies across North Africa, the external border states of the European Union, especially Italy and Malta, faced a number of over 50.000 refugees.<sup>63</sup> Especially Tunisians reached the European shores, due to the conflicts and violence which followed the collapse of the regime of the former President Zine el-Abidine Ben Ali. However, also the overthrow of the Qaddafi government in Libya and the subsequent Nord Atlantic Treaty Organization (NATO) intervention forced many individuals to leave Libya and these circumstances eventually increased the number of asylum seekers hoping for protection in the European Union. According to UNHCR statistics, the numbers of displaced persons who reached Italy in Lampedusa, mostly by boat, between January and September 2011 reached a number of 55,298 (in detail: 27,983 from Libya and 27,315 from Tunisia).<sup>64</sup>

An even more crucial situation occurred during the years of 2015 and 2016. The European Union had already faced steady waves during the years between 2011 and 2015, but the situation peaked when the number of Syrian displaced persons arriving in the European Union reached the one million mark in the first ten months of 2015.<sup>65</sup> Only in the first half of 2014, 87.000 persons arrived in Italy mainly from Syria and Eritrea. The number of displaced people coming from Syria increased steadily and dramatically, resulting in a total number of already

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<sup>63</sup> Skordas (n 20) 1070.

<sup>64</sup> Ineli-Ciger, *Temporary Protection in Law and Practice* (n 26) 157ff.

<sup>65</sup> Eurostat (n 7).

125.000 applications in 2014. These numbers of displaced persons arriving at the borders of the European Union during this time are however without a doubt limited compared to the extent of the refugee flow towards the neighboring states of Syria, reaching a number of 3.8 million already at the beginning of 2015, including over one and a half million refugees in Turkey.<sup>66</sup> Almost 370.000 Syrians have applied for asylum in the EU Member States in 2015<sup>67</sup> and UNHCR characterized the situation as a mass influx situation under Art 2 of the Directive and called for the activation of the temporary protection mechanism.<sup>68</sup>

The first debate on the possibility of activating the temporary protection mechanism dates back to the mid-2000s after thousands of people sought refuge in Europe due to the armed conflicts in Iraq and Afghanistan. However, several Member States feared the potential pull factors of the implementation of such temporary protection and the debate soon ground to a halt.<sup>69</sup> As just described above, in the beginning of 2011 Italy faced an increased number of asylum applications from Tunisia during the Arab Spring and therefore requested the activation of the temporary protection mechanism for the first time since the existence of the TPD in spring 2011.<sup>70</sup> However, the Commission did not forward a proposal to the Council and the request was therefore not pursued. The responsible EU Home Affairs Commissioner Malmström was of the opinion that Europe did not face a mass influx in this situation, since the numbers of applications would have not met the preconditions of the Directive. Further Malmström argued that there would be other ways to help Italy and Malta to cope with the pressure.<sup>71</sup> According to the Study on temporary protection the request of activation was eventually discussed (but not officially dealt with as a proposal of the Commission) in the Committee of Permanent Representatives to the Council of Europe, within the Council, as well as on a bilateral level with

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<sup>66</sup> Skordas (n 20) 1070.

<sup>67</sup> Eurostat, 'EU Member States Granted Protection to More than 330 000 Asylum Seekers in 2015' (20 April 2016) <<https://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/34c4f5af-eb93-4ecd-984c-577a5271c8c5>> accessed 22 February 2022.

<sup>68</sup> UNHCR, 'UNHCR's Proposals in Light of the EU Response to the Refugee Crisis and the EU Package of 9 September 2015' (2015) <<https://www.refworld.org/docid/55f280774.html>>.

<sup>69</sup> Di Scaria (n 19).

<sup>70</sup> European Commission - Directorate General for Home Affairs (n 10).

<sup>71</sup> Ivan Camilleri, 'Malmstrom Again Rejects Call for Activation of Migration Mechanism' *Times of Malta* (11 April 2011) <<https://timesofmalta.com/articles/view/malmstrom-again-rejects-call-for-activation-of-migration-mechanism.359381>> accessed 2 February 2022.

other Member States. Nevertheless, there was simply no political will to trigger the mechanism, since especially the northern States saw the situation as “not sufficient” since the number of people was much smaller than it was during the Kosovo war, when there were hundreds of thousands of people affected.<sup>72</sup> According to Art 5 TPD the Commission is not obligated to forward any Member State’s request to the Council. However, the Study on temporary protection by the European Commission indicates, that according to the formal intern procedure of the Commission, the Commissioner must at least forward the request with a recommendation based on an assessment of the legal requirements to the College of Commissioners, which then is up to decide whether or not to put the proposal forward to the Council. In the case that the request will not be forwarded, the Commission is supposed to send a “well-motivated response” to the Member State that requested the activation. This formal procedure was, according to the final report of the just mentioned study, not adopted by the Commission in response of Italy’s (as well as Malta’s) request. Mentionable in this regard is furthermore the fact that, the Commission not only not followed the formal procedure to deal with such request but more so questioned the fulfillment of the formality requirements of the state’s requests. Italy’s request was made through approaching the European Commission through its institutional channels instead of writing an official letter, which was doubted as not sufficient by the Commission.<sup>73</sup> After declining Italy’s request to activate the Directive, the EU mainly responded to the mass arrivals with mechanisms to strengthen the border controls as well as the surveillance along the Mediterranean borders, especially through extending the FRONTEX operations in this area. The Italian government adopted national temporary residency for Tunisian citizens that entered Italy between 1<sup>st</sup> January and 6<sup>th</sup> of April, with the right to free movement within the EU in April 2011, after the Commission did not forward the request to activate the temporary protection mechanism of the EU. The issuance of such permits resulted in a lot of criticism by other Member States (especially Austria, Germany, and France) and the temporary closure of France’s border for Tunisian migrants coming from Italy.<sup>74</sup>

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<sup>72</sup> Valentina Pop, ‘EU Ignores Malta on Special Status for Refugees’ *EU Observer* <<https://euobserver.com/news/32103>> accessed 22 February 2022.

<sup>73</sup> European Commission - Directorate General for Home Affairs (n 10) 21.

<sup>74</sup> Ineli-Ciger, ‘Has the Temporary Protection Directive Become Obsolete?’ (n 9).



During the mass exodus of Syrian refugees in 2015, the European Parliament even called on the Council in April 2015 to trigger the TPD solidarity mechanism.<sup>75</sup> Interestingly enough, this line of argumentation of comparing the number of displaced persons entering the EU in 2015 to the Kosovo situation in 1999 was not used during the debate of 2015, even though the number was double as high.<sup>76</sup> Nevertheless, 2015 was not the first time the Commission received a call for activation of the TPD. In fact, already in a European Parliament resolution of October 2013, the Parliament urged the Commission to consider the possibility to apply the Directive.<sup>77</sup> A year later, in 2014, after already almost 100.000 Syrians have applied for international protection between January and October 2014, the question regarding why temporary protection has not been applied was directed to the European Commission.<sup>78</sup> The Commission answered in January 2015 that “given the scale of the influx and how these persons' asylum applications have been handled, the Commission considers that a proposal to trigger the EU- wide temporary protection regime provided by the TPD would not be justified in the present circumstances.” Therefore, the Commission was of the opinion, that the number of 100.000 asylum requests between January and October 2014 did not reach the level of a mass influx situation that the national asylum systems could not handle.<sup>79</sup> However, interestingly to mention is the fact that instead of activating the TPD, several measures to ease the pressure of especially the frontline states were implemented through the New European Agenda on Migration in May 2015, including an emergency relocation plan aiming to assist Greece and Italy (Council Decision (EU) 2015/1523 of 14 September 2015 and Council Decision (EU) 2015/1601 of 22 September 2015- establishing provisional measures in the area of international protection for the benefit of Italy and of Greece). These two Council Decision on a temporary relocation scheme were based on Art 78 (3) TFEU, which allows the Council – in the event of Member States being

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<sup>75</sup> European Parliament Resolution of 29 April 2015 on the Latest Tragedies in the Mediterranean and EU Migration and Asylum Policies (2015/2660(RSP)), 2015.

<sup>76</sup> Nika Bačić Selanec, ‘A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation’ (2015) 11 Croatian Yearbook of European Law and Policy <<http://www.cyelp.com/index.php/cyelp/article/view/230/139>> accessed 6 March 2022.

<sup>77</sup> European Parliament resolution of 9 October 2013 on EU and Member State measures to tackle the flow of refugees as a result of the conflict in Syria ([2013/2837\(RSP\)](#))

<sup>78</sup> Bačić Selanec (n 74).

<sup>79</sup> See the answer given by the Commission here

[https://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/libe/dv/10\\_e\\_008507\\_2014\\_answer/10\\_e\\_008507\\_2014\\_answer\\_en.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/10_e_008507_2014_answer/10_e_008507_2014_answer_en.pdf);

confronted with a sudden inflow of persons of third countries due to an emergency – to adopt such provisional measures<sup>80</sup> (see more about the approach of the European Union to deal with the situation in the following chapters).

### 1.2. Assessment of these previous situations under the definition of a mass influx

As discussed above, every mass influx situation should be examined case by case on an individual basis, considering the elements described. The Commission and the Council were of the opinion, that that the previously presented cases could have not been declared as mass influx situations due to the scale of the influx. However, the European Commission explicitly acknowledged that the experience gained during the Kosovo crisis had influenced the adoption of the Directive.<sup>81</sup> As we could see above, this mass influx event in the early 2000s was used as a comparison standard in the political discussion of 2011, which eventually lead to the result that the high refugee influx into Italy and Malta in 2011 was not declared as a mass influx situation due to the lower number of displaced people reaching the European Union compared to the Kosovo crisis. As argued by several scholars, such as Meltem Ineli-Ciger and Skordas, the suddenness of the situation can justify the existence of a mass influx by a lower number of individuals seeking protection in a short amount of time, compared to a slower but higher number of displaced persons seeking protection in the European Union.<sup>82</sup> In 2011, more than 5000 Tunisians crossed the Mediterranean to Italy in less than three weeks<sup>83</sup>, which clearly overwhelmed the asylum system of Italy, as much as Italy (as well as Malta) found it to be necessary to request the activation of the Directive at the European Commission. The study follows the opinion that this could be therefore clarified as a mass influx situation under the Directive due to its suddenness and effect on the national asylum systems.

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<sup>80</sup> Asylum Information Database (AIDA), ‘Common Asylum System at a Turning Point: Refugees Caught in Europe’s Solidarity Crisis’ <[https://ecre.org/wp-content/uploads/2016/06/aida\\_annualreport\\_2014-2015\\_0.pdf](https://ecre.org/wp-content/uploads/2016/06/aida_annualreport_2014-2015_0.pdf)>.

<sup>81</sup> Durieux (n 26) 9.

<sup>82</sup> Skordas (n 20) 1070f.

<sup>83</sup> UNHCR, ‘UNHCR Helps Italy Cope with High Seas Influx of Thousands of Tunisians’ (15 February 2011) <<https://www.unhcr.org/news/latest/2011/2/4d5a92b56/unhcr-helps-italy-cope-high-seas-influx-thousands-tunisians.html>> accessed 11 April 2022.

The situation in 2015, however, can undeniably be declared as mass influx situation, since the numbers of Syrians displaced during the “European Union’s refugee crisis” in 2015 exceeded the number of Yugoslavian refugees by more than double with over one million refugees arriving in the European Union in the first ten months of 2015.<sup>84</sup> UNHCR numbers further indicate that during these fifteen months over three million Syrians sought protection in Turkey.<sup>85</sup> Therefore, the scale of refugees reaching the European Union during the years 2015 and 2016 does not, in any way, seem to be a valid explanation for the non-activation of the Directive, since this situation has been proven to be the highest scaled refugee flow in European history up to this moment.

## **2. The EU’s approach to deal with previous mass exodus situations through the example of the 2015 refugee situation**

As already discussed above, the civil war in Syria has caused almost half of the Syrian population to be displaced, resulting in 6.3. million internally displaced persons during the years 2015 and 2016 and in total over five million refugees.<sup>86</sup> During 2015 and 2016 the European Union counted an influx of over one million Syrians crossing the border of the European Union.<sup>87</sup> Most of those people arrived by sea<sup>88</sup>, which in 2015 tragically ended in the death of more than 3700 persons, who tried to reach the European shores and were hoping for a safe destination.<sup>89</sup> This situation put a severe pressure on the asylum system of the European Union with over one million asylum cases pending at the end of 2015 and 2016.<sup>90</sup> An especially high pressure was put on the external border states of the European Union, foremost the coastal states Italy and Greece, as well as the Balkan states and the favorable destination states, such as

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<sup>84</sup> Dzibur (n 22) 404f.

<sup>85</sup> ‘Revisiting Temporary Protection as a Protection Option to Respond to Mass Influx Situations’ (n 40) 202f.

<sup>86</sup> Basak Kale, ‘The Limits of an International Burden-Sharing Approach: The Syrian Refugee Protection Crisis and Its Consequences on Turkey’s Refugee Policy’ (2017) 22 *Perceptions* (Ankara, Turkey) 55, 62.

<sup>87</sup> John Koo, ‘Mass Influxes and Protection in Europe: A Reflection on a Temporary Episode of an Enduring Problem’ (2018) 20 *European Journal of Migration and Law* 157, 162.

<sup>88</sup> Meltem Ineli-Ciger, ‘Time to Activate the Temporary Protection Directive’ (2016) 18 *European Journal of Migration and Law* 1, 13.

<sup>89</sup> *ibid* 2.

<sup>90</sup> John Koo, ‘Mass Influxes and Protection in Europe: A Reflection on a Temporary Episode of an Enduring Problem’ (2018) 20 *European Journal of Migration and Law* 157, 162.

Germany<sup>91</sup> with a total number of 1,555,000 asylum applicants or Sweden with 327,000 applications.<sup>92</sup> The political position of the Member States on how to deal with this severe influx of displaced people into the European Union, ranged from Germany's approach of the necessity to strengthen the EU asylum system to a strong criticism of the European Union's decision powers in the field of burden sharing by states like Hungary.<sup>93</sup> Therefore, the 2015 refugee influx not only revealed a deep political division between the Member States and uncovered the tension between EU competences and state sovereignty, but also challenged the Common European Asylum System (CEAS) in its very base. Several scholars acknowledged, that the situation in 2015 cannot be declared as a refugee crisis rather than a crisis of the European Union's asylum system, which revealed the flaws of the CEAS. Especially crucial in this regard is one hand the unsustainability of the Dublin III Regulation, according to which the country of first arrival has the responsibility for processing the asylum applications. On the other hand, it once more exposed the unharmonized asylum procedures and the wildly varying levels of facilities in asylum reception centers of the different Member States, which can lead to an uneven share of burden between the Member States, since asylum applicants are drawn to reach a Member State with a functioning asylum system as their final destination within the EU.<sup>94</sup>

As a response to the just described migration situation, the European Union adapted a ten-point action plan on migration on the 20<sup>th</sup> of April 2015.<sup>95</sup> Following this action plan, the European Commission developed the European Agenda on Migration, which was published in May 2015 and has since become the cornerstone of the European Union's migration and border control institutional framework.<sup>96</sup> The agenda was articulated around four pillars: (i) strong common asylum policy, (ii) a new policy on legal migration, (iii) incentives for irregular migration, (iv) border management, especially securing the external borders as well as reducing and saving

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<sup>91</sup> Sandra Lavenex, "Failing Forward" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System' (2018) 56 *JCMS: Journal of Common Market Studies* 1195, 1195.

<sup>92</sup> Marek Sobczyński, 'Causes and Main Routes of the Mass Immigration to Europe in 2015' (2019) 26 *European spatial research and policy* 7, 25.

<sup>93</sup> Lavenex (n 89) 1195.

<sup>94</sup> Thomas Spijkerboer, 'Minimalist Reflections on Europe, Refugees and Law' (2016) 2016 1 *European Papers* 533, 541.

<sup>95</sup> Ineli-Ciger, 'Time to Activate the Temporary Protection Directive' (n 87) 2.

<sup>96</sup> Ineli-Ciger, *Temporary Protection in Law and Practice* (n 26) 160.

lives at sea.<sup>97</sup> Therefore, the agenda incorporated a number of measures, including the aim to address the immediate pressure through the implementation of an emergency relocation scheme from frontline Member States, namely Italy and Greece, to other EU States under Art 78 (3) TFEU, as well as the establishment of a hotspot reception center approach in Greece and Italy.<sup>98</sup> Furthermore, it constituted a proposal for a common list of safe third countries of origin, a suggestion for a new European border control and an action plan on smuggling, as well as tripled the budget of the FRONTEX joint-operations Triton and Poseidon.<sup>99</sup> Beside these commitments, which were established through the European Agenda on Migration, the European Commission reached an ad referendum agreement with the Turkish government on a series of collaborative commitments of the European Union as well as Turkey which mainly addressed the issue of irregular migration. This external relationship approach was extended by a very controversial EU-Turkey Statement in March 2016, which aimed to end the irregular migration from Turkey to the EU.<sup>100</sup> In the following part, the relocation system, the hotspot concept, the EU border control concept as well as the foreign policy approach of the European Union as solutions to deal with the refugee influx of the years 2015 and 2016 will be shortly explained.

### 2.1. Relocation systems

In the European Agenda on Migration of May 2015, the Commission inter alia proposed the relocation of 120.000 asylum seekers from Greece, Italy as well as Hungary to other Member States. The number of relocations was then increased to 160.000 people through the Justice and Home Affairs Council Decision 2015/1523 of 14 September 2015 and the Council Decision (EU) 2015/160 of 22 September 2015. Hungary repelled to cooperate with this relocation system, therefore the relocation decision only applied to Italy and Greece. These relocation systems are based on the emergency system under Article 78(3) of the Treaty on the

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<sup>97</sup> Mathilde Duhaà, 'Europe at a Crossroads - The EU Migration Crisis, a Governance Test for the Future of the Union' (Master Thesis, EMA, The European Master's Programme in Human Rights and Democratisation) 26.

<sup>98</sup> Koo (n 88) 177.

<sup>99</sup> Hemme Battjes and others, 'The Crisis of European Refugee Law: Lessons from Lake Success' [2016] SSRN Electronic Journal 10f  
<[https://www.academia.edu/25544303/The\\_Crisis\\_of\\_European\\_Refugee\\_Law\\_Lessons\\_from\\_Lake\\_Success](https://www.academia.edu/25544303/The_Crisis_of_European_Refugee_Law_Lessons_from_Lake_Success)>  
accessed 11 June 2022.

<sup>100</sup> Ineli-Ciger, *Temporary Protection in Law and Practice* (n 25) 160.

Functioning of the European Union (TFEU). They mainly aim to find a better distribution solution for asylum seekers in Europe<sup>101</sup> and to put the principle fair sharing of responsibilities and solidarity, which are enshrined in Art 80 TFEU, into practice.<sup>102</sup> The relocation system derogated the Dublin Regulation, according to which Italy and Greece would have been in charge of evaluating the applications for international protection, in accordance with the standards outlined in chapter III of the Dublin Regulation.<sup>103</sup> The relocation mechanism was limited to asylum seekers that had requested international protection in Greece or Italy<sup>104</sup> with a nationality that has an average recognition rate over 75 percent in all the Member States, such as Syrians.<sup>105</sup> For the first time, these relocation decisions implemented binding targets of burden-sharing of asylum applications between the Member States.<sup>106</sup> The distribution formula was based on the capacity of each state to share the burden<sup>107</sup> and took account of each states geographical size, the level of welfare (GDP), unemployment rate, its number of inhabitants, as well as the past number of asylum seekers and resettled refugees. The relocation measures terminated in September 2017, and by this time, a total number 31,237 of relocations was counted, which represented only 19.5% of the commitment of the Councils decisions.<sup>108</sup> The relocations have not been received by all the Member States<sup>109</sup> and a study of the European Commission of the year 2017 indicates that some Member States have declined to comply with the relocation system, even though the relocation decisions were legally binding.<sup>110</sup>

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<sup>101</sup> Fabian Willermain, 'The European Agenda on Migration, One Year on. The EU Response to the Crisis Has Produced Some Results, but Will Hardly Pass Another Solidarity Test' 8, 135.

<sup>102</sup> European Parliament, 'Asylpolitik | Kurzdarstellungen zur Europäischen Union | Europäisches Parlament' <<https://www.europarl.europa.eu/factsheets/de/sheet/151/asylpolitik>> accessed 11 June 2022.

<sup>103</sup> Bruno Nascimbene, 'Refugees, the European Union and the "Dublin System". The Reasons for a Crisis' (2016) 2016 1 European Papers - A Journal on Law and Integration 101, 6.

<sup>104</sup> Noemia Bessa Vilela and Boštjan Brezovnik, 'Europe: Hell or Paradise? An Overview of European Law and Case Law' Journal of Comparative Politics 80 <[https://usearch.univie.ac.at/primo-explore/fulldisplay/TN\\_cdi\\_proquest\\_journals\\_2099388911/UWI](https://usearch.univie.ac.at/primo-explore/fulldisplay/TN_cdi_proquest_journals_2099388911/UWI)> accessed 14 May 2022.

<sup>105</sup> Battjes and others (n 97) 12.

<sup>106</sup> Koo (n 85) 177.

<sup>107</sup> Battjes and others (n 97) 15.

<sup>108</sup> Koo (n 88) 177.

<sup>109</sup> Willermain (n 99) 1356.

<sup>110</sup> Cathryn Costello, Elspeth Guild and Violeta Moreno-Lax, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece' 8 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL\\_STU\(2017\)583132\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf)>.

## 2.2. The Hotspot concepts

As indicated above, the European agenda for migration contained another mechanism that aimed to release the pressure of the first reception countries— the hot spot approach. The concept of hotspots was jointly implemented by the European Union Agency for Asylum (EASO), Frontex and the European Union Agency for Law Enforcement Cooperation (Europol), which in cooperation with task forces of the frontline Member States on the ground of these states aimed to quickly identify, register and fingerprint incoming migrants as well as coordinate returns.<sup>111</sup> The establishment of hotspots in Greece and Italy was meant to support the process of pinpointing who of the displaced persons are in need of international protection “through a process of identification and filtering of applications”. This concept aimed to assist border state authorities with the reception of asylum seekers by ensuring a systematic registration process, to eventually achieve a more balanced distribution of asylum seekers in the European Union.<sup>112</sup> The hotspot approach should additionally contribute to the implementation of the just explained relocation scheme for a total of 160,000 people in need of international protection.<sup>113</sup> The core idea of the hotspot system was the complementary work of these three above mentioned agencies: Frontex helping the Member States by coordinating the return of irregular migrants, Europol supporting the host Member State with investigations to break up smuggling and trafficking networks and EASO support teams assisting to process asylum cases as fast as possible. In total five hotspots on Greek islands (Leros, Lesbos, Samos, Kos, Chios) and four fixed hotspots in Italy (Trapani, Lampedusa, Pozzallo, Taranto) were created in 2015.<sup>114</sup>

## 2.3. The EU border control concept

Within the 2015 migration agenda also the mandate of the border agency Frontex got strengthened. This decision was based to the assumption that there was a growing need to improve the security at the external borders of the European Union to cope with the high influx of displaced persons, who as indicated above, mostly reached the EU’s borders by boat through

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<sup>111</sup> European Parliament (n 100).

<sup>112</sup> Battjes and others (n 97) 10E.

<sup>113</sup> European Parliament (n 100).

<sup>114</sup> Willermain (n 101).

the first line Member States Greece and Italy. The lack of staff and equipment, an insufficient budget, as well as a limited mandate of the agency due to the need to of a request of a member state prior to any action, Frontex was declared as ineffective to deal with the increasing pressure on the Union.<sup>115</sup> Therefore, the migration agenda included a severe stock up of the resources of Frontex and tripled the capacities and assets of the agency for the joint operations Triton in Italy and Poseidon in Greece. More precisely, the European Commission equipped Frontex with an additional 26 million Euro to the original 114-million-Euro budget for 2015 in emergency funds as well as the providing of 260 officers assisting the registration of new arrivals as well as border surveillance officers to strengthen the two operations. In October 2015 these operations were stocked up another time by 448 additional officers.<sup>116</sup> Moreover, the permanent staff was stocked up and the general responsibility of Frontex was extended with the task of coordinating and supporting controls at all the borders as well as carrying out operational duties, such as return operations, processing personal data, fighting against cross-border crimes, search and rescue operations, migration management, and the training of coastguards.<sup>117</sup> However, not only Frontex got strengthened in its support and operational scope, but also the Member States focused on closing and securing their boarders, especially the neighboring states of the Balkan migration route, such as Austria with its fences to the Slovenian border.<sup>118</sup>

#### 2.4. Foreign policy approach – EU-Turkey Joint Action Plan

Soon after the publishing the Agenda on Migration the European Union realized its plan to develop incentives for irregular migration and border management and agreed on a joint action plan with the Republic of Turkey (EU-Turkey Joint Action Plan). This action plan, which was activated on 29 November 2015 during an EU-Turkey summit, aimed to strengthen the cooperation to deal with the refugee crisis and to manage - or stop - irregular migration flows towards the EU borders.<sup>119</sup> The European Union saw this cooperation as an essential part of the migration management due to the fact that in 2015, more than 856,723 refugees and migrants

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<sup>115</sup> Duhaâ (n 95) 37.

<sup>116</sup> Willermain (n 99) 134.

<sup>117</sup> Duhaâ (n 95) 37f.

<sup>118</sup> Sobczyński (n 90) 25.

<sup>119</sup> Carmen Moldovan, 'Is the EU-Turkey Action Plan an Effective or Just an Apparent Solution to the Refugee Crisis?' (2017) 9 CES working papers 195, 198.



have arrived in Greece by sea through Turkey.<sup>120</sup> According to the Agenda on Migration, the plan introduced a mechanism to create a system of responsibility sharing and solidarity with the Turkish government to protect the millions of displaced persons from Syria.<sup>121</sup> This aim was supposed to be fulfilled by three main commitments: by providing support to Syrians through temporary protection in Turkey, by addressing the root cause leading to the mass influx of Syrians and by stepping up cooperation in the field of preventing illegal migration flows.<sup>122</sup> The commitments of the European Union included the increasing of the capacity of Turkey to combat migrant smuggling, the raising of new funds as well as the supporting of present resettlement program. The commitments of Turkey were inter alia registering new arrivals, providing access to public services, supporting the Turkish Coast Guard, harmonizing visa policies between Turkey and the EU as well as the prevention of irregular migration.<sup>123</sup> Turkey's policy towards the 2,5 million Syrian refugees that ended up on the territory of Turkey was based on a "temporary guest" approach, which is mainly based on the fact that non-European asylum seekers can only be given a conditional refugee status in Turkey.<sup>124</sup>

The Joint Action Plan was followed up in March 2016 through a statement published by the Heads of State or Government of the European Union regarding the progress of the cooperation with the Turkish government. This 2016 statement intended to clarify that the aims of the Joint Action Plan was to safeguard European Union's exterior borders, which included the closing down of people smuggling routes and especially business models of the smugglers. The European Union was convinced, that the pattern smuggling route was the return of new irregular migrants and asylum seekers from Greece to Turkey.<sup>125</sup> Therefore, the 2016 Statement introduced a mechanism, that was supposed to regularize the smuggling routes by returning irregular migrants crossing from Turkey into the EU external shores in Greece to Turkey. In return the European Union agreed to the resettlement of one Syrian from Turkey to the

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<sup>120</sup> Ineli-Ciger, *Temporary Protection in Law and Practice* (n 26) 162.

<sup>121</sup> Willermain (n 99) 135.

<sup>122</sup> Moldovan (n 117) 198.

<sup>123</sup> Şeyma Akin, 'The Syrian Refugee Crisis and Turkey-EU Relations: Responses in Politics' (2017) 19 *Sosyal ve Ekonomik Araştırmalar Dergisi* 141, 144.

<sup>124</sup> Kale (n 84) 66.

<sup>125</sup> Moldovan (n 117) 198.

European Union Member States, for every Syrian migrant that got readmitted by the Turkish authorities from Greek islands to Turkey.<sup>126</sup>

### 2.5. Assessing the EU's approach to deal with mass exodus situations and the past - A problematic setting for future mass influx scenarios

The European Union's approach to handle the above explained mass influx situations from North Africa and the Middle east during the last past 21 years since the implementation of the Temporary Protection Directive draws a picture of locked borders and security measures, rather than ensuring a high protection standard. The just discussed approach of the European Union on how to deal with the Syrian refugee influx in the years 2015 and 2016 was fundamentally flawed for several reasons. Generally speaking, the European Union based most of its measures to cope with the high influx of refugees on a security-based protection policy, especially with the increased border presence, which aimed to contain the flow of refugees and irregular migrants outside of the European Union and deter the migration process.<sup>127</sup> Some scholars argue that the European Union did not recognize the scope and the consequences of the humanitarian crisis resulting from the Syrian civil war and was therefore not able to develop an effective response in such a short time and since the EU Member States felt threatened the only way to solve this situation was to implement security measures.<sup>128</sup> In any case, the strong focus on securing the external borders did not fulfill its official objective to regularize the influx of refugees or address the root causes of the refugee flows. Instead, it resulted in a low protection standard and several severe human rights issues. Especially the EU-Turkey Deal, as one of the most controversial measures that the EU has implemented during the refugee influx of 2015, raised serious concerns for not being compatible with the international and European human rights and refugee protection standards.<sup>129</sup> The EU Turkey deal, which was proclaimed by the European Commission as the only effective way to organize safe and legal pathways to Europe

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<sup>126</sup> Eleni Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' (2019) 88, 2019 *Nordic journal of international law = Acta Scandinavica juris gentium* 315, 350f.

<sup>127</sup> Duhaà (n 95) 37.

<sup>128</sup> Kale (n 84) 71f.

<sup>129</sup> Ineli-Ciger, *Temporary Protection in Law and Practice* (n 26) 160f.

and to prevent migrants from putting their lives at risk,<sup>130</sup> has been indeed partly responsible for the drop in arrivals at the European borders, however also raised a lot of questions regarding the protection standard of those refugees, especially concerning the standard of effective protection for the refugees in Turkey.<sup>131</sup> Moreover, the resettlement concept as well as the hotspot approach received vehement criticism from NGOs. An Amnesty International report of November 2016 indicated that the implementation hot spot approach did not fulfill its aim to alleviate pressure of the frontline Member States but led to violation of basic human rights of the refugees, especially through ill-treatment and arbitrary detention.<sup>132</sup> This was furthermore confirmed by a study of the European Commission of the year 2017, which clarified that the protection standard for refugees in the hot spot system got highly degraded.<sup>133</sup>

It is of utmost importance that the EU guarantees a high protection standard for such future (mass) influx situations of displaced persons fleeing a conflict or generalized violence. As indicated above, socioeconomic predictions estimate a mass influx of 20 million persons from North Africa and the Middle East towards the European Union in the next 10-20 years<sup>134</sup> due to conflict situations. The EU focused on measures to strengthen the EU border control system in the past to deal with the high influx of Syrian refugees<sup>135</sup> and when looking at the budgetary developments of the border control agency FRONTEX, which stocked up the budget from 142 million Euro in 2015 to 460 million Euro in 2020<sup>136</sup> it seems like that the European Union will not change the approach for future refugee influxes. One of the potential solutions to ensure a higher protection standard, without the need for closed borders, would be the activation of the temporary protection regime for such future situations. Therefore, it is crucial to elaborate on

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<sup>130</sup> Duhaâ (n 95) 32f.

<sup>131</sup> Terry Kyilah, 'Article: The EU-Turkey Deal, Five Years On: A Fray.. | Migrationpolicy.Org' (8 April 2021) <<https://www.migrationpolicy.org/article/eu-turkey-deal-five-years-on>> accessed 11 June 2022.

<sup>132</sup> Amnesty International, 'Hotspot Italy: How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights' (3 November 2016) <<https://www.amnesty.org/en/documents/eur30/5004/2016/en/>> accessed 12 June 2022.

<sup>133</sup> Costello, Guild and Moreno-Lax (n 108) 51f.

<sup>134</sup> Hannes Tretter, 'Eine Alternative Zur „Festung Europa“?' <[https://international.or.at/wp-content/uploads/2021/10/International\\_5\\_2021-Tretter.pdf](https://international.or.at/wp-content/uploads/2021/10/International_5_2021-Tretter.pdf)>.

<sup>135</sup> Council of the European Union, 'Strengthening the EU's External Borders - Concilium' (*Council of the European Union - Policies*) <<https://www.consilium.europa.eu/en/policies/strengthening-external-borders/>> accessed 16 March 2022.

<sup>136</sup> Euro-Med Human Rights Monitor (n 16).

the question why the Directive has not been activated in the past but the just described approach of the EU was chosen.

### **3. Main Reasons for the non-activation of the Temporary Protection Directive during these mass influx situations**

There are many factors that contributed to the Directive's non-implementation, however especially legal disagreements, as for example the wide scope of the definition of a mass influx situation combined with the high activation requirements, seem to be the main hindering factors for the non-activation of the Directive until the year 2022.<sup>137</sup> The following chapter will analyze the main political as well as the legal reasons for the 21 years of obsolescence of the Directive:

#### 3.1. Legal reasons

##### 3.1.1. Wide margin of appreciation

The first and most obvious reason for 21 years of non-activation of the Directive, seems to be the unprecise scope of the key concept of the Directive – the definition of a mass influx situation within the Directive.<sup>138</sup> As described above, while UNHCR defines mass influx as the arrival of large-scale numbers of people seeking refuge or asylum, the Directive itself does not specify which scale of displaced persons reaching the EU borders can be considered as a mass influx situation.<sup>139</sup> Therefore, the Commission, as well as the Council, are left with a wide margin of appreciation when it comes to the question if a certain number of displaced persons fulfills the Directive's definition. This can be clearly seen in the attempts of Italy and Malta to activate the directive in 2011.<sup>140</sup> The European Commission, however, noted in 2013 that this leaves a “wide room for maneuver, in the form of open definitions of keywords, such as mass

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<sup>137</sup> Dzubur (n 22) 404.

<sup>138</sup> Carrera and others (n 18) 10.

<sup>139</sup> Krayem (n 29).

<sup>140</sup> Meltem Ineli-Ciger, EU Temporary Protection Directive (Brill Nijhoff 2017)

<<https://brill.com/view/book/9789004327535/BP000009.xml>> accessed 16 March 2022.

influx”<sup>141</sup>, arguing for the positive aspects of flexibility to respond to various mass influx situations, may those be sudden or gradual arrivals.<sup>142</sup> Nevertheless, this definition of mass influx can be seen as a major flaw of the Directive as it leads to result in a state of limitation of the scope of the Directive, since a determination of the existence of a mass influx is only based on the discretion of the European authorities.<sup>143</sup> Ultimately, as described above, the scale of the refugee influx was used as the main argument to not trigger the temporary protection mechanism during the mass influx situations in 2011 and 2015/2016.

### 3.1.2. Complex and politicized activation process

The complex and highly politicized activation process undermines the effectiveness of the temporary protection mechanism and can be seen as the second reason for the non-implementation of the Directive. Meltem Ineli-Ciger argues, that firstly, needs to be considered that Member States, even the most effected ones, cannot request the activation of the Directive directly at the Council, since only the Commission can submit such a proposal. Secondly, the high threshold of a qualified two-thirds majority in the Council appears to be another severe weak point of the activation process of the Temporary Protection Directive, since mass flows of migrations naturally firstly and mainly affect only a few borderland Member States, such as Italy, Greece or Malta. A two-thirds majority in the Council, therefore, appears to be very unlikely to be met, due to the fact that the northern EU Member States do not experience the same scale of incoming refugees on their territory.<sup>144</sup>

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<sup>141</sup> European Commission, Commission Staff Working Document: Climate Change, Environmental Degradation, and Migration, SWD (2013) 138 final.

<sup>142</sup> Krayem (n 29).

<sup>143</sup> Genç and Şirin Öner (n 6).

<sup>144</sup> Ineli-Ciger, *EU Temporary Protection Directive* (n 139).

### 3.2. Political reasons

#### 3.2.1. Pull factor

The reluctance of Member States to trigger the temporary protective mechanism could be also related to the so called “pull factor”.<sup>145</sup> According to this theory the implementation of temporary protection as a group-based protection mechanism could possibly worsen an already critical situation, attracting even more refugees in neighboring countries to travel to the EU with the goal to obtain a temporary protection status.<sup>146</sup> This concern was especially expressed by some Member States in a study of the European Commission on the Temporary Protection Directive in 2016.<sup>147</sup> However, this element is considered highly overrated by several academics, for example by Meltem Ineli-Ciger, since firstly, the potential pull factor is minimized by the fact that the Council must circumscribe the applicability of the temporary protection to specific groups. Secondly, it has been demonstrated that forced migration is mainly determined by push factors such as systematic violations of human rights as well as conflict and that people in such circumstances would seek refuge whether or not mechanisms of temporary protections are activated.<sup>148</sup>

#### 3.2.2. The protection standard level

Meltem Ineli-Ciger argues that the high protection standard of the Directive might furthermore explain part of the reluctance of Member States to trigger the mechanism. The rights for beneficiaries of temporary protection that are enshrined within the TPD (Art 8-16) implement a standard of protection which might seem too high for the Member States. Art 12 of the Directive implements for example a high standard of working rights, specifically to engage in employment relationships or self-employed activities as well as other educational activities and trainings related to work opportunities (vocational training, practical workplace experience for

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<sup>145</sup> Ineli-Ciger, ‘Revisiting Temporary Protection as a Protection Option to Respond to Mass Influx Situations’ (n 40) 201f.

<sup>146</sup> Dzubur (n 22) 404.

<sup>147</sup> European Commission - Directorate General for Home Affairs (n 10).

<sup>148</sup> Ineli-Ciger, *EU Temporary Protection Directive* (n 139).

adults ect).<sup>149</sup> This specific reason for the non-activation got furthermore confirmed in the survey of the European Commission on the Temporary Protection Directive in 2016.<sup>150</sup> Moreover, a study of the European Migration Network suggests that some Member States (namely Belgium, Austria, Greece, Ireland, Poland, Italy and Spain) have opted to establish national temporary protection regimes, rather than activating temporary protection under the EU Directive. The study indicates that the main reason for choosing the establishment of a national temporary protection regime seems to be also the fact, that the EU Directive sets out a high minimum protection standard, compared to the national standards.<sup>151</sup>

### 3.2.3. Further political reasons

However, Meltem Ineli-Ciger argues furthermore that there might be more underlying reasons that prevented the activation of the Temporary Protection from its adoption in 2001 until 2022. First of all, the Member States and all the stakeholders in the activation process may believe that the activation of measures such as temporary protection are the ultimo ratio and are not necessary, since the current Common European Asylum System has always been able to cope with the pressure of a high number of influx of refugees.<sup>152</sup> Secondly, some Member States expressed the undermining of their national sovereignty as a reason in the study on Temporary Protection, indicating that the granting of protection on a collective basis reduces the ability of Member States to peruse a national decision who can enter a state's territory. Of course, this reasoning does not consider the fact, that the identification process would still be carried out by the Member States for every person who enters their territory. Furthermore, the study indicates the "national pride" or reputation of states as another reason for not invoking the TPD, since the activation request could be seen as a failure of coping with the influx situation within their own national asylum system.<sup>153</sup>

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<sup>149</sup> *ibid.*

<sup>150</sup> European Commission - Directorate General for Home Affairs (n 10).

<sup>151</sup> European Migration Network, 'The Different National Practices Concerning Granting of Non-EU Harmonised Protection Statuses' (2010) <[https://www.emn.at/wp-content/uploads/2017/01/0\\_EMN\\_Synthesis\\_Report\\_NonEUharmonised\\_FinalVersion\\_December2010.pdf](https://www.emn.at/wp-content/uploads/2017/01/0_EMN_Synthesis_Report_NonEUharmonised_FinalVersion_December2010.pdf)>.

<sup>152</sup> Ineli-Ciger, *EU Temporary Protection Directive* (n 139).

<sup>153</sup> European Commission - Directorate General for Home Affairs (n 10).

Other scholars argue that some Member States anchored a certain believe that the temporary protection mechanism should only be provided for conflict situations in other European countries. Medina Dzubur explains this argument with the existence of a general fear of some EU states that individuals from non-European countries would have no incentive to return to their home country and such a fear does not exist regarding persons fleeing from European countries. She further argues that this fear goes back to the long existing “underlying religious animosity and a misplaced fear of terrorism” towards certain non- European regions.<sup>154</sup>

#### **4. Why the EU temporary protection regime is a viable protection framework to respond to mass influxes**

Despite the fact that the EU has faced several situations of mass movements as just described in the chapters above through several extreme humanitarian crisis in the Middle East and in North Africa, including the to be proven largest refugee flow in European history until this point during the Syrian refugee situation in 2015 and 2016, the Temporary Protection Directive did never get activated.<sup>155</sup> This circumstance of non-activation led not only to an increased pressure of the first reception Member States<sup>156</sup>, but furthermore - as discussed above - severely degraded the protection standard.

This study supports the argumentation of several scholar in the field of migration and refugee protection, including Meltem Ineli-Ciger, that the implementation of the Directive would have been a more effective response to these situations. One of the most obvious advantages of the activation of the temporary protection regime, is the fast determination procedure of beneficiaries of temporary protection and therefore the fast response to a mass influx situation. This is especially important since the refugee status determination (RSD) is usually a lengthy

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<sup>154</sup> Dzubur (n 22) 404f.

<sup>155</sup> Skordas (n 20) 1076f.

<sup>156</sup> Dzubur (n 22) 392.



and complicated process<sup>157</sup> and can take up to over 2 years in some European Union Member States.<sup>158</sup> Secondly, as already indicated above, the temporary protection regime may apply to a wider group of individuals who are seeking protection due to a conflict or generalized violence since it would apply to an entire group of individuals from the same country or region of origin. The 1951 Convention does not generally protect persons fleeing armed conflict and does therefore in principle not respond to mass influx situations which are mostly due to conflict situations.<sup>159</sup> The refugee definition under Article 1 of the Convention limits the application of a refugee procedure to persons with the well-founded fear of being personally persecuted for reasons of nationality, race, religion, membership of a particular social group or political opinion, meaning that not every person fleeing from an armed conflict and the connected generalized violence, falls under the refugee determination under the Convention. Therefore, the temporary protection regime of the European Union is a viable protection option in a broader manner, since it has the prospect of protecting a whole group of certain displaced persons due to an armed conflict.<sup>160</sup>

In conclusion, can be argued, that temporary protection is not only quicker than the asylum proceedings, but also more flexible. This means that the Member States have the advantage to implement a process that complements their current legal system the best and therefore the states would be able to keep their sovereignty, while ensuring the minimum protection standard.<sup>161</sup> Furthermore, this protection standard ensures that the displaced people are provided with rights to begin reestablishing their lives through the possibility to work for an income and get education while being provided with a minimum standard of social security and other social rights.<sup>162</sup>

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<sup>157</sup> Jinan Bastaki, 'Temporary Protection Regimes and Refugees: What Works? Comparing the Kuwaiti, Bosnian, and Syrian Refugee Protection Regimes' (2018) 34 *Refuge: Canada's Journal on Refugees* 73, 75.

<sup>158</sup> Asylum Information Database (AIDA), 'The Length of Asylum Procedures in Europe' (2016) 9 <<https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf>> accessed 6 May 2022.

<sup>159</sup> Ineli-Ciger, *Temporary Protection in Law and Practice* (n 26) 257.

<sup>160</sup> Ineli-Ciger, 'Revisiting Temporary Protection as a Protection Option to Respond to Mass Influx Situations' (n 40) 207f.

<sup>161</sup> Kälin (n 24).

<sup>162</sup> Dzibur (n 22).

## 5. Main Challenges of the Directive

Despite the fact that the Temporary Protection Directive inherits many chances for a broader and especially faster protection of displaced persons, the Directive has also been criticized for more reasons than the above described legal and political challenges that led to a 21 yearlong non-activation of the Directive.

The most important challenge lies in the question, of what happens after the termination of the temporary protection regime. The Directive itself does not give a satisfactory answer and does most importantly not provide any kind of safeguarding procedures that the returning procedure would not interfere with the main international refugee rights, such as the principle of non-refoulement. The Directive simply refers in Art 20 to the application of the general laws on protection and the laws on aliens in the Member States after the end of temporary protection. However, there is no provision in the Directive that guarantees, for example, the identification of those individuals who cannot - despite the possible improvement of the situation in the region or in the country - be returned to their country of origin due to personal persecution in accordance with the principle of non-refoulement. Moreover, the Directive includes an insufficient explanation for a possible situation where the maximum duration of three years is terminated and the situation in the country of origin has not improved. Walter Kälin argues that in this case subsidiary protection would be the only way to decide on individual cases that are not protected by refugee status.<sup>163</sup> More generally in this regard, there exists the challenge, that temporary protection could be - in some countries – used as an easy substitute to asylum. This would especially be critical in the case that a large part of the arriving beneficiaries of temporary protection would be in fact likely to get a positive asylum decision.<sup>164</sup>

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<sup>163</sup> Kälin (n 24) 235f.

<sup>164</sup> *ibid* 220.

## **6. Conclusive thoughts on the 21 years of non-activation**

Considering the above-described challenges, it can be argued that the main reason for the missing decision to activate the temporary protection regime for past mass influxes, was the political unwillingness of the European Union's Member States to give comprehensive and fast protection to these groups of individuals. This seems to be especially connected with the fear to create a pull factor through the activation of temporary protection for a group of non-European individuals, combined the above-mentioned concern of the Member States that individuals from non-European countries will have no incentive to return to their home country.

The study supports that the activation of the Temporary Protection Directive could have been definitely a viable option for the European Union, to manage the mass influx situations of the past, especially concerning the Syrian refugee exodus in the years 2015 and 2016, in order to ensure a minimum protection standard for these persons trying to enter EU territory. As stated above, the main reasons for the non-implementation of the Temporary Protection Directive during these previous mass influx situations are of political nature. These political challenges could eventually only be resolved through a political change in the Member States. However, there do exist certain legal challenges, especially the vague definition of a mass influx situation, which could be overcome through a revision of the Directive. Such a revision could eventually lead to a high protection standard in the case of all future mass influxes towards the European Union.

The next part of the research sheds light to the current extreme mass influx situation, after Russia's large-scale aggression against Ukraine starting on 24 February 2022, which led to 5.4 million (June 2022) Ukrainian refugees fleeing into the European Union.<sup>165</sup> Almost immediately after the Russian invasion of Ukraine the Commission proposed the activation to the Council <sup>166</sup> and only one week after the invasion started - while the number of displaced

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<sup>165</sup> UNHCR, 'News Comment: UNHCR Welcomes EU Decision to Offer Temporary Protection to Refugees Fleeing Ukraine' (n 1).

<sup>166</sup> European Commission, 'Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001 and Having the Effect of

persons already climbed up to reach one million people - the Council of the European Union unanimously decided on the existence of a mass influx situation and the necessity to activate temporary protection for persons fleeing the war in Ukraine.<sup>167</sup> The study elaborates in this next chapter on the on hand the political situation and the main reasons for the activation, in comparison to the situations during the 21 years of non-activation of the Directive.

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Introducing Temporary Protection' (2 March 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2022:91:FIN>> accessed 16 March 2022.

<sup>167</sup> Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

#### IV. THE 2022 ACTIVATION OF THE DIRECTIVE - A PRADIGM CHANGE?

##### 1. Activation of the Directive

###### 1.1. Background and activation process

On 24 February 2022 Russian military troops launched a large-scale aggression in Ukraine, which put the world in shock. Countries and people all around the world have shown compassion towards the Ukrainian population. Besides a strong wave of protests demanding to stop the war, the humanitarian action that has been taken by individuals, NGOs and international organizations and states has been outstanding.<sup>168</sup> The Russian invasion quickly caused a mass exodus situation of displaced people from Ukraine entering into the European Union.<sup>169</sup> In only five days the number of people fleeing Ukraine to the neighboring EU countries grew rapidly to half a million people.<sup>170</sup> Russia's invasion was highly condemned by United Special Rapporteurs, which also underlined the importance of guaranteeing protection for these high numbers of displaced people.<sup>171</sup> The neighboring EU countries of Ukraine, such as Slovakia, Hungary, Romania and Poland have shown a surprisingly unbureaucratic and fast response opening their borders for those people. However, even though Ukrainians could enter the European Union visa free for short time stays up to 90 days, which was already a different situation to most other refugees that arrived in the EU during the mass influxes of the past, there was a clear incentive in the European Union Member States, that this is not enough in terms of protection standards for these people fleeing the Russian invasion.<sup>172</sup>

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<sup>168</sup> Sergio Carrera and others, 'The EU Grants Temporary Protection for People Fleeing War in Ukraine - Time to Rethink Unequal Solidarity in EU Asylum Policy' (2022) 6 <<https://www.ceps.eu/ceps-publications/eu-grants-temporary-protection-for-people-fleeing-war-in-ukraine/>> accessed 20 June 2022.

<sup>169</sup> European Commission, 'Temporary Protection' <[https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/temporary-protection\\_en](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en)> accessed 20 June 2022.

<sup>170</sup> UNHCR, 'News Comment: UNHCR Welcomes EU Decision to Offer Temporary Protection to Refugees Fleeing Ukraine' (n 1).

<sup>171</sup> OHCHR, 'UN Experts Call for End to Russian Aggression against Ukraine and Urgent Protection of Human Rights' (*OHCHR*, 28 February 2022) <<https://www.ohchr.org/en/press-releases/2022/02/un-experts-call-end-russian-aggression-against-ukraine-and-urgent-protection>> accessed 21 June 2022.

<sup>172</sup> ICMPD, 'The War in Ukraine and the Renaissance of Temporary Protection - Why This Might Be the Only Way to Go' (2 March 2022) <<https://www.icmpd.org/blog/2022/the-war-in-ukraine-and-the-renaissance-of-temporary-protection-why-this-might-be-the-only-way-to-go>> accessed 20 June 2022.

The refugee situation emerging from Ukraine towards the European Union prompted an immediate response not only by all relevant EU institutions but also by the representatives of the Member States. Therefore, almost immediately after the Russian invasion in Ukraine, the European Union reacted to the already foreseen displacement of Ukrainian people with an extraordinary Justice and Home Affairs Council meeting on 27 February 2022 to discuss the possibility to activate the Temporary Protection Directive 2001.<sup>173</sup> The Member States immediately indicated a clear support for guaranteeing a protection standard for the Ukrainian refugees and the use of the Temporary Protection Directive.<sup>174</sup> Shortly after, Ursula von der Leyen, president of the European Commission, stated in a press release that Ukrainians will be welcomed with open arms and the president of the European Parliament Roberta Metsola recognized and praised during the Parliament's Extraordinary Plenary Session on 1 March 2022 the common European response for the crisis.<sup>175</sup> This support was quickly followed by a proposal of activation of the Directive to the Council on 2 March 2022<sup>176</sup> and only one week after the invasion started - while the number of displaced persons already climbed up to reach one million people - the Council of the European Union unanimously decided on the existence of a mass influx situation and the necessity to give temporary protection for persons fleeing the war in Ukraine on 4 March 2022.<sup>177</sup> The Commission's proposal was accompanied by a communication providing the European Union Member States with guidelines on external border control. Another communication entitled "European Solidarity with Refugees and War Refugees in Ukraine", got published on 8 March 2022, which summarizes the EU's actions including humanitarian support through emergency financial assistance. In this communication,

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<sup>173</sup> Council of the European Union, 'Extraordinary Justice and Home Affairs Council, 27 February 2022' (*Council of the European Union - Meetings*) <<https://www.consilium.europa.eu/en/meetings/jha/2022/02/27/>>.

<sup>174</sup> EU Law Analysis, 'Temporary Protection for Ukrainians in the EU? Q and A' (27 June 2022) <<http://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html>> accessed 20 June 2022.

<sup>175</sup> Carrera and others (n 169) 12.

<sup>176</sup> European Commission, 'Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001 and Having the Effect of Introducing Temporary Protection' (2 March 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2022:91:FIN>> accessed 16 March 2022.

<sup>177</sup> Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

the Commission underlines that the EU's commitment to helping people in need is unwavering and highlights the necessity of solidarity as one of the cornerstones of the EU.<sup>178</sup>

According to UNHCR Statistics, by 7 June 2022, over 7,3 million border crossings from Ukraine have been documented with 5,3 million entered the European Union, most of through Poland, Slovakia and Hungary, while 3,2 millions of these persons registered for Temporary Protection or similar protection schemes.<sup>179</sup> The outstandingly fast reaction of the European Union to activate this never used mechanism was warmly welcomed by different international organizations such as UNHCR<sup>180</sup> and other international NGOs such as the International Commission of Jurists.<sup>181</sup> The activation of the temporary protection mechanism was recognized by all the involved parts as a solution to guarantee that those persons fleeing the war, are provided with a safe entry to the EU's territory and assured a minimum protection standard, without the necessity to go through the lengthy individual asylum determination status procedures. The positive reaction of the civil society and scholars regarding the activation of the Temporary Protection Directive is also due to the fact that – for the first time ever – this activation sent a clear sign of a common EU engagement to apply a coordinated response, avoiding ad hoc measures and easing pressures on national asylum systems.<sup>182</sup>

### 1.2. Reasons for the activation for the first time since the existence of the Directive

The historic agreement on the activation Temporary Protection Directive, as of one of the most controversially discussed EU legislation in the field of migration and asylum, now raises the question why the Directive got that promptly activated for Ukrainian refugees in the beginning of March 2022 - especially in comparison to the 21 years of obsolescence of the Directive that were discussed above.

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<sup>178</sup>Carrera and others (n 169) 17.

<sup>179</sup>UNHCR, 'Ukraine Refugee Situation' <[https://data.unhcr.org/en/situations/ukraine#\\_ga=2.66358118.936568332.1655203036-172188106.1654868302](https://data.unhcr.org/en/situations/ukraine#_ga=2.66358118.936568332.1655203036-172188106.1654868302)> accessed 20 June 2022.

<sup>180</sup> UNHCR, 'News Comment: UNHCR Welcomes EU Decision to Offer Temporary Protection to Refugees Fleeing Ukraine' (n 1).

<sup>181</sup> International Commission of Jurists (n 12).

<sup>182</sup> Carrera and others (n 169) 17.

In the proposal for activation of the temporary protection regime, the Commission identified<sup>183</sup> a clear risk of a severe collapse of the asylum system in the European Union, as the national asylum system of the Member States would be unable to process the asylum claims of the Ukrainian refugees due to the scale of the estimated arrivals.<sup>184</sup> For the first time since the implementation of the Directive, the Commission declared a situation under the definition of a mass influx according to the Art 2 (d) of the Directive and acknowledged that the scale and speed of the arrivals as being significant to fall under the definition. Even though the proposal of the Commission for the activation of the Temporary Protection regime confirms for the first time the existence of a ‘mass influx’ due to the armed conflict in Ukraine (Art 1), they proposal nor the Implementing Council Decision provide a clear list of elements that were considered to declare this situation as a mass influx. However, the following elements of the decision can be extracted to be decisive elements in the process of determination of the existence of the mass influx situation: i) the number of arrivals based on UNHCR data, which counted more than 660000 arriving in the European Union and Moldova by 1 March 2022, ii) the rate of arrival, iii) the likelihood of a high migration pressure on the eastern EU border states, with a predication of 2,5 to 6,5 million people fleeing from the Ukraine based on data used by the EU Migration Preparedness and Crisis Management Network, iv) the assessment that half of the Ukrainians arriving in the EU would benefit from the visa free regime, as well as lastly v) the severe danger of a collapse of the Member States’ asylum systems with detrimental effects on their efficient functioning and on the protection-seeking individuals' interests as well as those of the parties involved.<sup>185</sup> The Commission and the Council therefore furthermore recognized that the Temporary Protection Directive, would be the most suitable instrument in the current circumstances since the mass influx situation would also negatively affect the rights of those Ukrainian who are seeking protection in the European Union.<sup>186</sup>

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<sup>183</sup> European Commission, Proposal for a COUNCIL IMPLEMENTING DECISION establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection 2022 pt Preamble 7 & 13.

<sup>184</sup> European Commission, ‘Temporary Protection’ (n 170).

<sup>185</sup> Meltem Ineli-Ciger, ‘5 Reasons Why: Understanding the Reasons behind the Activation of the Temporary Protection Directive in 2022 – EU Immigration and Asylum Law and Policy’ <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 20 June 2022.

<sup>186</sup> *ibid.*



Nevertheless, when it comes to the critical question why the European Union acted in a clear difference to the above-described mass influx situations in the past 21 years since the implementation of the Directive, the situation needs to be analyzed from a political angle. Generally speaking, the political situation between the European Union and Russia has led European countries embrace a high protection standard for the people fleeing the war. Extracting the reasons for such a reaction can be stated that a sense of guilt for having to watch how Ukrainian cities being bombed in front of the EU borders and humanitarian action being the only option to offer, due to the fear caused by Russia's nuclear threats and NATO's hands being tied and unable to go to Ukraine's defense, is the first important fact to consider.<sup>187</sup> The invasion further constitutes a territorial threat to the bordering EU Member States, transmitting a deep understanding that if Ukraine falls, the EU border states might be next.<sup>188</sup> Therefore, Meltem Ineli-Ciger argues, that it is doubtful if the temporary protection mechanism would have been activated if the aggressor would have been any other, state since the activation was clearly a statement response against the Russian aggression to defend the European values. Meltem Ineli-Ciger underlines this argumentation with the fact that the European Union has – in addition the just mentioned sympathy for the Ukrainians that needed to flee the country – a direct interest in this conflict since Russia invaded Ukraine due to its move towards the European Union and the NATO, as the West's defensive military alliance. This line of argumentation, according to Meltem Ineli-Ciger, is further emphasized by the reasoning in the Commission's proposal for activation as well as the implementing Council Decision 2022/382, which clearly stated the “extraordinary and exceptional nature of the military invasion of Ukraine by Russia” as one of the main reasons to activate the temporary protection mechanism.<sup>189</sup>

Meltem Ineli-Ciger argues that there is a further reason, why the current situation of Ukrainian refugees entering the European Union in a large scale, differ from previous mass influx situations. This being the fact, that Ukrainian nationals could always enter the territories of the

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<sup>187</sup> Carrera and others (n 169) 18.

<sup>188</sup> Daniela Vitiello, 'The Nansen Passport and the EU Temporary Protection Directive: Reflections on Solidarity, Mobility Rights and the Future of Asylum in Europe' (2022) 2022 7 European Papers - A Journal on Law and Integration 15, 27.

<sup>189</sup> Ineli-Ciger, '5 Reasons Why' (n 184).

European Union for stays of no more than 90 days in any 180-day period due to a bilateral agreement. This not only clearly differs to the mass influx situations of the past, but moreover logically facilitates the activation of the temporary protection regime. In previous mass influx situations, obtaining a visa to enter the European Union was almost impossible for citizens of countries in war, since usually the EU states shut down their diplomatic representation in such conflict-countries and EU does not foresee an obligation of the Member States to issue visa to persons fleeing conflict or violence in order to then apply for asylum. Furthermore, the strategies of how to deal with the mass influx situation of 2015, especially the border control focus as well as the externalization of the EU's asylum policy, precisely the EU-Turkey deal, made it significantly harder for e.g. Syrian refugees to first approach the borders of the European Union and eventually even enter the territory of the European Union legally. These border control focused strategies naturally lessened numbers of the of displaced persons arriving in the EU and made an activation of the Directive more unlikely.<sup>190</sup>

## **2. Content of the activation decision and its challenges**

### **2.1. Free choice of destination**

With the activation of the temporary protection regime, the EU has introduced a kind of de facto freedom of choice that previously seemed politically unimaginable. In terms of solidarity and responsibility sharing, the EU's view of free choice of asylum has obviously fundamentally changed - at least regarding the Ukrainian refugee influx. The Council's Decision (Preamble 16) introduced temporary protection as free choice system in order to facilitate a balanced distribution of efforts among Member States. Ukrainian nationals can therefore choose in which Member State to exercise their rights as beneficiaries of temporary protection (Article 4, Annex II). This is a very welcomed development, since it can not only prevent pressures from building up in neighboring countries that may have limited capacity to receive asylum seekers and process applications but from the refugees' perspective, the free choice of asylum procedures

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<sup>190</sup> *ibid.*

allows them to join social networks that support their integration.<sup>191</sup> This is in contrast, to the EU asylum system – including the Temporary Protection Directive itself – in which the question of *acquis* is based on a constitutive system of the allocation to a single state, which is often the country where the asylum seeker first arrives according to the criteria set out in the Dublin Regulation (Article 7).<sup>192</sup> Within this system, a free choice of the state of protection is only possible when EU territory is entered through the country where they wish to apply, which in practice is rarely possible. Secondary movements of asylum seekers are in principle prohibited, and repatriation is facilitated by the Dublin system's readmission mechanism (Article 23). Under the Temporary Protection Directive, Art 8, the beneficiaries may exercise their rights only in the issuing Member State of the residence permit. It is obvious from the Preamble 9 of the Temporary Protection Directive that a transfer of responsibility is not foreseen in the Directive and should have been countered. In this sense, the Directive (Article 11) obliges Member States to readmit a person enjoying temporary protection in their territory in case of secondary movements, however, allows that Member States relinquish those obligations through a bilateral decision. With the Implementing Decision, Preamble 15, this concept was turned over with a free choice system and the non-application of Art 11 of the Directive.<sup>193</sup> Nevertheless, Preamble 16 of the Implementing Decision of the Council indicates, that the permanency of residence principle remains in place, since the protection responsibilities are clearly assigned to the Member State which is providing residency. Therefore, to sum up the new concept of free choice, Ukrainian displaced persons do have the full freedom to choose their country of temporary protection, however, only before the issuing of a residency permit in one of the Member States.<sup>194</sup> This new approach of a limited freedom of choice is a much-needed perspective change on border management in the field of migration and asylum. Hopefully this inspires changes within the European Union development in the field of migration in the future and constitutes an incentive to liberalize the allocation question, since

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<sup>191</sup> EU Law Analysis (n 175).

<sup>192</sup> Daniel Thym, 'Temporary Protection for Ukrainians - The Unexpected Renaissance of "Free Choice"' (*Verfassungsblog*) <<https://verfassungsblog.de/temporary-protection-for-ukrainians/>> accessed 20 June 2022.

<sup>193</sup> *ibid.*

<sup>194</sup> EU Law Analysis (n 175).

the Dublin Regulation and the criminalization of secondary movements of refugees' asylum seekers have brought many human rights issues in the past.<sup>195</sup>

Moreover, Daniel Thym argues, that this semi free choice model, in connection with temporary protection, also raised several important issues, that are still unsolved. As for example, on which state the protection responsibility falls and when it exactly starts. Such questions seem to be especially relevant in the case of movements before obtaining temporary protection, such as in the case of a person who moves to another state where she/he/they registers with the authorities and receives a temporary protection certificate but moves to a third Member State afterwards to request a residence permit. These questions are not addressed in the Council Decision and even though there exist different possibilities to resolve this issue, is still not clear until now how to deal with this matter.<sup>196</sup>

## 2.2. Personal scope of beneficiaries and the connected difficulties

As described in chapter II, regarding the personal scope of beneficiaries of temporary protection the European Commission proposes the activation for a group of people who are entitled to this status, which then gets defined by the binding Council decision.<sup>197</sup> The decided protection status in Art 2 of the Council Decision 2022/382 applies to Ukrainian nationals residing as well as their families, in the case of displacement on or after 24 February 2022. Stateless persons or persons of third countries benefiting from international protection in Ukraine are eligible for temporary protection if they reside in tin the Ukraine before the 24 February 2022. This also includes their families, insofar as the family already existed in the Ukraine.<sup>198</sup> The proposal follows the definition of family in the Directive itself in Art. 1, which include spouses or unmarried partners in stable relationships, minor unmarried children (adopted legitimate, illegitimate) and other close relatives living with the family and maintained by the sponsor. The

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<sup>195</sup> Carrera and others (n 169).

<sup>196</sup> Thym (n 193).

<sup>197</sup> bordermonitoring.eu, 'Zur Umsetzung der Massenzustrom-Richtlinie' (3 March 2022)

<<https://bordermonitoring.eu/eu/2022/03/zur-umsetzung-der-massenzustrom-richtlinie/>> accessed 20 June 2022.

<sup>198</sup> European Council, 'Ukraine: Council Unanimously Introduces Temporary Protection for Persons Fleeing the War' <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/04/ukraine-council-introduces-temporary-protection-for-persons-fleeing-the-war/>> accessed 20 June 2022.

definition of family in the Directive is therefore significantly narrower than the definition of family members in Art. 4 of the Family Reunification Directive.<sup>199</sup>

In summary the decision included three different kinds of categories of displaced persons from Ukraine:

- (i) “Ukrainian citizens and non-Ukrainian nationals with a recognized refugee status and members of their families, who are automatically covered by the EU temporary protection (Art. 2(1) and (4))”,<sup>200</sup>
- (ii) non-Ukrainian nationals or stateless persons with a permanent residence permit issued under Ukrainian law, whose admission to temporary protection or any adequate protection under national law is subject to documentary requirements and the verification that they cannot be safely returned home (art. 2(2)),
- (iii) non-Ukrainian nationals or stateless persons who were residing in Ukraine for only a short time and whose fate is left solely in the hands of the Member States, to decide if a lawful stay in Ukraine is proven and there is a risk of refoulement in case of deportation and if therefore temporary protection should be granted (art. 2(3)).<sup>201</sup>

The Commission’s proposal for the personal scope of beneficiaries covered Ukrainian nationals displaced outside Ukraine as of February 24, 2022, third-country nationals who are "unable to return to their country or region of origin in safe and durable conditions," and long-term residents of Ukraine and their family members (Art. 1(1)). In comparison to the Council’s decision, the Commission suggested to let the Member States decide whether to consider accepting persons with a refugee status or a current asylum claim in Ukraine. Other third-country nationals who are in Ukraine and have "the possibility to return under safe and durable conditions" to their country or region of origin were also not considered in the Commission's initiative. Among the groups exempted from the TPD, according to the Commission's proposal

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<sup>199</sup> Carrera and others (n 169) 15.

<sup>200</sup> Vitiello (n 189) 18.

<sup>201</sup> Vitiello (n 189) 18.

it would have not been possible to offer those third-country nationals that are studying or working in Ukraine on a short-term basis temporary protection.<sup>202</sup>

Even though the Councils decision leaves a greater room for maneuver for the Member States to decide whether and which third nationals to grant temporary protection, compared to the Commission's proposal, the optionality for the Member States leads to certain severe challenges of the temporary protection regime. The fact that students and foreigners are not automatically covered from temporary protection according to Art 2(3) of the Councils decision painted a picture of a high degree of legal uncertainty regarding the obligations of the relevant Member States - which leaves a lot of room for discriminatory acts towards these groups.<sup>203</sup> Moreover, since more than 70 thousand people, mainly from Africa and India, were studying in Ukraine - in addition to workers and family members - these controversies regarding third country nationals are far from irrelevant.<sup>204</sup> The Decision 2022/382 clarifies in Preamble 13 that these not automatically protected persons should be granted unconditional access to the territory of the Member States. However, different NGOs documented push-back practices as well as numerous other xenophobic and racist incidents based on ethnic profiling at the Eastern borders against non-European refugees as well as families with a Roma background.<sup>205</sup> The UN Special Rapporteur on contemporary forms of racism, Tendayi Achiume, clearly articulated his concerns about the reports of discrimination based on race, ethnicity, and nationality at the EU borders. He issued a statement condemning such xenophobia and racist threats at the EU's external borders as well as calling on all relevant government authorities and international organizations "to ensure safe passage and life-saving protections for all people affected by the conflict."<sup>206</sup> There have been numerous other reports in the media of people of color needing to wait in separate queues and facing extended waiting times. Several incidents that occurred in Ukraine while boarding evacuation trains or attempting to leave the country by other means were reported. For example, South African students were not allowed to flee Ukraine and enter

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<sup>202</sup> Carrera and others (n 169) 12.

<sup>203</sup> *ibid* 19.

<sup>204</sup> Thym (n 193).

<sup>205</sup> Vitiello (n 189) 18.

<sup>206</sup> OHCHR, 'Ukraine: UN Expert Condemns Racist Threats, Xenophobia at Border' (*OHCHR*, 3 March 2022) <<https://www.ohchr.org/en/press-releases/2022/03/ukraine-un-expert-condemns-racist-threats-xenophobia-border>> accessed 21 June 2022.

the EU with others fleeing Ukraine, leading to reportedly over 1,200 foreign students being stranded in Ukraine and African students experiencing discriminatory treatment arriving at the Polish border.<sup>207</sup> In addition, people without biometric passports or any documents, such as the elderly, unaccompanied children, especially those living in state orphanages, or people with disabilities who are under a legal guardian,<sup>208</sup> as well as Roma population experienced challenges regarding the evacuation and reception.<sup>209</sup> This has further prompted some actors to release statement on this issue, as for example the African Union did on February 28, 2022. In its statement ‘on the reported ill treatment of Africans trying to leave Ukraine’ it expressed to be highly concerned by the fact that African citizens on the Ukrainian side of the border are being denied the right to enter the EU. Since such a different treatment would be not only shocking but further unexceptionally discriminatory and in breach of international law, the African Union demanded equality of treatment and an end to discrimination on the right to leave Ukraine based on nationality or racial identity.<sup>210</sup>

Meltem Ineli-Ciger argues that this double standard for the treatment of asylum seekers and refugees that are non-European is another significant difference between the situation in 2022 and the previous mass influx situations, especially of the years 2011 and 2015.<sup>211</sup> This double standard - which gets confirmed through the just described racist incidents at the EU borders in March 2022 - and the connected institutionalized manifestation of racism are furthermore reflected in the statement of some of the EU government leaders in regard to the importance of a high protection standard for Ukrainian refugees. As an example, Kiril Petkov, the Bulgarian Prime Minister proclaimed that ‘These [Ukrainians] are not the refugees we are used to... these people are Europeans... These people are intelligent, they are educated people.... This is not the refugee wave we have been used to ...there is not a single European country now which is afraid

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<sup>207</sup> Lighthouse Reports, ‘Ukraine Exodus’ (*Lighthouse Reports*, 23 March 2022)

<<https://www.lighthousereports.nl/investigation/ukraine-exodus/>> accessed 21 June 2022.

<sup>208</sup> BBC News, ‘Ukraine Conflict: Children on Their Own, Parents Stay Behind’ *BBC News* (26 February 2022)

<<https://www.bbc.com/news/world-europe-60539104>> accessed 21 June 2022.

<sup>209</sup> romea.cz, ‘Roma and Other People of Color Fleeing War in Ukraine Face Discrimination and Racism’ (*romea.cz*, 3 March 2022) <<http://www.romea.cz/en/news/world/roma-and-other-people-of-color-fleeing-war-in-ukraine-face-discrimination-and-racism-jaroslav-miko-tells-romea-tv-that>> accessed 21 June 2022.

<sup>210</sup> Carrera and others (n 169) 15.

<sup>211</sup> Ineli-Ciger, ‘5 Reasons Why’ (n 184).

of the current wave of refugees.<sup>212</sup> Hungary's Foreign Minister Peter Szijjarto defended this approach, as he stated in a UN meeting in Geneva: "I must reject drawing comparisons between those fleeing war and those trying to get into the country illegally".<sup>213</sup>

### 2.3.Upholding rights after temporary protection expires

As discussed in chapter III as part of the challenges of the Temporary Protection Directive, the question what happens after the termination of the temporary protection regime, has been an issue from the beginning of the adoption of the temporary protection regime. Paragraph 21 of the Preamble of the Council activation decision declares that the duration of the temporary protection should last – in accordance with the Directive – for an initial period of one year and be extended automatically by six monthly periods for a maximum of another year, unless terminated under the terms of Article 6(1). Additionally, if the circumstances in Ukraine allows for a safe and long-lasting return of persons who were granted temporary protection, the Commission may at any time suggest ending the temporary protection.<sup>214</sup> The Directive regulates in Art 20, that after the termination of the temporary protection regime, the general laws on protection and foreigners apply.<sup>215</sup> In principle, it is possible for the beneficiaries of temporary protection to receive another legal status under the EU migration and asylum system or under a national status. Those who do not benefit from such another legal status are required to leave. The Temporary Protection Directive includes specific provisions in chapter V for the return procedure, which should initially be voluntary. Forced return is explicitly provided for, but such return must be carried out "with respect for human dignity" and Member States must "take into account any compelling humanitarian reasons that may make return impossible or unreasonable in individual cases" (Art 22). Concerning the applicable regulations in the case of

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<sup>212</sup> Tazreena Sajjad, 'Ukrainian Refugees Are Welcomed with Open Arms – Not so with People Fleeing Other War-Torn Countries' (*The Conversation*, 9 March 2022) <<http://theconversation.com/ukrainian-refugees-are-welcomed-with-open-arms-not-so-with-people-fleeing-other-war-torn-countries-178491>> accessed 21 June 2022.

<sup>213</sup> Hassan Hankir and Hams Rabah, 'Arab Refugees See Double Standards in Europe's Embrace of Ukrainians' (*SWI swissinfo.ch*) <<https://www.swissinfo.ch/eng/reuters/arab-refugees-see-double-standards-in-europe-s-embrace-of-ukrainians/47395932>> accessed 20 June 2022.

<sup>214</sup> Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022 (OJ L) para Art 21.

<sup>215</sup> Temporary Protection Directive 2001.



termination, return and beneficiary of another legal status after the termination, beneficiaries of temporary protection will be subject to the EU Qualification Directive, the procedural rules in the Directive's procedural regulations, and the rules on the status of asylum seekers set out in the Reception Conditions Directive on the status of asylum seekers.<sup>216</sup> However, the Council Decision stays silent regarding the challenges that were discussed in chapter II. Especially critical seems to be the question how the identification be dealt with of those individuals who cannot - despite the possible improvement of the situation in the region or in the country - be returned to their country of origin due to personal persecution. Moreover, the Directive and the implementing decision are insufficient about the topic of a possible situation where the maximum duration of three years is terminated and the situation in the country of origin has not improved. Walter Kälin argues that in this situation, the only possible method for deciding on specific situations that are not covered by refugee status is subsidiary protection.<sup>217</sup> In any case, it is from utmost importance, that the temporary protection status, does not replace the right of these beneficiaries to be granted asylum or any other protection status after the termination of the temporary protection regime. Carrera et al. argue that it is in this sense crucial for the European Union to develop a strategy for the event that the war does not end soon, to provide both Ukrainian and non-Ukrainian nationals who are fleeing the conflict with lasting protection options in addition to access to asylum and subsidiary protection.<sup>218</sup>

### **3. Conclusive thoughts on the activation of the temporary protection regime in 2022**

As aforementioned, the activation of temporary protection was warmly welcomed by scholars, civil society, international organizations and the EU institutions and can be seen as the best solution for the high number of people fleeing the war in Ukraine. Temporary protection grants the people fleeing the Ukrainian war a safe access to the EU's territory, with a protection standard, that includes residency, work permits and other social rights - without the need of lengthy individual asylum determination status procedures that could eventually lead to a

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<sup>216</sup> EU Law Analysis (n 175).

<sup>217</sup> Kälin (n 24) 235f.

<sup>218</sup> Carrera and others (n 169) 22.

collapse of the asylum system. The EU reacted swiftly to this extremely high refugee influx by opening its borders and a great display of solidarity with the people of Ukraine. However, this reaction clearly differs from the approach that the European Union choose in previous mass influx situations as for example in 2015, during which the approach was not to open borders but to close them.

The present research supports the choice of the European Union to activate the temporary protection regime for displaced persons from Ukraine since the temporary protection is indeed the right framework to activate in such a mass influx situation. Due to its advantages (discussed in chapter III), especially the general broad personal scope of beneficiaries, the flexible criteria and the harmonization of a minimum protection standard, temporary protection can guarantee a high protection standard for all the displaced persons due to the conflict in Ukraine while ensuring that the asylum system will not collapse. Even though the Directive contains some legal challenges (which were also discussed in chapter III) and the challenges that came with the implementing decision, offering these displaced persons that fled from Ukraine into the European Union temporary protection, is inarguably the best solution to guarantee a high protection standard for these persons and to fulfill the EU Member States commitment regarding refugee protection.

However, all this taken together begs the question if the current shift in action can be seen as a major paradigm shift, for mass influx situations that will occur in the future but might not stem from a European country as it did now. As discussed in the previous chapters, the activation of temporary protection, means not only open borders but also solidarity with those fleeing from a conflict. With the activation in 2022 the EU even went a step further and implemented a system of a (semi-) free choice of destination for beneficiaries of temporary protection. All these facts differ greatly to the approach on how to deal with the previous mass influx situations and would constitute a highly desirable shift in action for future, non-European, mass influx situations. However, as just indicated above, the decision in favor of activating the temporary protection regime, was guided by practical as well as political reasons. Arguably, the most significant factor for the 2022 activation is the specific political situation, through which a direct interest of the European Union in this conflict due to Ukraine's proximity to the European

Union, was spiked. This situation differs inherently to the previous discussed mass influx situations and would mean that only in such cases in which the European Union has a political interest, a high protection standard for displaced persons coming within a mass influx would be activated. Furthermore, when assessing the differentiation between Ukrainian nationals and third nationals, as well as the discriminatory and xenophobic incidences at the border to the European Union towards non-white third country nationals and asylum seekers from the Middle East, Africa and Asia, the impression of such a paradigm change in the future fades. These incidents rather show - as Carrera et al argue - the continuity of systemic unequal solidarity in the EU and the Member States' asylum systems.<sup>219</sup>

Taking the in chapter II described reasons for the obsolescence of the Directive into account, most of the European Union Member States fear that letting more protection seeking persons into the European Union would possibly worsen an already critical situation. This fear of a pull factor is however apparently only applicable for non-European refugees since this was no discussion during the activation process of 2022. Therefore, it could be argued that the current framework of temporary protection is only set up for individuals from non-European countries since the Member States obviously feel less threatened that European nationals would have no incentive to return to their home countries after arriving in the European Union. As stated above, Medina Dzubur reasons these fears towards non-Europeans with a “underlying religious animosity and a misplaced fear of terrorism”.<sup>220</sup> In sum of all these political circumstances and reasons for activation and non-activation for previous mass influx situations, can be stated that the activation of the Temporary Protection Directive for persons fleeing Ukraine after the Russian invasion at 4 March 2022 will most probably not constitute the hoped paradigm change which would ensure the activation of the Directive in future mass influx situations and can be declared as a circumstantial situation that made it possible to activate the Directive. Nevertheless, this study supports the idea that the Directive can be changed in certain ways to overcome this dependence on the “right political circumstances” for the activation of the temporary protection regime. These ideas will be discussed in the last chapter.

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<sup>219</sup> *ibid* 10.

<sup>220</sup> Dzubur (n 22) 404f.

V. **Excursus: THE NEW PACT ON ASYLUM AND MIGRATION – A HOPEFUL SIGN FOR A PARADIGM CHANGE OF THE EU’S APPROACH TO DEAL WITH MASS INFLUX SITUATIONS?**

In September 2020, the Commission proposed a new Pact on Migration and Asylum, aiming for a revision of the current Common European Asylum System through inter alia faster and improved procedures and a balanced sharing of responsibility.<sup>221</sup> In the course of this development, the Commission also proposed repealing the Temporary Protection Directive, since it – according to the proposal – does no longer respond to the Member State’s “current reality and needs”.<sup>222</sup> The introduced temporary protection regime should replace the temporary protection, however in regards to the content of the protection standard of the newly proposed immediate protection, it has clear overlaps with the existing temporary protection concept.<sup>223</sup> Art 10 of the proposal clarifies that this mechanism can only be activated in crisis situations “in respect of displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin.” In this aspect the immediate protection regime differs in the language to the Temporary Protection Directive, since the granting of temporary protection is linked to the existence of a mass influx situation as well as the inability of the asylum system to cope with the high number of displaced persons reaching EU territory. Immediate protection however, is conditioned to the occurrence of a so-called crisis situation and the risk of obtaining a non-functional asylum, reception or return system in the Member States.<sup>224</sup> Article 1(2)(a) and (b) of the Proposal for a Migration and Asylum Crisis Regulation defines four conditions that need to be classified as crisis situation: (i) the existence of an

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<sup>221</sup> European Commission, ‘New Pact on Migration and Asylum’ (*European Commission - European Commission*) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)> accessed 20 June 2022.

<sup>222</sup> European Commission, Proposal for a Regulation of the European Parliament and the Council addressing situations of crisis and force majeure in the field of migration and asylum 2020 Explanatory Memorandum, 3.1.

<sup>223</sup> Rossana Palladino, ‘The “Immediate Protection” Status under the New Pact on Migration and Asylum: Some Remarks’ *Journal of Mediterranean Knowledge X* 376 <[file:///Users/susannefridl/Downloads/213-Article%20Text-838-1-10-20220113%20\(3\).pdf](file:///Users/susannefridl/Downloads/213-Article%20Text-838-1-10-20220113%20(3).pdf)> accessed 10 May 2022.

<sup>224</sup> Meltem Ineli Ciger, ‘What a Difference Two Decades Make? The Shift from Temporary to Immediate Protection in the New European Pact on Asylum and Migration – EU Immigration and Asylum Law and Policy’ (11 November 2020) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>> accessed 21 June 2022.

imminent or actual mass influx situation, (ii) the consistence of this mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following a search and rescue operation (iii) the arrival of a number of persons, which is disproportionate to the population and GDP of the Member State concerned, (iv) the non-functionality of the Member States asylum, reception or return system due to the nature and scale of the arrivals.<sup>225</sup> Meltem Ineli-Ciger argues that the proposal for the new pact includes a clearer description and more precise indicators of a situation of crisis in comparison to the definition of ‘mass influx’ in the Temporary Protection Directive.<sup>226</sup> This is – according to her – especially evident in the inclusion of the number of arrivals being out of proportion to the population and GDP of the Member State, which can theoretically make the determination of the existence of a crisis to some extent easier.<sup>227</sup> Nevertheless, even though the definition in the new proposed Directive uses a clearer language, the actual indicators do not differ very much to the ones developed by the European Commission and described in chapter III.

For the most part, the proposed immediate protection system shares many commonalities with the current temporary protection system. However, there are some striking differences of the proposal of immediate protection compared to temporary protection: on the one hand the proposal includes a limited duration of the mechanism as well as on the other hand a narrowed scope. Firstly, the number of beneficiaries from the proposed immediate protection is more limited than in the temporary protection regime, since not all third-country nationals or stateless persons arrive on EU territory due to search and rescue operations. Additionally, it is obvious that the reference to “exceptional situations of armed conflict” restrict the eligibility for an immediate protective status of displaced persons and would exclude for example those who are fleeing due to systematic human rights violations. For that reason, the personal scope of the proposed immediate protection is clearly narrower than that the Temporary Protection Directive 2001/55/EC.<sup>228</sup> Another striking difference regards the period of enjoyment of immediate

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<sup>225</sup> Meltem Ineli-Ciger, ‘Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?’ [2022] *Reforming the Common European Asylum System* 149, 154.

<sup>226</sup> Ineli Ciger (n 223).

<sup>227</sup> Ineli-Ciger, ‘Immediate Protection in the New Pact on Migration and Asylum’ (n 222) 154.

<sup>228</sup> *ibid* 151.

protection: with a maximum duration of one year the limit set for immediate protection is much shorter the time period for temporary protection, which could be extended up to three years.<sup>229</sup>

Nevertheless, the most important difference of the new proposed immediate protection - which also has the potential to make an activation of the mechanism more likely - is the simplification of the activation mechanism. According to the proposed Directive (Article 10(4)), the Commission instead of the Council has the authority to decide if the immediate protection regime should be triggered, who would receive the status and for which duration. The reason for this different activation approach, seems to be the hope that such a change of authority would increase the likelihood of activation.<sup>230</sup> According to Art 3 (1) of the proposed regulation the Member States which is facing such a crisis, can submit a reasoned request directly to the Commission, which in a further step assesses the necessity to activate immediate protection.<sup>231</sup>

However, the question remains, if this new immediate protection system would theoretically increase the likelihood of an activation in a situation of a mass influx compared to the current Temporary Protection Directive, that has been obsolete for such a long time. More precisely it begs the question, if immediate protection would constitute a paradigm change to deal with mass influx situations of the future, that possibly do not stem from the European region.<sup>232</sup> The new mechanism seeks to overcome the above-described challenges and reasons for a non-activation of the Temporary Protection Directive, especially by simplifying the activation process and leaving the decision of activation by the Commission and not by the Council. However, in this regard must be countered, that the Commission during these last 21 years of obsolescence never showed the willingness to trigger the activation to the Council, and as discussed above, ignored the calls of different EU institutions, NGOs and international organizations during the mass influx situations of 2011 and 2015/2016. It is therefore highly doubtful that this - well-meant - simplification would overcome this problem and that the Commission would

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<sup>229</sup> Palladino (n 222) 229.

<sup>230</sup> Ineli-Ciger, 'Immediate Protection in the New Pact on Migration and Asylum' (n 222) 154.

<sup>231</sup> Palladino (n 222) 378.

<sup>232</sup> Ineli-Ciger, 'Immediate Protection in the New Pact on Migration and Asylum' (n 222) 150.

show a different will if it had the authority to activate the mechanism without the decision of the Council.<sup>233</sup>

Furthermore, it can be stated, that despite the fact that there are a number of objective criteria that make it harder for the commission to find a leeway for the consideration of the activation, the factors are still too vague and open for interpretation to assume an easily triggered activation of the mechanism.<sup>234</sup> Especially, the definition of a large-scale irregular arrival of third country nationals or the non-functional of the asylum system<sup>235</sup> are parts of the new definition that resemble the vagueness of the temporary protection. Even though a more precise definition of what constitutes a crisis situation is valuable it does not necessarily allow the conclusion of a more likely activation of the regime in the future.

To answer the asked question of this chapter, if the New Pact on Migration and Asylum would be a better approach to deal with mass influx situations of the future, it can be argued that the reason for non-implementation would per se not be automatically overcome with the replacement of the temporary protection with immediate protection.<sup>236</sup> To sum up, the reasons for this are that the definition of a crisis situation is still too vague and open for interpretation. Furthermore, the - in general well-received - authority shift of the trigger process to the Commission would not automatically change the main problem of the non-activation of the temporary protection mechanism: the political unwillingness. The true problem lies in the lack of solidarity for certain streams of influxes and in this respect the proposed new mechanism would be very likely to encounter the same resistance as was seen in the aftermath of the 2015 crisis in another similar mass influx situation.<sup>237</sup> This study therefore comes to the conclusion that, the New Pact and its proposed immediate protection regime cannot be declared as the needed change to properly deal with mass influx situations, as its activation for non-European

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<sup>233</sup> *ibid* 155.

<sup>234</sup> Amnesty International, 'Position Paper - The Proposed Crisis Regulation' (Amnesty International 2021) <<https://www.amnesty.eu/wp-content/uploads/2021/03/AI-position-paper-on-Crisis-Regulation-.pdf>> accessed 1 May 2022.

<sup>235</sup> Ineli Ciger (n 223).

<sup>236</sup> *ibid*.

<sup>237</sup> Durieux (n 26) 11.

refugee flows is as unlikely as the non-activation of the Temporary Protection Directive for the last 21 years.

Moreover, the study follows the approach that the reasoning for the proposed replacement of the temporary protection, which is that the Temporary Protection Directive does not respond to the needs of the Member States, is not valid and does not reflect the problematic issues that lead to 21 years of obsolescence. As we could see through from the swift activation process of temporary protection for the displaced persons fleeing the war in Ukraine in 2022, temporary protection obviously does respond to the needs of the Member States, as long as the political will for an activation exists. The implementation of immediate protection would have, as just stated, most probably not changed the reaction of the European Union in the previous mass influx situations that were discussed above. Furthermore, it must be noted that the limited duration of the mechanism as well as the narrowed scope of application are two developments that are designed to ensure the highest protection standard for displaced persons entering the European Union within a mass influx. Temporary protection is therefore in principle the most adequate instrument to activate in all mass influx situation. Nevertheless, solutions need to be developed to overcome the political barriers that are preventing its activation and at guarantee a high protection standard for displaced persons for all future mass influx situations. Such possible solutions will be discussed in the following chapter of this research.



## VI. CONCLUSION AND RECOMMENDATIONS

After discussing the 21 years of non-activation of the Temporary Protection Directive, while looking at the main reasons for this obsolescence of the Directive, as well as at how the European Union dealt with previous mass influx situations in *chapter III*; giving an overview over the context and the reason for the positive implementing Council 2022/382 Decision of 4 March 2022 in *chapter IV*; evaluating the New Pact on Migration and Asylum and its proposed immediate protection regime as a possible better approach for future mass influx situations in a short *excursus*, this final chapter will conclude this thesis by summarizing the results of this research, answering the research questions, and providing possible (policy) recommendations for the way forward.

This thesis aimed to answer the main research question, if the Temporary Protection Directive is the most promising solution to cope with future mass influx waves of refugees, especially also for the predicted refugee waves of non-European regions. In other words, if the activation of the Directive can be considered as a paradigm shift to tackle all mass influx waves of refugees of the future, coming from European as well as non-European countries, or if the activation of the Directive can be seen as something circumstantial applied only for the Ukrainian refugees. In order to answer these questions, the study focused first on the question why the Temporary Protection Directive has been seemingly obsolete for the last 21 years, even though the European Union faced several mass influx situations, especially in the years 2011 and 2015/2016. The research also elaborated on approach of the European Union to deal with these mass influx situations. Lastly, the thesis shed light on the rather unexpected and extremely prompt decision of the Council to declare a mass influx situation and activate the so far never used temporary protection mechanism and elaborate on the reasons why the Directive got so easily activated in 2022, while it has never been even close to activation in other mass influx situations.

The study concludes that even though the activation is a very welcomed step into the direction of a higher protection standard for refugees and displaced people in the case of mass influx situations, it cannot be declared as a clear and lasting paradigm change for the European Union to deal with future mass influx situations, especially from non-European countries. This is

mainly due to the fact that the activation of the Temporary Protection regime for future mass influx situations depends mainly on a political incentive of the Member States of the European Union, since as discussed in chapter III the non-activation between 2001 and 2022 as well as the swift activation for Ukrainian refugees was due to political reasons. The political situation in 2022 differs significantly to the previous mass influx situations since the European Union Member States clearly had a political interest in a high protection standard for the Ukrainians that were displaced due to the Russian invasion, which was not the case in previous mass influx situations. This rapid activation of the Directive and the newly established and highly welcomed concept of free choice of destination for temporary protection beneficiaries, however, stands in a clear contrast to the in chapter II discussed reaction of the European Union to the mass influx of Syrian refugees in 2015/2016, in which the strategy was quite the opposite with closed borders and strong security measures. Taking the in chapter II described reasons for the obsolescence of the Directive into account, most of the European Union Member States fear that letting more protection seeking persons into the European Union would possibly worsen an already critical situation. This fear of the pull factor is however apparently only attributed to non-European refugees since this was no discussion during the activation process of 2022. Furthermore, when assessing the discriminatory and xenophobic incidences at the border to the European Union towards (non-white) third country nationals from non-European regions, the impression of such a paradigm change, through which also non-European refugee flows would be treated with a high protection standard, fades. The current approach of the European Union to deal with refugees is clearly based on a double standard – differentiating between European and non-European displacement, and this contradicts the principles of the rule of law and fundamental rights enshrined in Article 2 of the Treaty on European Union (TEU).<sup>238</sup>

However, even though the activation cannot be declared as a major paradigm change to deal with mass movements of future, the study sympathizes with the opinion that the Temporary Protection Directive is the right instrument to use in such mass influx situation. Nonetheless, the directive needs to be adapted in a way that ensures that it will be activated for all the mass influx situations that are predicted for the future. As explained in chapter II, the EU focused on

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<sup>238</sup> Carrera and others (n 169) 1.

measures to strengthen the EU border control system in the past to deal with the high influx of non-European refugees, as for example with the high influx of Syrian refugees in 2015. Especially, when looking at the budgetary developments of the border control agency Frontex which stocked up the budget from 142 million Euro in 2015 to 460 million Euro in 2020 it seems like that the European Union is not willing to change the border control approach for certain refugee influxes. The possibility of an activation of the temporary protection regime is therefore more than desirable for such future influx situations stemming from other regions than Europe, since it would ensure that the approach of the EU would fulfill the necessary protection standard for such displaced persons.

In this regard, it seems that the only way to overcome these obvious political hindering factors for an activation of the Directive, is to adapt the legal barriers for the non-activation. The activation of the Directive in 2022 would offer a unique window to discuss a reform of the Temporary Protection Directive. The two main legal challenges are in this regard, as described in chapter III, the unprecise scope of the definition in the Directive of a mass influx situation and the complex and politicized activation process:

Regarding the complex activation process, scholars like Meltem Ineli-Ciger proposed a few years prior to the activation of the Directive, that it needs to be considered that Member States, even the most affected ones, cannot request the activation of the Directive directly at the Council, since only the Commission can submit such a proposal. Moreover, the high threshold of a qualified two-thirds majority in the Council appears to be another severe weak point of the activation process of the Temporary Protection Directive, since mass flows of migrations naturally mainly affect only a few borderland Member States, such as Italy, Greece or Malta. A two-thirds majority in the Council, therefore, appears to be very unlikely to be met, due to the fact that the northern EU Member States do not experience the same scale of incoming refugees on their territory. Therefore, Meltem Ineli-Ciger argued in many of her texts that a solution to facilitate the Directive's activation in future instances of mass influx could be to amend its activation mechanism and to lower the threshold. This argumentation seems to be not valid anymore, since the case of the Ukrainian refugee influx in the beginning of March 2022 showed that as long as there is the political will (as just discussed above) the Directive

can be activated, no matter how complicated the process. Nevertheless, a lower threshold in the Council or even the proposed new way of shifting the activation authority to the Commission alone without a necessary vote in the Council is a good approach to higher the chances for an activation and should be considered as a possible adaptation of the Directive. This change of authority is in principle highly welcomed, however, as stated in the previous chapter about the New Pact and the immediate protection proposal, must be considered that such a change of the activation regime does not automatically ensure an activation of the Directive, since it is still a matter of political will of the Commission to activate the mechanism.

Nevertheless, as Meltem Ineli-Ciger further argued in her texts, there exists another possibility to overcome these political barriers for activation: The definition of the term *mass influx* can be seen as the most striking flaw of the Directive as it leads to result in a state of limitation of the scope of the Directive, since a determination of the existence of a mass influx is only based on the discretion of the European authorities. Ultimately, as described above, the scale of the refugee influx was used as the main argument to not trigger the temporary protection mechanism during the mass influx situations in 2011 and 2015/2016, while it was also the main argument for the 2022 decision for activation. The only way to conquer this big room for political leverage seems to revise the definition of a mass influx situation. Meltem Ineli-Ciger argued in this regard, that the Council decision requirement should be substituted with a clear and objective definition of a mass influx situation. More precisely this would mean that once the conditions that determine a mass influx situation materialize, the Directive would be activated.<sup>239</sup> Especially after the above assessed politicalized reasons for the obsolescence of the Directive in the last 21 years as well as the 2022 swift activation, the only change of the Directive to overcome this barrier seems to be the change of the definition of mass influx to a clear referral to a particular number of persons arriving in a certain Member State within a clearly defined time frame<sup>240</sup> - depending on the stability of the asylum system and the predictions how many applications for international protection would overwhelm the national asylum regimes of the EU. This clearly defined number of asylum seekers entering a certain Member State/the EU would then act as a threshold for declaring if the certain number of

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<sup>239</sup> Genç and Şirin Öner (n 6).

<sup>240</sup> Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete?' (n 9) 246.

arrivals and predicted arrivals would declare as a mass influx. The predicted numbers of arrival could be based on the data of the EU Migration Preparedness and Crisis Management Network, which was also used in the case of the implementing Decision in March 2022.<sup>241</sup> Even if such clear numbers would be developed as precise indicators for a mass influx, the Council would still have the authority to decide which groups would be eligible for temporary protection.<sup>242</sup>

Such a revision of the Temporary Protection Directive could eventually ensure that people fleeing conflicts and seeking protection in the European Union as part of a large scale influx are not subjected to illegitimate double standards based on political views of the Member States towards non-European and European refugees - grounded on discriminatory reasons such as ethnicity, race or religion.<sup>243</sup> In order to counter the discrimination and the endemic racism that dominates the migration and asylum debate in the Union, it is crucial to put a high protection standard for the individuals entering the European Union as well as a human-centric approach for the sake of decent humanity and justice should as the ultimate objective.<sup>244</sup> This could eventually be achieved through the adoption of a clear definition of mass influx within the Temporary Protection Directive, which would open the possibility of the activation of temporary protection also for future mass influx situations stemming from non-European countries. This revision could eventually prevent, that the just described political double standard of the EU in terms of migration, hinders a high protection standard for all displaced persons entering the European Union within a mass influx situation. It could ensure a high protection standard for every displaced person entering EU land - regardless from which region of the world come from.

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<sup>241</sup> Ineli-Ciger, '5 Reasons Why' (n 184).

<sup>242</sup> Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete?' (n 9) 246.

<sup>243</sup> Carrera and others (n 172) 1.

<sup>244</sup> *ibid* 35.

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