

# THE EU AND THE MASS INFLUX FROM UKRAINE: IS THERE A FUTURE FOR TEMPORARY PROTECTION?

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*Abstract: In an unexpected turn of events, Council Directive 2001/55/EC and the status of temporary protection became an inevitable choice of the EU when dealing with the largest displacement of individuals since World War II. What was once believed to be a forgotten reminiscence of the past within the Common European Asylum System stands now at the heart of the EU's response to the mass influx caused by the Russian aggression in Ukraine. And while arguably bringing a fresh change to EU asylum law, the current success of temporary protection is still only of a temporary nature given the Commission's New Pact on Migration and Asylum and the proposed repeal of the Directive. The article aims to tackle the use of temporary protection at the EU level in 2022 and 2023 and explore the question of its relevance in EU law more than two decades after the adoption of the currently employed legal framework of temporary protection within the Common European Asylum System.*

*Keywords: temporary protection, mass influx, EU asylum law, temporariness of protection, Council Directive 2001/55/EC, Common European Asylum System*

## 1 Introduction

In 2023, temporary protection remains an unexpected 'mainstream' of the EU's migration and asylum policy and has become a synonym for protecting those fleeing the consequences of the Russian aggression in Ukraine. The numbers confirm the previous statements: the status of temporary protection has been granted to millions of Ukrainian and oth-

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er designated third-country nationals in all the EU Member States.<sup>2</sup> In the context of the Common European Asylum System, this situation is unprecedented – and so is the use of temporary protection’s existing legal basis in EU law.

Council Directive 2001/55/EC (hereinafter: the Directive) is a more than 20-year-old protection instrument which established a protection scheme never amended or activated before 2022. Not to mention that I am referring to an EU Directive whose fate initially seemed to be sealed in the light of the Commission’s 2020 proposal for a New Pact on Migration and Asylum. Ironically, it is exactly the framework of the Directive that was in 2020 labelled as ‘no longer responding to Member States’ current reality’.<sup>3</sup> The fact that the Directive and its framework are now at the heart of the EU response to the large-scale movement of Ukrainians could be proving the opposite and requires that the value and importance of the Directive be addressed once again.

What is the rationale behind this proposition? First, it is the fact that providing some form of sensible and immediate protection to individuals fleeing from their homes in large numbers never felt easier from the perspective of EU law. Temporary protection was provided to Ukrainian nationals swiftly, on a group basis and without the need to examine the situation of each individual applicant. The use of the only group-based protection scheme within the Common European Asylum System (hereinafter: CEAS) provided Member States’ asylum systems with enough breathing space to handle the sudden arrivals of hundreds of thousands of third-country nationals, while the beneficiaries of temporary protection were instantly provided with a set of harmonised rights across all of the EU Member States. How important this was can only be demonstrated when one compares the current legal response with the one employed by the EU Member States in 2015, when calls for activating the framework of the Directive in response to the Syrian refugee crisis were not heeded.<sup>4</sup>

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<sup>2</sup> Eurostat, ‘30 April 2023: Almost 4 Million with EU Temporary Protection’ (*Eurostat*, 9 June April 2023) <[https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Annual\\_asylum\\_statistics#Decisions\\_granting\\_temporary\\_protection](https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Annual_asylum_statistics#Decisions_granting_temporary_protection)>. I refer to temporary protection here as a *status*, in spite of its definition in EU law. The reasons behind this are mainly related to the fact that beneficiaries of temporary protection are provided with a set of harmonised rights defined by 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 (Temporary Protection Directive) [2001] OJ L212.

<sup>3</sup> 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 (Crisis Regulation Proposal) [2020] COM/2020/613 final, part 3.1 ‘Evidence-based policy-making’ of the Explanatory Memorandum.

<sup>4</sup> Danielle Gluns and Janna Wessels, ‘Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current “Refugee Crisis”’ (2017) 36 *Refugee Survey Quarterly* 62.

Secondly, the rather ‘unproblematic’ response of some Member States, for whom the Directive’s broad language was now apparently sufficient to grant protection to millions of third-country nationals, appeared to many as particularly surprising also in the light of the proposed New Pact on Migration and Asylum. Why is this so? The very first ‘activation’ of the Directive in more than 20 years following its adoption will one day probably be hailed as a success story – at least from the standpoint of its effectiveness and the achieved collective effort in creating a safe haven for individuals fleeing war-torn Ukraine.

Yet the Directive was a dead letter of EU law until March 2022 and notwithstanding its success, it is apparently still not predestined to become the next big thing of EU asylum law. On the contrary, the Directive’s fate is still rather uncertain as not long ago it was set to be repealed and completely replaced with the new Crisis Regulation<sup>5</sup> and the status of immediate protection: a novel, more, stringent form of protection in terms of its personal scope that simultaneously builds on more complex (and, most importantly, more complicated) solutions regarding the issue of solidarity among Member States.

This article aims primarily to reflect on the use of the Directive and temporary protection in 2022 and 2023 and on the Commission’s 2020 Proposal for a Crisis Regulation: is the eventual repeal of the Directive a welcome change of EU asylum law? At first, the article examines this question from the perspective of the solidarity and burden-sharing mechanism anchored within the Directive: is there a lesson to be learned from the inaugural activation of the Directive on the Common European Asylum System and its rules relating to solidarity and responsibility? And if not, are there any other relevant factors and parts of its framework that would justify the Directive’s continuing existence? This article will try to untangle these questions also by looking at the practice of providing temporary protection by Central and Eastern European EU Member States (hereinafter: CEE Member States), particularly the Czech Republic and Slovakia, former *nay-sayers* on the issue of relocation quotas and on EU asylum law in general, with their own and distinct historical experience and that are currently leading the way in addressing the Ukraine crisis.

## 2 Temporary Protection Directive: twenty years later

The framework of the Directive is one of the outcomes of the European experience in protecting individuals fleeing the armed conflict in Bosnia and Herzegovina (1991-1995) and Kosovo (1999).<sup>6</sup> The experience is not unfamiliar to the Czech Republic or other post-communist countries,

<sup>5</sup> 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 (Crisis Regulation Proposal) [2020] COM/2020/613 final.

<sup>6</sup> Maryellen Fullerton, ‘A Tale of Two Decades: War Refugees and Asylum Policy in the European Union’ (2011) 10 Washington University Global Studies Law Review 1, 98; Guy Goodwin-Gil and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 340.

which were at the time providing this type of group-based protection based on their own national legislations.<sup>7</sup> The contemporary version of temporary protection status, and the subsequent evolution of its original form, the status of *temporary refuge*,<sup>8</sup> is therefore not an unknown form of protection in the whole European context. On the contrary, the use of national schemes of temporary protection independently by European countries in the 1990s signalled the subsequent need for a common protection status to be established at the level of EU law: an instrument specifically designed to deal with exceptional situations of mass influx and aiming to establish a shared minimum standard of harmonised rights for holders of such status.<sup>9</sup> In terms of the Directive's history, there is hardly anything to add beyond these introductory remarks. Over the course of the next twenty years, the Directive and its status of temporary protection were left out as the only non-amended and unexplored option offered by the complex of CEAS.<sup>10</sup> This, however, changed with the Russian aggression on Ukraine and the subsequent adoption of the Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine on 4 March 2022.<sup>11</sup> Suddenly – and more than twenty years later – the Directive was no longer a 'dead letter' of EU law.

Not much has been written about the Directive over the past years as the implementation of its framework was only a theoretical prospect of resolving past issues. One of the exceptions in this regard is the continuing work of Meltem Ineli-Ciger. In her work, she outlined a number of arguments in favour of implementing the content of the 'old' Temporary Protection Directive already back in 2016 when the number of asylum seekers in Europe hit an absolute peak.<sup>12</sup> In line with this argumentation and before moving to the issue of solidarity, I will briefly mention some of the Directive's normative aspects, which I believe proved relevant when defining the EU's current response to the mass influx from Ukraine – despite the 'primordial' character of the Directive.

First, as noted by Meltem Ineli-Ciger, the Directive employs a wide definition of its potential beneficiaries, so-called '*displaced persons*'. In terms of its personal scope, the purpose of the Directive is to address the protection needs of various categories of individuals fleeing their countries of origin. Subject to a final decision of the Council, the status of temporary protection can be provided to:

<sup>7</sup> Věra Honusková, 'The Czech Republic and Solidarity with Refugees: There Were Times When Solidarity Mattered' (2018) 9 *Czech Yearbook of International Law* 242.

<sup>8</sup> Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill Nijhoff 2018) 4.

<sup>9</sup> Temporary Protection Directive, Art 1.

<sup>10</sup> Meltem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive' (2016) 18 *European Journal of Migration* 1, 14.

<sup>11</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 [2021] OJ L71.

<sup>12</sup> Meltem Ineli-Cigler (n 9).

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 organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection [...].<sup>13</sup>

The Directive, in particular, mentions and refers to (i) persons who have fled areas of armed conflict or endemic violence, and (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.<sup>14</sup> The list of potential beneficiaries is, however, not exhaustive, making the framework of the Directive potentially capable of addressing situations not legally covered either by refugee (asylum) status or subsidiary protection status.<sup>15</sup>

The final decision in determining the personal scope of temporary protection lies in the discretion of the Council:<sup>16</sup> the Directive provides that the Council decision establishing the existence of a situation of mass influx includes, *inter alia*, a description of the specific groups of persons to whom the temporary protection applies.<sup>17</sup>

Secondly, and even more importantly, temporary protection is a group-oriented status and an exceptional measure<sup>18</sup> made for exceptional circumstances which involve the existence of *mass influx*,<sup>19</sup> a situation in which there could be a real risk that asylum system(s) will be unable

<sup>13</sup> Temporary Protection Directive, Art 2(c).

<sup>14</sup> *ibid.*

<sup>15</sup> This aspect of temporary protection refers to the problem of the so-called *protection gaps*: especially those that are a by-product of the protection system established by the 1951 Refugee Convention and its 1967 Protocol. It is well known that not all individuals legitimately in need of protection can be, *ratione materiae*, provided with refugee status as codified by the 1951 Refugee Convention. In this respect, see Volker Turk and Rebecca Dowd, 'Protection Gaps' in Elena Fiddian-Gasmieh, Gil Loescher, Katy Long and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 238; MJ Gibney argues that the 'humanitarian objective', ie the broad personal scope of protection that surpassed the limits of the definition of refugee as provided by Article 1 A of the 1951 Convention was one of the main advantages of the temporary protection status in the European context of the late 1990s: Matthew J Gibney, 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (1999) 14 Georgetown Immigration Law Journal 690-691.

<sup>16</sup> Temporary Protection Directive, Art 5(1).

<sup>17</sup> *ibid.*, Art 5(3).

<sup>18</sup> *ibid.*, Art 2(a).

<sup>19</sup> Temporary Protection Directive, Art 2(d) provides that for the purpose of the Directive, 'mass influx' means '*arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme.*'

to process this influx without adverse effects for its operation.<sup>20</sup> A *prima facie* approach taken by the Directive in providing protection then adds to the practical dimension of temporary protection as a flexible and pragmatic tool of international protection.<sup>21</sup> A *prima facie* approach requires no individual assessment of a person's claims, making the temporary protection status capable of not overwhelming the asylum system of any Member State, for protection is afforded to the pre-described group at once.<sup>22</sup> To put it another way and with regard to the EU's response to the mass influx from Ukraine, Member States were in 2022 able to primarily focus on the reception conditions of temporary protection beneficiaries rather than on lengthy qualification proceedings concerning each individual seeking protection in the EU. Considering the number of individuals fleeing the well-known consequences of Russian aggression, this was probably the only sensible option on how to respond to the situation efficiently and in a timely manner.

Thirdly, as Ineli-Ciger argues, the Directive introduces a 'clear list of obligations that Member States have towards temporary protection beneficiaries'.<sup>23</sup> The list of rights guaranteed by the Directive is long and proves the complexity of temporary protection status in EU law. Many will oppose a separate mention of rights anchored by the Directive, for there is nothing new or revolutionary about the fact that the Directive guarantees certain rights to its beneficiaries. By doing so, the Directive in fact provides an even lower standard of treatment compared to refugee or subsidiary protection status. Yet the added value of the Directive lies in how these rights are afforded and the fact that temporary protection in EU law is conceived as an intermediate status not prejudging the eventual recognition of refugees.<sup>24</sup> With regards to the process of allocating protection, I refer to the above-mentioned *prima facie* approach to the grant-

<sup>20</sup> Considering the wording of the Temporary Protection Directive, the existence of a situation in which a mass influx renders an asylum system unable to operate regularly is not a prerequisite for the implementation of the EU's temporary protection regime. According to Art 2(a) of the Temporary Protection Directive, temporary protection 'means a procedure of exceptional character to provide (...) immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects'. On the other hand, the existence of a mass influx usually has at least some negative impact on the overall functioning of the asylum system concerned, notwithstanding the rather unclear definition of mass influx adopted by the Temporary Protection Directive. This conclusion is also supported by Achilles Skordas. See Daniel Thym and Kay Hailbronner, *EU Immigration and Asylum Law: A Commentary* (2nd edn, CH Beck 2016) 1064. In this respect, see also Hélène Lambert, 'Temporary Refuge from War: Customary International Law and the Syrian Conflict' (2017) 66(3) *International and Comparative Law Quarterly* 723–732.

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<sup>22</sup> Meltem Ineli-Ciger (n 9) 25. Nevertheless, in some situations, the Directive also employs the opposite principle, ie individual determination of the relevant facts. Article 28 of the Directive carefully lists grounds enabling Member States to exempt a *person* from temporary protection. Any considerations regarding the application of exclusion under Art 28(2) of the Directive implicitly presuppose the individual assessment of a person's conduct.

<sup>23</sup> Meltem Ineli-Ciger (n 9) 25.

<sup>24</sup> Temporary Protection Directive, Art 3(1).

ing of protection. With regard to the aspect of complexity, certain rights anchored by the Directive deserve special reference. It is important in the first place to bear in mind that the Directive and its *may clauses* provide only a minimum harmonised standard to be applied. But even here, the Directive is far from providing completely abstract or irrelevant rights to individuals seeking protection abroad. On the contrary, the Member States are required to facilitate access to suitable accommodation or to provide persons enjoying temporary protection with means to housing.<sup>25</sup> Temporary protection beneficiaries are eligible for obtaining necessary assistance in terms of social welfare as well as for medical care.<sup>26</sup> Subject to certain circumstances, Member States shall also authorise persons enjoying temporary protection to engage in employed or self-employed activities.<sup>27</sup>

Individuals under the age of 18 years are to be granted access to education under the same conditions as nationals of the host Member State.<sup>28</sup> Moreover, the Directive anchors its own provisions on family reunification<sup>29</sup> or the granting of residence permits for temporary protection holders.<sup>30</sup> And, most importantly, the take on the temporary protection is, at least in law, meant to be in line with Member States' international obligations arising from the 1951 Refugee Convention and the 1967 Protocol.<sup>31</sup>

As previously noted, individuals enjoying temporary protection are therefore able to apply for asylum at any time, and applications not processed before the end of the temporary protection must be completed afterwards.<sup>32</sup> Another dominant aspect of the Directive lies in its burden-sharing mechanism and rules related to solidarity which were missing in the debates on the design of solidarity and responsibility-sharing measures in the New Pact on Migration and Asylum.<sup>33</sup> I will elaborate on the Directive's burden-sharing mechanism further in this paper.

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<sup>25</sup> *ibid.*

<sup>26</sup> Temporary Protection Directive, Art 13(2).

<sup>27</sup> *ibid.*, Art 12.

<sup>28</sup> *ibid.*, Art 14.

<sup>29</sup> *ibid.*, Art 15.

<sup>30</sup> *ibid.*, Art 8.

<sup>31</sup> Temporary Protection Directive, Recital 10, provides that 'This temporary protection should be compatible with the Member States' international obligations as regards refugees. In particular, it must not prejudge the recognition of refugee status pursuant to the Geneva Convention of 28 July 1951 on the status of refugees, as amended by the New York Protocol of 31 January 1967, ratified by all the Member States'.

<sup>32</sup> Temporary Protection Directive, Art 17.

<sup>33</sup> Daniel Thym, 'Temporary Protection of Ukrainians: The Unexpected Renaissance of "Free Choice"' (*EU Immigration and Asylum Law and Policy Blog*, 7 March 2021) <<https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/>> accessed 25 May 2023.

### **3 Temporary protection and solidarity: a burden sharing mechanism like no other**

Arguably, the post-2015 period in EU asylum law is still marked by a search for the ideal or at least generally accepted formula on the matter of solidarity and responsibility among the EU Member States. The recent development in EU asylum law is no exception to this endeavour, as the configuration of particular rules on solidarity and responsibility between the Member States is a key theme in the ongoing reform of the Common European Asylum System and the New Pact on Migration and Asylum.<sup>34</sup> I will not dwell on the content of the substantive changes brought by the proposed Asylum and Migration Management Regulation<sup>35</sup> in its complexity and detail, as this would require additional space in this article given the proposal's complexity.<sup>36</sup> Only the general principles of the proposal will be mentioned here as I believe this will be sufficiently illustrative for the purposes of this article.<sup>37</sup>

First, the newly proposed Asylum and Migration Management Regulation reiterates to some extent the already existing rules on the determination of the Member State responsible for processing individual applications for international protection as established by the Dublin III Regulation subject to certain amendments drawn up by the former Proposal on the Dublin IV Regulation.<sup>38</sup> This ('responsibility') part of the newly proposed regulation must be read in conjunction with the proposed Screening Regulation<sup>39</sup> and the proposal for an Asylum Procedure Regulation<sup>40</sup> outlining a new 'pre-entry phase' which channels certain categories of international protection applicants into a faster border procedure.

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<sup>34</sup> Philippe De Bruycker, 'The New Pact on Migration and Asylum: What It Is Not and What It Could Have Been' in Daniel Thym (ed), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Nomos 2021) 43.

<sup>35</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM (2020) 0279.

<sup>36</sup> For the overview analysis of the new proposal's content, I will refer to Francesco Maiani, 'Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact' in Thym (n 33).

<sup>37</sup> Moreover, it is worth mentioning that the New Pact on Migration and Asylum and its instrument are still under legislative process and their final normative content is, therefore, still subject to potential change.

<sup>38</sup> Francesco Maiani (n 35) 45-48.

<sup>39</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council: Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 [2020] COM/2020/612 final.

<sup>40</sup> Commission, 'Amended Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' COM(2020) 611 final.



Second, the proposal on the Asylum and Migration Management Regulation implements within the current 'responsibility' part a new solidarity mechanism which should be *mandatory* but at the same time *flexible*. Here, things become increasingly complicated: the proposed solidarity mechanism builds on the already known relocations as a principal instrument of achieving a fair share in distributing applicants for international protection among the Member States. This time, relocations and the solidarity mechanism are accompanied by new concepts and terminology such as 'solidarity pool', 'critical mass correction mechanism' or, should some of the Member States prefer instead to legally avoid the above-mentioned relocations, alternative forms of solidarity such as financial contributions.<sup>41</sup> A complicated mechanism, for sure, which also has its own relevance for the modified solidarity mechanism related to the proposed Crisis Regulation and immediate protection status, functioning within the same normative structure. When reading the content of the Proposal for a New Pact on Migration and Asylum, it is important to bear in mind the Commission's words of explanation: 'There is currently no effective solidarity mechanism in place, and no efficient rule on responsibility'.<sup>42</sup>

Surprisingly, the problem of solidarity and responsibility in protecting individuals fleeing war-torn Ukraine was not the issue of the day when applying the framework of the 'old' Temporary Protection Directive. Considering the number of Ukrainians and other third-country nationals fleeing the armed conflict in Ukraine and when compared to the events of 2015/2016, this was a remarkable result. As noted by some scholars,<sup>43</sup> a number of factors was probably involved, including the visa-free regime for Ukrainians entering the territories of EU Member States and the absence of any third country in between Ukraine and the EU. But the primary question to be addressed is one of the Directive's merits in achieving this result. After all, the added value of the simplistic and voluntary 'solidarity mechanism' established by the Directive should, perhaps, also not be underestimated.

How does the solidarity mechanism operate within the framework of the Directive? At first glance, the framework of the Directive seems to be well equipped as it contains rules on financial sharing and rules on the sharing of received persons.<sup>44</sup> According to Article 24 of the Directive,

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<sup>41</sup> Francesco Maiani (n 35).

<sup>42</sup> In this respect, see Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM (2020) 0279, Part 1 'Context of the Proposal'.

<sup>43</sup> Joanne Van Selm, 'Temporary Protection for Ukrainians: Learning the Lessons of the 1990s?' in Sergio Carrera and Meltem Ineli-Ciger (eds), *EU Responses to the Large-Scale Refugee Displacement from Ukraine. An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (European University Institute 2023) 381.

<sup>44</sup> Karoline Kerber, 'The Temporary Protection Directive' (2003) 4(2) *European Journal of Migration and Law* 209.

measures based on its content are to benefit from the European Refugee Fund. Article 25 of the Directive then provides that ‘The Member States shall receive persons who are eligible for temporary protection in a spirit of Community solidarity’. Member States are required in advance to state – in figures or at least in general terms – their capacity to receive temporary protection beneficiaries.<sup>45</sup> Notifications of reception capacities represent a crucial step in the process of ensuring *physical solidarity* as information on reception capacity is envisaged to become an integral part of the Council decision establishing the existence of a mass influx and *activating* the protection mechanism of the Directive.<sup>46</sup> However, closer inspection of the Directive’s wording reveals here the apparent shortcoming of the system: the Directive specifies no limits, whether minimal or maximal, when obliging Member States to state their capacities.<sup>47</sup> As pointed out by many, the Directive’s rules on solidarity are from the start based on the ‘double voluntarism’ of temporary protection, a striking feature of the EU’s take on temporary protection.<sup>48</sup> The reception of displaced persons by Member States is dependent on the will of Member States to state their capacities under Article 25(1) of the Directive. The other side of voluntariness lies in the expression of the consent of displaced persons to be received in the territory of the Member State.<sup>49</sup>

Curiously, the 2022 Council Implementing Decision (2022/382) lacks any specification of the reception capacities of individual Member States, effectively providing leeway for the unprecedented situation of ‘free choice’ in which Ukrainian nationals were able to choose their host Member State freely.<sup>50</sup> Should the above-mentioned capacities prove in practice not to be enough, the Directive also includes its own quasi-correction mechanism: if the reception capacities of Member States are exceeded, the Council shall examine the situation and *take appropriate action*, including recommending additional support for the Member States affected.<sup>51</sup>

What does this mean? As argued by Meltem Ineli-Ciger, the cited provision empowers the Council to adopt binding measures, including relocations of the temporary protection beneficiaries from the Member

<sup>45</sup> Temporary Protection Directive, Art 25(1).

<sup>46</sup> *ibid.*, Art 5(3). Moreover, the Member States have agreed not to apply Article 11 of the Temporary Protection Directive which essentially prohibits the secondary movements of temporary protection beneficiaries. See the Council Implementing Decision, recital 15.

<sup>47</sup> The ambiguous wording of the Directive could be supporting the conclusion that Member States are, as a matter of law, not obliged to receive temporary protection holders at all. In this respect, see Meltem Ineli-Ciger (n 7) 157.

<sup>48</sup> Commission, ‘Study on the Temporary Protection Directive Final Report’ (January 2016) <[https://home-affairs.ec.europa.eu/pages/document/012016-study-temporary-protection-directive\\_en](https://home-affairs.ec.europa.eu/pages/document/012016-study-temporary-protection-directive_en)> accessed 10 June 2023.

<sup>49</sup> Temporary Protection Directive, Art 25(2).

<sup>50</sup> Thym (n 32).

<sup>51</sup> Temporary Protection Directive, Art 25(3).

States most affected.<sup>52</sup> Meltem Ineli-Ciger then argues that the Council might take into consideration various factors when defining the distribution formula: GDP, size of the population, unemployment rate, or the past number of asylum seekers and resettled refugees.<sup>53</sup>

Nevertheless, not all authors share the same firm view on the content of the Council's competence under the Directive. Karoline Kerber contends that the Directive leaves rather open the question of whether the 'taking of appropriate action' means the additional distribution of persons.<sup>54</sup> Other authors share the same reluctance in giving a definitive meaning to this particular provision of the Directive.<sup>55</sup>

The Directive does not further elaborate on the matter of solidarity and responsibility among the Member States. While it is true that the text of the Directive also refers to the possibility of transferring beneficiaries of temporary protection to another Member State, the factual cooperation of the Member State requested is, in this case, mandatory and, therefore, questionable in practice. And most importantly, the Directive requires here again the consent of the displaced persons to be transferred, making the prospects of such transfers in some cases arguably even less realistic, despite the will of Member States to conduct the transfer of the individuals concerned.<sup>56</sup> In spite of this, the Directive's (un)intentionally minimalistic approach might prove appealing to many – at least to those who prefer abstract to casuistic legal solutions. Notwithstanding this debate, the Directive is without doubt producing results at the moment, and it does so without needing to normatively outline every possible scenario in detail. If this is the case for Ukrainians fleeing their country of origin, why should the notion of such *voluntary* solidarity not be prioritised over its *mandatory* counterpart as well in the future?

Obviously, one should not be too naive. As noted by some authors, the voluntary mechanism that counts in the first place on the provision of protection 'in *the spirit of the Community*' could be seen as a system securing not many guarantees to establish solidarity between the Member States and as a mere reminiscence of the solidarity shown to the individuals fleeing the horrors of the armed conflict in the former Yugoslavia.<sup>57</sup> After all, the Directive was one of the first instruments adopted within the framework of the CEAS and it reflects the experience of European countries in providing protection in similar situations at the dawn of EU asylum law. As further demonstrated using the example of some Member States' responses to the mass influx of Ukrainians, the burden-sharing

<sup>52</sup> Meltem Ineli-Ciger (n 9) 31.

<sup>53</sup> *ibid* 32.

<sup>54</sup> Kerber (n 43) 212.

<sup>55</sup> Skordas (n 19) 1099.

<sup>56</sup> Temporary Protection Directive, Art 26(1).

<sup>57</sup> Nataša Chmelíčková, 'Legislativní reakce Evropské komise na migrační krizi aneb spíše zamyšlení nad nesnesitelnou těžkostí bytí směrnicí 2001/55/ES o dočasné ochraně' in Lenka Pitrová (eds), *Aktuální právní aspekty migrace* (Leges 2016) 55.

mechanism anchored within the Directive is producing positive results because the Member States precisely *want it* to do so. This applies in particular to the EU Member States reluctant in the past to contribute to resolving well-known deficiencies of EU law, especially the discrepancies in the allocation of responsibility for examining asylum applications caused by the Dublin regulation's infamous criteria of irregular entry.

#### **4 A look into the past and the present: Czech Republic, V4 countries and migration**

In 2015, the Czech Republic, Slovakia, and other Central-European countries gave a deliberate 'no' to relocation quotas and embarked on becoming the *naysayers* and self-proclaimed rebels<sup>58</sup> of the Community: an endeavour which culminated in the ECJ judgment of 2 April 2020 in Joined Cases C-715/17, C-718/17 and C-719/17<sup>59</sup> in which the ECJ concluded that the Czech Republic, Poland, and Hungary had failed to meet their obligations by not taking part in the mandatory relocations of international protection applicants. Back then, the Czech Republic committed to relocating 12 individuals from Greece. After relocating these individuals, the Czech Republic suspended the implementation of all its obligations.

Seven years later and with more than 430,000 temporary protection visas issued, the Czech Republic became the Member State hosting the largest number of displaced persons from Ukraine per capita.<sup>60</sup> Slovakia, Hungary, and Poland became the new 'frontline' States of the Union. Poland is now hosting a little less than one million displaced persons. In an unexpected turn of events, the former *naysayers* have shown solidarity with individuals fleeing the consequences of Russian aggression. What changed?

Some of the reasons behind the activation of the Directive and the sudden commitment of the CEE Member States in providing a safe haven for Ukrainians had already been outlined after the beginning of the armed conflict in Ukraine.<sup>61</sup> I find them all to be of importance, including the existence of a visa-free regime for Ukrainian citizens, yet needing certain clarification, especially with respect to the historical experience

<sup>58</sup> Joined Cases C-715-17, C-718/17 and C-719-17 *European Commission v Poland, Czech Republic and Hungary* ECLI:EU:C:2019:917, Opinion of AG Sharpston, para 141.

<sup>59</sup> Joined Cases C-715-17, C-718/17 and C-719-17 *European Commission v Poland, Czech Republic and Hungary* ECLI:EU:C:2020:257.

<sup>60</sup> Ondrej Plevak, 'Czechia Hosts Most Ukrainian Refugees Per Capita' (*Euractiv*, 24 February 2023) <[www.euractiv.com/section/politics/news/czechia-hosts-most-ukrainian-refugees-per-capita/](http://www.euractiv.com/section/politics/news/czechia-hosts-most-ukrainian-refugees-per-capita/)> accessed 31 May 2023.

<sup>61</sup> Meltem Ineli-Cigler, '5 Reasons Why: Understanding the Reasons Behind the Activation of the Temporary Protection Directive in 2022' (*EU Immigration and Asylum Law and Policy*, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 31 May 2023.

of these Member States which I believe is one of the main reasons for their commitment to protecting individuals fleeing Ukraine. As rightly argued by some, Europe is known for its double standards in providing protection to certain categories of asylum seekers depending on where they come from.<sup>62</sup>

But this was hardly a novelty for Ukrainians before the commencement of the Russian aggression in February 2022. Legal practitioners and immigration attorneys in the Czech Republic and Slovakia could argue that Ukrainians were to some extent subject to their own double, and often nothing less than discriminatory, standards when dealing with the Czech or Slovak immigration authorities. This is not to say that the Czech or Slovak response to the Syrian refugee crisis would hypothetically be the same in 2022 as the one related to the Ukrainian mass influx, but both the population of the Czech Republic and Slovakia has undoubtedly had to take a different stance to the issue of mass migration recently. One way of understanding what changed is by defining what is at stake in the ongoing Russo-Ukrainian war.

After all, the Czech Republic, Slovakia or Poland were former victims of the Soviet Union's expansionist politics in Eastern Europe. Think of the invasion of Czechoslovakia in 1968, which crushed the ideal of democratisation in the socialist Czechoslovakia, or the aftermath of the Hungarian revolution in 1956 which led to the exile of more than 200,000 Hungarians and the execution of the country's president Imre Nagy. The Polish have an even more haunting experience of Russian and Soviet expansionism, which spans several centuries. As aptly put by the Slovak Minister of Foreign Affairs Miroslav Wlachovsky, no one in Slovakia wants to have the Russian Federation as his first neighbour.<sup>63</sup> The same would hardly be perceived differently in Hungary or Poland. The point is that most of the Central and Eastern European Member States underwent, be it in different forms, the reality Ukraine is experiencing today, and this is part of a collective memory passed onto younger generations.

But the case of providing aid to Ukrainians by the Central and Eastern European Member States is at the same time more complex. The migration part represents, in my opinion, only one aspect of this effort. The CEE Member States (with the exception of Hungary<sup>64</sup>) and the United States of America were arguably the first to push for the large and sys-

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<sup>62</sup> *ibid.*

<sup>63</sup> RSI, 'Foreign Minister: No One in Slovakia Wants to Have Russia for Neighbor' (May 2023) <<https://enrsi.rtvs.sk/articles/topical-issue/327832/foreign-minister-no-one-in-slovakia-wants-to-have-russia-for-neighbour>> accessed 5 June 2023.

<sup>64</sup> Hungary has primarily been focused on providing humanitarian and financial aid to Ukraine. Nevertheless, Viktor Orban's government continuously threatens to end the support to Kiev and to block the collective EU aid to Ukraine. More recently, the new prime minister of Slovakia, Robert Fico, joined this rhetoric. In this respect, see Reuters, 'Most EU Leaders Back New Ukraine Aid; Hungary, Slovakia Voice Doubts' (October 2023) <<https://www.reuters.com/world/europe/eu-broadly-supports-more-cash-ukraine-needs-time-work-out-details-2023-10-27/>> accessed 1 November 2023.

tematic transfer of arms to Ukraine. With no intention of following the 'appeasement logic' that military aid to Ukraine equals a further escalation of the conflict and no chance for peace between Ukraine and the Russian Federation, the Czech Republic sent the first train carriage loaded with military aid to Ukraine already on 27 February 2022, three days after the beginning of the armed conflict.<sup>65</sup> Since then, the Czech Republic, Slovakia and Poland have provided Ukraine with hundreds of pieces of heavy military equipment and with billions of euros in financial aid.

The second rationale for the voluntary commitment of the CEE Member States in protecting millions of Ukrainians could in the long run be of a *purely* political nature – especially in relation to the proposed New Pact on Migration and Asylum. There are in fact signs that this argument is not just of hypothetical value. When the recent news about the achieved political agreement<sup>66</sup> between the Member States on the New Pact on Migration and Asylum spread in the Czech news, the prime minister Petr Fiala and the minister of the interior Vít Rakušan soon had to respond to accusations formulated by the Czech parliamentary opposition labelling the general acceptance of the New Pact on Migration and Asylum by the current government to be 'unthinkable treason'.<sup>67</sup>

It would make no sense to reproduce the whole parliamentary debate on this issue. Most importantly, the minister of the interior stressed in reply to these remarks that solidarity among the Member States within the New Pact on Migration and Asylum would take the form not just of relocations, but also of alternative measures, including the financial contributions or capacity building of frontline Member States, and that the Czech Republic and other CEE Member States would seek to secure certain exceptions within this new framework, considering the number of Ukrainians residing in their territories. In his later TV appearance, the minister reiterated that mandatory relocations remain a 'red-line' for the Czech government. Most curiously, the prime minister and the minister of the interior also noted that after the temporal end of temporary protection, the Czech Republic would become a 'clear' beneficiary of solidarity funds within the New Pact, suggesting that many Ukrainian nationals would probably enter asylum procedures after they cease to be protected

<sup>65</sup> iRozhlas, 'První vlak se zbraněmi a municí dorazil z Česka na Ukrajinu. Vláda chystá další' (February 2022) <[www.irozhlas.cz/zpravy-domov/ministerstvo-obrany-zbrane-na-pomoc-ukrajine-cernochova-armada-cr\\_2202270755\\_jgr](http://www.irozhlas.cz/zpravy-domov/ministerstvo-obrany-zbrane-na-pomoc-ukrajine-cernochova-armada-cr_2202270755_jgr)> accessed 31 May 2023.

<sup>66</sup> Commission, 'Statement on the Political Agreement on the New Pact on Migration and Asylum' (June 2023) <[https://ec.europa.eu/commission/presscorner/detail/en/statement\\_23\\_3183](https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3183)> accessed 12 June 2023.

<sup>67</sup> iDnes, 'Zrada občanů, řekl Babiš k dohodě o migraci. Fiala jí hájil, podržel Rakušana' (June 2023) <[www.idnes.cz/zpravy/domaci/snemovna-mimoradna-schuze-migrace-ano-rakusan.A230614\\_140922\\_domaci\\_kop](http://www.idnes.cz/zpravy/domaci/snemovna-mimoradna-schuze-migrace-ano-rakusan.A230614_140922_domaci_kop)> accessed 15 June 2023; for further information regarding the Czech experience of providing temporary protection and its national temporary protection legislation, see Věra Honusková and Enes Zaimović, 'Temporary Protection as a Bridge between Ukraine and Czechia: An Unexpected Choice of Where to Stay and How' in Jakub Handrlica, Liliia Serhiichuk and Vladimír Sharp (eds), *Ukrainian Law and the Law of the Czech Republic: An Unexpected Encounter* (ADJURIS 2023) 59–66.

by the framework of the Directive.<sup>68</sup>

These are somewhat confusing statements, especially for hundreds of thousands of Ukrainian nationals who are with growing uneasiness awaiting a 'decision' on the type of durable solution to be applied in their situation. Does the end of temporary protection suppose the return of its former beneficiaries to their country of origin,<sup>69</sup> or will these once again be given *free choice* as was in most instances the case of temporary protection provided to individuals fleeing conflicts in former Yugoslavia?<sup>70</sup> The answer to this question is most probably still unresolved by a number of Member States, but the argument of the already depleted reception capacities of the CEE Member States after the Russian invasion will most probably resonate in the future more often.

The third way to understand the approach taken by the CEE Member States is by also acknowledging that these countries had in fact no other option. The framework of the Directive only formalised the already existing effort and gave it the hallmark of a common response. This argument leads us back to the remarks of Meltem Ineli-Cigler at the very beginning of the armed conflict in Ukraine.<sup>71</sup> Unlike many others fleeing their homes in despair, Ukrainian nationals were, legally speaking, *able to seek refuge* in the Member States of the European Union from day one of Russian aggression due to the existing visa waiver regime. One can only recognise the importance of this singular aspect when looking at the plight of Syrian Refugees undertaking dangerous paths to reach Europe at the cost of 'irregularly crossing' the external EU borders and being subject to the Dublin procedure.<sup>72</sup> With no physical or regulatory barrier between Ukraine and the Member States on the eastern frontiers of the Union – especially no *safe third country* in between – hardly anything could have stopped the Ukrainian mass influx.<sup>73</sup>

For the Czech Republic and Slovakia, being two of the EU Member States with some of the largest and most significant Ukrainian diasporas in the EU,<sup>74</sup> time was obviously of a crucial importance. And considering the staggering hundreds of thousands of individuals crossing the

<sup>68</sup> Twitter account of the Czech Minister of Interior, Vít Rakušan (June 2023) <[https://twitter.com/Vit\\_Rakusan/status/1666888162235277323?s=20](https://twitter.com/Vit_Rakusan/status/1666888162235277323?s=20)> accessed 8 June 2023.

<sup>69</sup> Temporary Protection Directive, Art 20.

<sup>70</sup> Honusková (n 6).

<sup>71</sup> Meltem Ineli-Cigler (n 60).

<sup>72</sup> On legal constraints in securing legal paths to the EU for asylum seekers without entry visas or any other residence permit in light of the Court of Justice's decision C-638/16 (*X & X v État belge*) and the ECtHR's decision in *MN and Others v Belgium* (Appl No 3599/18), see Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law' in Vladislava Stoyanova and Stijn Smet, *Migrants' Rights, Populism and Legal Resilience in Europe* (CUP 2022).

<sup>73</sup> Meltem Ineli-Cigler (n 60).

<sup>74</sup> Eurostat, 'Ukrainian Citizens in the EU' (November 2022) <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Ukrainian\\_citizens\\_in\\_the\\_EU](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Ukrainian_citizens_in_the_EU)> accessed 30 May 2023.

EU-Ukrainian border only days after the beginning of the Russian invasion, reliance on individualised asylum procedures was implicitly out of the question. Rather, both the Czech Republic and Slovakia immediately resorted to the use of alternative group-oriented measures with a legal basis in their respective national legislations.

The Slovak government did not even hesitate to wait for the Council Implementing Decision and activated its national variant of temporary protection under the Slovak Act on Asylum.<sup>75</sup> Similarly, the Czech Republic started as early as on 26 February 2022 with the process of granting temporary leave to stay visas to Ukrainian nationals on a group basis.

While the Czech Act on the Residence of Aliens still presupposes the existence of an individualised thirty-day procedure in which the existence of reasons preventing the alien's return to the country of origin is examined,<sup>76</sup> the proceedings concerning applicants from Ukraine took after 24 February 2022 a completely different form, despite the explicit wording of the law. The long-term visa option was later in fact even widely promoted in the public by the Czech Ministry of the Interior at the price of implicitly neglecting the possibility of entering the asylum procedure separately. And while providing its holders with a less favourable standard of rights<sup>77</sup> than in the case of subsidiary protection status,<sup>78</sup> the irresistible technical advantage of providing Ukrainian nationals with only a stamped visa instead of a biometric residence permit card<sup>79</sup> was the apparent ef-

<sup>75</sup> Government of Slovakia, 'Proposal for a declaration of temporary refuge pursuant to § 29 para 2 of Act no 480/2002 Coll on Asylum' (February 2022) <<https://rokovania.gov.sk/RVL/Material/26992/1>> accessed 15 June 2023.

<sup>76</sup> Act no 326/1999 Coll on the Residence of Aliens in the Territory of the Czech Republic, § 33 (1) (a) read in conjunction with § 169t (3) of the Act on the Residence of Aliens in the territory of the Czech Republic.

<sup>77</sup> Holders of a temporary leave to stay long-term visa (dlouhodobé vízum za účelem strpění) in the Czech Republic are not allowed to engage in any gainful activity without the permission of the Czech Labour Office, they are not part of the public health or social security system, nor are they eligible for housing assistance.

<sup>78</sup> I use the status of subsidiary protection as a point of reference here primarily for reasons connected to the definition of a risk of *serious harm*, a prerequisite for granting subsidiary protection. Article 15(c) of the Qualification Directive provides that serious harm means a 'serious and individual threat to civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. Considering the well-known scale of the conflict in Ukraine and the continuous 'presence' of Russian bombing attacks also in distant parts of western Ukraine, I believe that the majority of Ukrainians would satisfy the threshold for the granting of subsidiary protection. The situation could, however, be different with respect to refugee (asylum) status. A number of doctrinal works raise the question of whether individuals fleeing the armed conflict fall under the grounds of persecution by the Refugee Convention. Another issue is represented by the infamous and disputed *individualisation* criterion. Nevertheless, some authors argue that Ukrainians fleeing the armed conflict in their country of origin may fulfil the definitions of refugee. In this respect, see eg Hugo Storey, 'Are Those Fleeing Ukraine Refugees?' in Sergio Carrera and Meltem Ineli-Ciger (eds), *EU Responses to the Large-Scale Refugee Displacement from Ukraine. An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (European University Institute 2023).

<sup>79</sup> Act no 325/1999 Coll on Asylum, § 59a.



fectiveness of the whole process. When the capacity of the Czech MoI's Immigration Offices reached a peak, visas were issued in public libraries or special reception centres all over the country, demonstrating that solutions can be found within a short time.<sup>80</sup>

As already noted, the long-term visa option was far from comparable to the rights provided by the Qualification Directive and the status of subsidiary protection, and there are good reasons to believe that the Czech Republic would, without the activation of the Directive, still push for an alternative *prima facie* (national) protection regime instead of relying on an individualised international protection procedure, making the final standard of treatment even more uncertain and dependent on its discretion. But precisely this changed with the inaugural activation of the Directive and with the late March 2022 entry into force of the new Act on Certain Measures in Connection with Armed Conflict in Ukraine Caused by the Invasion of the Russian Federation:<sup>81</sup> the so-called Czech *Lex Ukraine* which implemented the Council Implementing Decision, including the definition of *displaced persons* within the Czech legislation. All visas granted to Ukrainian citizens, starting from 24 February 2022, were from then on considered to be temporary protection, effectively levelling the content of protection for all Ukrainian long-term visa/temporary protection holders.

## 5 Crisis regulation. A way forward?

To conclude the previous part, the Directive's rules related to solidarity and responsibility-sharing among the Member States evidently did not play a significant part in defining the help provided to Ukrainian citizens in 2022 and 2023. Put in slightly different words, it is not the Directive's notion of voluntary protection and solidarity that should be credited for persuading even the *naysayers* to assume a significant role in the EU's current response to the largest displacement of people since World War II. As demonstrated above, there are apparent extra-legal reasons at stake here which should be given primary consideration when speaking of reasons behind the activation of the Directive in 2022. For many, this was in fact hardly surprising.<sup>82</sup> Indeed, some speak of the increased politici-

<sup>80</sup> František Trojan, 'V pražském kongresovém centru začalo fungovat centrum pro ukrajinské uprchlíky' (*Respekt*, 4 March 2022) <[www.respekt.cz/agenda/v-prazskem-kongresovem-centru-zacalo-fungovat-centrum-pro-ukrajinske-uprchliky](http://www.respekt.cz/agenda/v-prazskem-kongresovem-centru-zacalo-fungovat-centrum-pro-ukrajinske-uprchliky)> accessed 30 May 2023.

<sup>81</sup> Act no 65/2022 Coll on certain measures in connection with the armed conflict on the territory of Ukraine caused by the invasion of the Russian Federation.

<sup>82</sup> Meltem Ineli-Cigler, 'Reasons for the Activation of the Temporary Protection Directive in 2022: A Tale of Double Standards' (Asile Project, October 2022) <[www.asileproject.eu/reasons-for-the-activation-of-the-temporary-protection-directive-in-2022-a-tale-of-double-standards/](http://www.asileproject.eu/reasons-for-the-activation-of-the-temporary-protection-directive-in-2022-a-tale-of-double-standards/)> accessed 13 May 2023.

sation of access to protection within the EU,<sup>83</sup> and the current response to the 2022 mass influx could indeed become a testament to this observation. But, on the other hand, such a conclusion itself does not render the framework of the Directive *a priori* useless. Even recent events have demonstrated the practical validity of the Directive and that there are lessons to be learned from its inaugural activation, although not on the pressing issue of solidarity.

What turned out to be of particular relevance with regard to the mass influx of Ukrainians was, as demonstrated above, a *prima facie* or a group-based approach to protecting those in need. The Directive remains the only group-oriented protection scheme within the CEAS and from its beginning had been meant to cope with situations where the 'fair weather' instruments of CEAS would fail to work properly. This proved to be true in February 2022. But if this was the only added value of the Directive, then one could rejoice when seeing the Commission's proposal for the Crisis Regulation: the only group-protection instrument was intended to be replaced by another one, albeit with a different name. However, when speaking of the Commission's proposal for the Crisis Regulation, one has to be aware of the more fundamental changes the Crisis Regulation introduces in EU law.<sup>84</sup>

Not surprisingly, the proposal for the Crisis Regulation has already been subject to the criticism of scholars and NGOs.<sup>85</sup> However, the Crisis Regulation was, at least in its form as a Commission proposal, far from bringing only negative changes to EU asylum law. There were, in fact, several areas and concepts of the Crisis Regulation's framework and the proposed immediate protection status which attempted to remedy some of the well-known shortcomings of the current Directive.<sup>86</sup> First, the Com-

<sup>83</sup> Lucas Rasche, 'Ukraine: A Paradigm Shift for the EU's Asylum Policy?' (Delors Centre, March 2022) <[www.delorscentre.eu/en/publications/detail/publication/ukraine-a-paradigm-shift-for-the-eus-asylum-policy](http://www.delorscentre.eu/en/publications/detail/publication/ukraine-a-paradigm-shift-for-the-eus-asylum-policy)> accessed 13 May 2023.

<sup>84</sup> Note that the Crisis Regulation is still under legislation process which could dramatically change its final normative content. This equally applies to the novel status of immediate protection which was originally proposed by the Commission in its proposal. In fact, the very recent legislative changes to the Commission's proposal no longer contain provisions on the status of immediate protection. This could, however, change in the future. In this respect, see Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum – Mandate for negotiations with the European Parliament' 2020/0277 (COD).

<sup>85</sup> ECRE, 'Alleviating or Exacerbating Crises? The Regulation on Crisis and Force Majeure' (2021) <<https://ecre.org/wp-content/uploads/2021/03/ECRE-Policy-Note-32-Crisis-February-2021.pdf>> accessed 13 May 2023; Amnesty International, 'Position Paper: The Proposed Crisis Regulation' (March 2021) <[www.amnesty.eu/wp-content/uploads/2021/03/AI-position-paper-on-Crisis-Regulation-.pdf](http://www.amnesty.eu/wp-content/uploads/2021/03/AI-position-paper-on-Crisis-Regulation-.pdf)> accessed 13 May 2023.

<sup>86</sup> H Deniz Genç and Ashlı Şirin Öner, 'Why Not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union' (2019) 7(1) *International Journal of Political Science & Urban Studies* 15; Meltem Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean' in Celine Bauloz and others (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill 2018) 245.

mission's proposal for the Crisis Regulation employed a gradually less abstract definition of a triggering event for granting immediate protection: a *situation of crisis*.<sup>87</sup> The Regulation made it clear that the existence and scale of a mass influx rendering Member States' asylum, reception or return system non-functional is to be measured in relation to the population and the GDP of the Member State concerned, providing therefore at least certain interpretation guidelines missing within the current Directive.<sup>88</sup>

Obviously, the definition of the triggering event was and still remains far from clear. The follow-up aspect lay therefore in the activation mechanism as this is an equally crucial part of the process. Until recently, it was deemed virtually impossible to secure a qualified majority within the Council to activate the framework of the Directive by declaring the existence of a mass influx. Now, the responsibility for the issuing of the implementing decision for the purpose of activating the framework of the Crisis Regulation and granting immediate protection was to be shifted to the Commission, arguably making the prospect of applying the framework of the Crisis Regulation more feasible in the future.<sup>89</sup>

The third aspect concerns the rights secured by the Crisis Regulation and the status of immediate protection. To some extent, this was the moment when the offer met the demand. The very concept of temporary protection and the Directive itself were often criticised for taking part in the gradual erosion of the refugee protection regime.<sup>90</sup> One can see the relevance of these claims in the suspension of access to asylum procedures for up to three years (with the Crisis Regulation, the suspension of the asylum procedure pending the duration of immediate protection could occur only for up to six months with the possible extension of immediate protection not exceeding one year) and in providing temporary protection beneficiaries with a less favourable set of rights that come with the status.

There are a couple of ways to sort out this problem. One could either think of adapting the existing asylum procedures and international protection proceedings to a *prima facie* approach in granting protection – and there are precedents for this in the practice of States outside Europe,<sup>91</sup> or at least by making use of a *prima facie* approach within individualised (but accelerated) international protection procedures.<sup>92</sup> In fact, a number

<sup>87</sup> Crisis Regulation Proposal, Art 1(1).

<sup>88</sup> *ibid*, Art 1(2).

<sup>89</sup> *ibid*, Art 11.

<sup>90</sup> Esin Küçük, 'Temporary Protection Directive: Testing New Frontiers?' (2023) 25(1) *European Journal of Migration and Law*, 29.

<sup>91</sup> Jean Francois Durieux, 'The Many Faces of "Prima Facie": Group-Based Evidence in Refugee Status Determination' (2008) 25 *Refuge: Canada's Journal on Refugees* 2.

<sup>92</sup> Nikolas Feith Tan and Meltem Ineli-Ciger, 'Group Based Protection of Afghan Women and Girls Under the 1951 Refugee Convention' (2023) 72 *International and Comparative Law Quarterly* 816.

of EU Member States resorted in 2015 and 2016 to applying *prima facie* procedural modalities within individual status determination procedures in response to the arrivals of Syrian and Eritrean nationals onto their territories.<sup>93</sup> The second route could consist of securing a higher protection standard while making access to asylum procedures more accessible for its beneficiaries.

The latter was the case of immediate protection as a proposal for the Crisis Regulation providing beneficiaries of immediate protection with an equal set of rights provided to subsidiary protection beneficiaries<sup>94</sup> under the proposal for the Qualification Regulation.<sup>95</sup> This is a higher standard than the one provided to temporary protection beneficiaries.<sup>96</sup> Other than that, the framework of the proposed Crisis Regulation is, generally speaking, hardly comparable to the existing Directive, especially on the issue of solidarity. The Crisis Regulation was from the start intended to operate specifically within the framework to be established by the New Pact and its proposal for the Asylum and Migration Management Regulation with the 'mandatory but flexible' solidarity mechanism it introduces. In fact, the framework of the Crisis Regulation and both of the exceptional situations it addresses, the already mentioned situation of crisis and the situation of force majeure,<sup>97</sup> are still envisaged to constitute a system of rather serious derogations to rules established by the instruments proposed by the New Pact on Migration and Asylum.<sup>98</sup> However, where one can see apparent differences between the two are in the personal scope of both protection instruments. The initially proposed group-protection status of immediate protection established a far narrower definition of displaced persons. Under Art 10(1) of the Commission's proposal, protection was to be applied to those who are facing a high degree of risk of being subject to indiscriminate violence in exceptional situations of armed conflict. Considering the potential challenges arising in the future from, for example, mass migration caused by climate change,<sup>99</sup> this was

<sup>93</sup> In this respect, see also UNHCR, 'Discussion Paper Fair and Fast: Accelerated and Simplified Procedures in the European Union' (July 2018) <[www.refworld.org/docid/5b589eef4.html%20](http://www.refworld.org/docid/5b589eef4.html%20)> accessed 31 October 2023.

<sup>94</sup> Crisis Regulation Proposal, Art 10(2).

<sup>95</sup> Commission, 'Proposal for a regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM/2016/0466 final, 2016/0223 (COD) (Qualification Regulation).

<sup>96</sup> Meltem Ineli-Ciger, 'Immediate Protection in the New Pact on Migration and Asylum' in Thym (n 33) 157.

<sup>97</sup> Crisis Regulation Proposal, Art 7(1).

<sup>98</sup> *ibid.*, Art 2 and Arts 4–9.

<sup>99</sup> Frank Biermann and Ingrid Boas, 'Preparing for the Warmer World: Towards Global Governance Systems to Protect Climate Refugees' (2010) 10(1) *Global Environmental Politics* 74.

already back in 2020 a missed opportunity to have a broad protection instrument combining a *prima facie* approach to granting protection with a broad definition of potential reasons forcing the individual to leave his or her country of origin.

The question of personal scope was, obviously, not a controversial issue when defining the current response to the mass influx of Ukrainians, but it could in fact be of significant relevance in the future. After all, considering the scale of the present conflict, the majority of Ukrainian citizens would still be eligible for a different kind of protection on the grounds of the existence of armed conflict in their country.<sup>100</sup> This, on the other hand, would not apply vice versa to individuals fleeing their homes for any other reasons related to, say, endemic violence in the country of origin or general or systematic violence of human rights, reasons for flight already described by the Directive more than two decades ago. With the Proposal for the Crisis Regulation, individuals with a legitimate need of protection are left unprotected due to the protection gap created by the Crisis Regulation's limited personal scope of protection. These and many other categories of forced migrants would therefore have to seek protection within (exclusively national) statuses prescribed by the legislations of each Member State, making their prospects of obtaining the protection needed even more dubious.<sup>101</sup> The broad personal scope of temporary protection is the aspect of the Directive far ahead of its time, while the newly limited scope of immediate protection makes the latter apparently unfit for the future.

Where temporary protection keeps its relevance is the still-silent issue of temporariness of protection. I am well aware that this argument might seem controversial at first sight, but one of the temporary protection's fundamental aims was, at least in the past, to seek paths for the repatriation of each individual once protection is no longer needed.<sup>102</sup> Why is this aspect of the Directive worth mentioning? Because this is not a new approach in providing protection to those fleeing their countries of origin and one could expect at least some States to resort to this logic of

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<sup>100</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Qualification Directive) OJ L337, Art 15(c).

<sup>101</sup> I will use the Czech legislation here as an example. The Czech Act on the Residence of Aliens in the Territory of the Czech Republic lists in its § 179 reasons for not enabling an alien to depart to his country of origin. The inability to depart to a country of origin under this provision is a prerequisite for granting the discretionary status of long-term temporary leave to stay visa. Pursuant to § 179 (2) of the Act, the return of an alien is deemed to be in violation of law if it contradicts Article 2 to 6 ECHR. The scope of protection here goes far beyond the scope of subsidiary protection. However, in practice, a temporary leave to stay visa has rarely been granted by the Czech authorities. Moreover, no judicial remedy is available to unsuccessful applicants. In this respect, see § 171 (1) (a) of the Czech Act on the Residence of Aliens in the Territory of the Czech Republic.

<sup>102</sup> Matthew J Gibney, 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (1999) 14(3) *Georgetown Immigration Law Journal* 690-691.

protection at some point. The aspect that temporariness reiterates here – only if possible in the situation of the individual concerned – a consequence already predicted by the Refugee Convention's cessation clauses: part of the definition of refugee was long neglected in the European context as the price of pushing for the permanency of refugee protection.<sup>103</sup>

There are in fact reasons to believe that the temporariness of protection could become a strategy on how to bring on board all States – even the least cooperating ones embracing national identity arguments in the field of migration – when providing protection in situations of a mass influx. This is, perhaps, the realistic 'counterweight' needed when balancing the needs of individuals seeking refuge outside their countries with the seemingly opposed needs of States, trying until now to escape their international law obligations on many occasions. This was the original aim of temporary protection, and the Directive is far from being ill-equipped in this regard. As put more generally by J Fitzpatrick, temporary protection 'may assist democratic states in mediating competing public demands that asylum not be a back door to immigration but that humanitarian ideals be sustained'.<sup>104</sup> Focus on the repatriation of individuals formerly protected is not an illusory aspect of temporary protection. On the contrary, the framework of the Directive makes it clear that the durable solution anticipated here is the repatriation of an individual (whether voluntary or mandatory),<sup>105</sup> notwithstanding the general rule of the Directive saying that the general laws of Member States on protection and on aliens apply once the protection ends.<sup>106</sup>

Looking at the issue more systematically, one can also see that EU law makes a clear distinction between beneficiaries of temporary protection and individuals protected within the framework of the Qualification Directive. Article 34 of the Qualification Directive explicitly ensures access to integration facilities for beneficiaries of international protection.<sup>107</sup> The aspect of integration is also legally facilitated through the possibility of refugees and subsidiary protection holders to apply for long-term resident status.<sup>108</sup> None of these paths apply to temporary protection beneficiaries. At the same time, nothing here can be understood as definitively concluding that the current episode of temporary protection will need to be resolved with the repatriation of Ukrainians when the Directive's regime hits its temporal three-year limit. Considering the number of Ukrai-

<sup>103</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Art 1 C.

<sup>104</sup> Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94(2) *American Journal of International Law* 280.

<sup>105</sup> Temporary Protection Directive, Arts 21–23.

<sup>106</sup> *ibid.*, Art 20.

<sup>107</sup> Qualification Directive (n 99) Art 34.

<sup>108</sup> See Art 3(2)(b) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Consolidated text) OJ L132 as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 OJ L132/1.

nians protected, their family and private ties to Member States' societies and the enduring risks stemming from the ongoing armed conflict in Ukraine, 'free-choice' might once again be an inevitable solution.

The idea of temporariness is, however, far from being illegitimate, especially in the context of Ukraine's post-war reconstruction needs. Without a significant portion of its population, Ukraine will hardly be able to rebuild itself as a normal state. The example of Bosnia and Herzegovina illustrates how hard it is for a country to seek the proper organisation and functioning of its institutions thirty years after the war in the former Yugoslavia without its most valuable aspect, people.

## **6 Conclusion: the enduring relevance of temporary protection?**

The question of temporariness deserves the attention of academia not only because of the Directive or the way temporary protection is conceived in EU law. Temporariness seems to be gaining new momentum even with the proposal for the Qualification Regulation and its new provisions obliging national authorities to systematically carry out reviews of refugee and subsidiary protection status.<sup>109</sup> Apparently, the Commission follows here identical logic: the proposal aims to ensure that protection is granted only for as long as the grounds for persecution or serious harm persist and the legal background consists of cessation clauses until now not systematically used in practice by the Member States.<sup>110</sup>

Saying this, the future of temporary protection in EU law remains largely uncertain. But even if there was no future for temporary protection and for the Temporary Protection Directive, there seems to be at least a future for the temporariness of protection. The practices of cessations or *group* cessations are well known to States outside Europe. And so are their implications for the human rights of the individuals affected. In the European context (and, especially, in the context of the European regional system of protection of human rights), these questions have not yet been tackled properly. Precisely because of this, there should be additional focus on the identification of the potential legal limits of temporariness, arising not only from the standards applied when assessing the change of circumstances in countries of origin, but also from the perspective of the utmost importance of human rights instruments protecting the rights of individuals to private and family life. Current European discourse still largely misses out this aspect despite its chances to set the scene. Considering that each application for international protection lodged by Ukrainian citizens will have to be processed once the protection ends, the effect of temporariness could actually be postponed. But if no other durable solution is found for temporary protection holders, the current experience with temporary protection might be the first to challenge these boundaries on a larger scale.

<sup>109</sup> Proposal for a Qualification Regulation, Art 15, 21.

<sup>110</sup> Qualification Regulation Proposal 4.

Formally putting aside the highly theoretical issue of temporariness of protection, the use of the Directive in 2022 and 2023 has proven to be a highly effective step in dealing with the largest migratory flow in Europe since World War II. The solutions offered by the 'old' Directive demonstrated the validity of the long-neglected instrument which was also rightly described as a 'living dinosaur' of EU secondary legislation:<sup>111</sup> the *prima facie* approach in granting protection as well as the broad personal scope of temporary protection are two of the Directive's positive features that should – one way or another – be reflected in the EU's legislation for the future. Formally, the usefulness of the Directive was also acknowledged by the Commission which is now considering keeping the Directive as part of the EU's asylum toolbox.<sup>112</sup> Be that as it may, the more pressing issue will now concern the end of the Directive's regime in 2025. Time is ticking for temporary protection. And the same applies to finding an appropriate answer to what should come after it.



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<sup>111</sup> Thym (n 32).

<sup>112</sup> Commission, 'Communication from the Commission to the European Parliament and the Council: Temporary Protection for Those Fleeing Russia's War of Aggression Against Ukraine: One Year On' COM (2023) 140 final, 24.