



# Temporary Protection Directive: Testing New Frontiers?

*Esin Küçük* | ORCID: 0000-0002-8477-8316

Lecturer in Law, Essex Law School, University of Essex, Colchester, UK

*esin.kucuk@essex.ac.uk*

## Abstract

The activation of the Temporary Protection Directive has been considered a manifestation of solidarity towards refugees that enhances responsibility sharing between the Member States and is, therefore, perceived as a positive development. Focusing on the specific case of Ukrainian refugees, this paper explores the possible implications of the Temporary Protection Directive from the perspective of asylum solidarity. The purpose of the article is twofold. First, to dispel the assumption that the activation of the Directive is a positive step forward in addressing the Ukraine refugee incidence and challenge the presumed benefits of the Directive in terms of asylum solidarity. Second, the article seeks to explore how the detrimental effects of temporary protection can be mitigated both in the short and long term. It proposes possible solutions to prevent a regression in refugee protection standards through temporary protection and examines how a free choice model can be integrated to remedy some of the shortcomings of the current emergency management system.

## Keywords

temporary protection – inclusive solidarity – free choice of asylum state – immediate protection

## 1 Introduction

The response of the EU Member States to the Ukraine refugee emergency has been paradigm shifting. The Council of the EU activated the Temporary Protection Directive for the first time in 2022, more than two decades after it entered into force.<sup>1</sup> The directive was triggered, strikingly, not only with the required qualified majority, but the unanimous support of all Member States.<sup>2</sup> The Directive is designed to deal with ‘a mass influx of displaced persons’,<sup>3</sup> which is defined as ‘a large number of displaced persons, who come from a specific country or geographical area.’<sup>4</sup> As the definition does not provide any specific indicators or numerical threshold, what amounts to a large number of arrivals is a matter of interpretation and has been subject to debate.<sup>5</sup> What can be said with certainty is that the Directive is intended for exceptional situations, such as a malfunctioning asylum system.<sup>6</sup> It guarantees displaced persons, as members of a designated group, immediate access to basic rights without undergoing individual refugee status determination, which can be a lengthy process especially when the asylum system of a Member State is under pressure. As an emergency management mechanism, the Directive also provides for a solidarity scheme with a view to supporting a balance of effort in responsibility sharing.<sup>7</sup>

The activation of the Directive has been considered a manifestation of solidarity towards refugees that enhances responsibility sharing between the Member States. UNHCR welcomed the activation of the Directive, considering

- 
- 1 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] OJ L 212/12 (hereinafter ‘Temporary Protection Directive’). Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, [2022] OJ L 71/1 (hereinafter ‘Implementing Decision’).
  - 2 Council of the EU, Justice and Home Affairs Council, 3–4 March 2022, <https://www.consilium.europa.eu/en/meetings/jha/2022/03/03-04/>, accessed 28 July 2022.
  - 3 Temporary Protection Directive, Article 1. Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, ECLI:EU:C:2011:865, para. 93.
  - 4 Temporary Protection Directive, Article 2(d).
  - 5 On the meaning of the term, see Nuria Arenas, ‘The Concept of Mass Influx of Displaced Persons in the European Directive Establishing the Temporary’ (2005) 7 *European Journal of Migration and Law* 438–446.
  - 6 Temporary Protection Directive, Article 2(a).
  - 7 *Ibid.*, Articles 24 and 26.

it a positive step forward.<sup>8</sup> It was seen as a way to show solidarity towards those fleeing war, since it facilitates immediate access to certain rights without the long asylum process. From the perspective of the Member States, it was considered a 'smart and pragmatic response', as it prevented asylum systems from being overstretched whilst providing a framework for solidarity.<sup>9</sup>

Despite its obvious relevance, most notably during the 2015 refugee incidence, the Member States did not show much enthusiasm for activating the Directive.<sup>10</sup> The reluctance to activate the Directive has attracted widespread criticism. Ineli-Ciğer, for example, considered the scheme provided for in the Directive as 'practical', while regarding the complexities of the activation mechanism and the ambiguities surrounding the conditions to trigger the Directive as reasons for the failure to activate it in 2015.<sup>11</sup> Koo argued that the Temporary Protection Directive provided a 'good' instrument for the protection of those fleeing war and conflict, whilst acknowledging its weaknesses.<sup>12</sup> Similarly, Lambert maintained that the Directive could have provided an 'optimum mechanism' for dealing with the Syria crisis.<sup>13</sup>

Others have been even more critical of the Directive and its added value. Some have raised concerns about its implications for refugee protection, while others have questioned the value of the Directive in enhancing interstate solidarity. According to Gilbert, the Directive offered a mechanism that facilitated

8 UNHCR, UNHCR welcomes EU decision to offer Temporary Protection to Refugees fleeing Ukraine, 4 March 2022, <https://www.unhcr.org/uk/news/press/2022/3/6221f1c84/news-comment-unhcr-welcomes-eu-decision-offer-temporary-protection-refugees.html>, accessed 28 July 2022.

9 Daniel Thym, Temporary Protection for Ukrainians: The Unexpected Renaissance of 'Free Choice', <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/>, accessed 28 July 2022.

10 Elspeth Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' (2004) 29 *European Law Review* 198; Bruno Nascimbene and Alessia Di Pascale, 'Arab Spring and the Extraordinary Influx of People Who Arrived in Italy from North Africa' (2011) 13 *European Journal of Migration and Law* 341, 346–347. See also European Parliament, Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, para. 42.

11 Meltem Ineli-Ciğer, 'Time to Activate the Temporary Protection Directive' (2016) 18 *European Journal of Migration and Law* 22. However, in more recent work following the activation of the Directive, Ineli-Ciğer has revised her views on the complexity of the activation system. Meltem Ineli-Ciğer, Reasons for the Activation of the Temporary Protection Directive in 2022: *A Tale of Double Standards*, ASILE, 6 October 2022.

12 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* 178.

13 Hélène Lambert, 'Temporary Refuge from War: Customary International Law and the Syrian Conflict' (2017) 66 *The International and Comparative Law Quarterly* 745.

the denial of refugee status.<sup>14</sup> Peers has taken issue with the lower-level protection afforded by the Directive and welcomed its non-activation.<sup>15</sup> Considering the potential of the Directive to promote interstate solidarity, Gluns and Wessels have argued that it was a ‘waste of paper’ and maintained that it would not have made any difference even if it had been activated.<sup>16</sup>

This article has two main objectives. First, it analyses whether the activation of the Directive, in fact, constitutes a positive development in the context of the current refugee incidence. It adopts a novel angle – asylum solidarity – to evaluate the efficacy of the Directive against its objectives, which broadly correspond to two dimensions of asylum solidarity: solidarity towards refugees and solidarity between the Member States.<sup>17</sup> The article contends that the unfavourable consequences of the Directive are likely to prevail over its benefits in the long term. It promises little in terms of inter-state solidarity whilst paving the way for a retrenchment of refugee rights in the EU, unless necessary amendments are made. Secondly, if the first proposition proves to be true, the article examines how the weaknesses of the Temporary Protection Directive can be best alleviated both in the short and long term. Giving a more inclusive and rights-based reading of the concept of asylum solidarity, the article makes suggestions not only to prevent a regression in refugee protection standards through temporary protection, but also to better align the EU asylum system with the principle of solidarity and fair sharing of responsibility between the Member States.

The article is structured as follows. Section 2 considers the Temporary Protection Directive from the perspective of solidarity towards refugees and critically examines how it has been operationalised in response to the current refugee emergency. Section 3 assesses the Directive from the perspective of inter-state solidarity. In Section 4, the article reflects on the reasons that underlie the activation of the Directive. Section 5 examines how the detrimental effects of temporary protection can be best mitigated. Adopting an inclusive reading of asylum solidarity and drawing on insights from the Ukraine refugee crisis, it makes a case for a free choice of asylum in the future design of emergency management. Section 6 concludes.

14 Geoff Gilbert, ‘Is Europe Living Up to Its Obligations to Refugees?’ (2004) 15 *The European Journal of International Law* 982.

15 Steve Peers, *EU Justice and Home Affairs Law*, 4th Ed (OUP 2016) 280, fn. 302.

16 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* 83.

17 For these different dimensions of asylum solidarity, see Eleni Karageorgiou, ‘The Law and Practice of Solidarity in the Common European Asylum System: Article 80 and its Added Value’ (2016) *European Policy Analysis* 4–5.

## 2 Solidarity towards Refugees

### 2.1 *Access to the EU Territory*

The Temporary Protection Directive secures minimum rights that are integral to refugee protection. First, the Directive requires Member States to keep their borders open to displaced persons.<sup>18</sup> Activation ensures safe access to the EU's territory and protection against *refoulement* for displaced individuals. It is thus clearly beneficial to protection seekers who may otherwise cross borders irregularly using unsafe means, exposing them to exploitation and violence, or face deterrent practices, such as border closures and pushbacks.<sup>19</sup> Deterrent practices are problematic in terms of human rights protection, as acknowledged by the European Court of Human Rights, but are nonetheless a feature of many emerging asylum policies in the EU, which are predicated on keeping refugee numbers as low as possible and deflecting influxes.<sup>20</sup>

However, in the current refugee situation, the activation of the Directive is not nearly as relevant to gain access to the EU as it was during the 2015 refugee incidence, where asylum seekers were subject to visa restrictions. Ukrainian citizens, unlike many other refugees arriving in the EU, have been eligible for Schengen visa waivers since 2017.<sup>21</sup> Biometric passport holders can enter the Schengen territory,<sup>22</sup> and those who do not hold a biometric passport can be allowed on humanitarian grounds, which Member States did before the Temporary Protection Directive was triggered.<sup>23</sup>

Could the Member States pursue a policy of closing their borders at all under these circumstances? This would mean that to stop refugee flows, Member States would need to withdraw visa waivers. When the Kosovo war broke out, leading to sudden large-scale refugee movements, the initial response

18 Temporary Protection Directive, Article 8 (3).

19 On the increasing use of deterrent practices, see Filippo Grandi, UNHCR warns of increasing violence and human rights violations at European borders, 21 February 2022, <https://news.un.org/en/story/2022/02/1112342>, accessed 27 July 2022.

20 *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014); *MK and others v Poland* App no 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020); *Hirsi and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012).

21 Regulation 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, [2018] OJ L 303/39 (hereinafter 'Regulation on Schengen Visa Exemptions'), Article 4, Annex II.

22 Agreement between the European Union and Ukraine amending the Agreement between the European Community and Ukraine on the facilitation of the issuance of visas, [2013] OJ L 168/11.

23 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L 77/1, Article 6(5)(c).

of some Member States was to impose visa requirements on nationals of the countries in the conflict zone.<sup>24</sup> However, Schengen states cannot bilaterally re-introduce visa restrictions. This decision must be taken by the Commission subject to specific conditions defined under the Regulation on Schengen Visa Exemptions.<sup>25</sup> When a majority of the Member States request a suspension, the Commission must comply with the request.<sup>26</sup> Yet, it is difficult to imagine that the Commission and a majority of the Member States will take this step in the current circumstances. Therefore, as far as access to the EU territory is concerned, the added value of an activation of the Directive is the explicit commitment to keep borders open, which is largely symbolic in the case of Ukrainian nationals.

## 2.2 Access to Rights

A stronger argument for an activation of the Directive is that it secures access to basic rights across the EU under a new category of international protection.<sup>27</sup> However, a problematic consequence of the Directive is that temporary protection status adds an additional tier to an already stratified system of international protection under EU law.

Under the EU asylum regime, international protection is granted either in the form of refugee or subsidiary protection status. Refugee protection under EU law builds on the 1951 Refugee Convention,<sup>28</sup> which has been criticised for its restrictive definition of ‘refugee’.<sup>29</sup> The Refugee Convention is supplemented by subsidiary protection, which allows a larger group of people to access protection who do not fall under the definition of a refugee pursuant to the Convention.<sup>30</sup> Subsidiary protection can be invoked when an applicant clearly does not qualify as a refugee. This means according to the Court that

24 Reported also by Ingrid Boccardi, *Europe and Refugees: Towards an EU Asylum Policy* (Kluwer Law International 2002) 111, 112.

25 Regulation on Schengen Visa Exemptions, Article 8.

26 Ibid.

27 The issuance of persona documentation, a right to work, housing, social welfare, education, and family reunification are guaranteed under the Temporary Protection Directive, Chapter III.

28 Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 UNTS 137; Protocol Relating to the Status of Refugee, opened for signature, Jan 31, 1967, 606 UNTS 267 (together hereinafter 1951 Refugee Convention).

29 BS Chimni, ‘The Birth of a “Discipline”: From Refugee to Forced Migration Studies’, (2009) 22 *Journal of Refugee Studies* 16; Andrew E. Shacknove, (1985) Who is a Refugee 95 *Ethics*, 276–277; Matthew J. Gibney, *The Ethics and Politics of Asylum* (Cambridge University Press) 6–8.

30 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

refugee status must be considered first.<sup>31</sup> This relationship of primacy is of central importance, as subsidiary protection holders are entitled to a weaker level of protection than refugees.<sup>32</sup> The Member States influence the level of protection of subsidiary protection holders by opting for residence permits of shorter validity<sup>33</sup> or imposing restrictions on social welfare.<sup>34</sup>

How is temporary protection interlinked with refugee and subsidiary protection? The term 'displaced persons' who can benefit from temporary protection under the Temporary Protection Directive is more comprehensive than the term 'person eligible for subsidiary protection' as defined under the EU Qualification Directive.<sup>35</sup> Thus, the Temporary Protection Directive may cover individuals who are not eligible for refugee and subsidiary protection status.<sup>36</sup> However, the Temporary Protection Directive is not only designed to complement the protection provided under the 1951 Refugee Convention or the Qualification Directive, but also to replace it in emergencies. Temporary protection status can be granted to those who may be entitled to refugee or subsidiary protection status on account of the scale of arrivals.

What makes temporary protection most contentious is this very point, as it grants weaker rights to people who qualify for a status that would normally afford stronger protection. The responsibilities of host states are prescribed in the Directive in a way that allows for some discretion by the Member States. For example, under Article 13 of the Directive, protection holders should have access to 'suitable accommodation' and 'receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources'. The comments on the draft Proposal for a Temporary Protection Directive Article 11 show that the drafters abstained from imposing clear obligations to allow for flexibility on the part of host states.<sup>37</sup> Notwithstanding the

---

eligible for subsidiary protection, and for the content of the protection granted, [2011] OJ L 337/9 (hereinafter 'Qualification Directive'), Article 2(f).

31 Case C-604/12 *H.N.*, ECLI:EU:C:2014:302, para. 35.

32 On the differential treatment of refugees and beneficiaries of subsidiary protection, see European Council on Refugees and Exiles, Comments on the Commission Proposal for a Qualification Regulation (2016), <https://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-QR.pdf>, 15-17, accessed 5 July 2022.

33 Qualification Directive, Article 24.

34 *Ibid.*, Article 29 (2).

35 Compare Qualification Directive, Article 2(f), and the Temporary Protection Directive, Article 2(c).

36 Opinion of Advocate General Mengozzi in Case C-285/12 *Diakite* ECLI:EU:C:2013:500, para. 60.

37 Commission, Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2000] OJ C 311E (Hereinafter Proposal for a Temporary

lack of clarity surrounding the responsibilities of Member States, it can be said with confidence that the rights granted under the Directive are below the level of protection available to refugees and subsidiary protection holders, and the difference is far from insignificant. For instance, Article 13 provides in relation to health care that ‘the assistance necessary for medical care shall include at least emergency care and essential treatment of illness’. In comparison, under the Article 30 Qualification Directive, the Member States are required to ensure that the beneficiaries of international protection ‘have access to health-care under the same eligibility conditions as nationals of the Member State that has granted such protection’.<sup>38</sup>

In theory, these problems are to some extent attenuated because the Directive prohibits the denial of access to asylum procedures, which was a major flaw in the national practices of temporary protection.<sup>39</sup> Limitations in accessing asylum procedures meant that temporary protection status served to generate an alternative to refugee status. Under the Directive, beneficiaries can lodge an asylum claim anytime during temporary protection until the cessation of protection.<sup>40</sup>

However, two issues exist in practice. First, the Directive does not guarantee that the beneficiaries of temporary protection can retain their status when their asylum application is pending.<sup>41</sup> This means that a temporary protection holder may need to give up certain rights granted to her and fall back into asylum seeker status, which provides the weakest level of rights in the spectrum of protection. The precise implications depend on the host states of temporary protection beneficiaries, as some Member States are more generous in granting rights to asylum seekers than others. In a scenario where a temporary protection beneficiary needs to give up her right to work to apply for asylum, it is clear that the right to transition to another status may not be easily realised in practice.

Second, the Directive implicitly allows Member States to delay the processing of an asylum application until the end of temporary protection.<sup>42</sup> Given

---

Protection Directive). Compare with Qualification Directive, Article 29 on social welfare, which requires the Member States to offer ‘necessary social assistance as provided to nationals of that Member State’.

38 For further comparison, see Temporary Protection Directive, Articles 12–13, and Qualification Directive, Articles 20–34. See also Gluns and Wessels (n 16) 75–76.

39 Morten Kjaerum, ‘Temporary Protection in Europe in the 1990s’ (1994) 6 *International Journal of Refugee Law* 446.

40 Temporary Protection Directive, Article 17(1).

41 *Ibid.*, Article 19(1).

42 *Ibid.*, Article 17(2).



that the Temporary Protection Directive permits the extension of the protection period for up to three years, a delay in the processing of an asylum application would not only leave applicants in a state of limbo for an extended period, but also with a weaker status.

Closely connected to this point is the lack of an focus on integration in the Directive.<sup>43</sup> By delaying an application until the end of the protection period, Member States signal to protection seekers that their stay is temporary. If temporary protection is considered a route to return rather than to a permanent stay, asylum policies may be geared towards facilitating and actively promoting return, instead of developing incentives to support refugees in rebuilding a life in their host society. It is true that the Directive does not explicitly require temporary protection holders to return to their home countries. The fact that the Directive guarantees access to labour market can be seen as a way of facilitating integration in economic terms. However, the lack of emphasis on integration in the Directive leaves the door open to policies that prevent or at least slow down the social and cultural integration of protection holders.<sup>44</sup>

It is one of the goals of the temporary protection regime to reduce pressure on national asylum systems in situations of mass arrivals.<sup>45</sup> However, when seen through the lens of protection needs and equality considerations, the justification of different levels of protection on practical reasons seems morally and normatively untenable. Beneficiaries of temporary protection are exposed to the same risks and vulnerabilities as other international protection holders. They are therefore in equal need of assistance and the provision of a safe environment. Salomon argues convincingly against a justification of the differential treatment of beneficiaries of subsidiary protection and refugees based on differences in the source of harm.<sup>46</sup> Justifying the differential treatment of temporary protection holders is equally, if not more, problematic given that temporary protection holders are eligible for a stronger international protection status.

In theory, Ukrainian nationals may choose to lodge an asylum application, rather than relying on temporary protection, provided the asylum determination process is not suspended for those who are entitled to temporary protection. It is questionable, however, to what extent Ukrainian nationals are

43 Matthew J. Gibney, 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (2000) 14 *Georgetown Immigration Law Journal* 690, 705.

44 Kjaerum (n 39) 450.

45 Commission, Explanatory Memorandum to the Proposal for a Temporary Protection Directive, 5.1(2).

46 Stefan Salomon, Constructing Equality in EU Asylum Law (2021) 33 *International Journal of Refugee Law* 634.

informed of the consequences of their decision to apply for temporary protection instead of asylum. The lack of accurate and clear information regarding the rights attached to temporary protection has been one of the challenges expressed by Ukrainian nationals who applied for temporary protection.<sup>47</sup> Even if refugees are fully aware of the implications of their decision, their individual conditions may force them to choose to apply for temporary protection, since this provides stronger rights in the short term, as will be discussed in the next section.

### 2.3 *Immediate Protection*

A further argument supporting the activation of the Temporary Protection Directive is that it waives the asylum procedure for Ukrainian nationals, who, as a group, have access to certain benefits immediately. Given that temporary protection offers immediate access to more generous rights than asylum seekers are entitled to, temporary protection seems more desirable than submitting an application through the normal asylum procedure, which could be lengthy and cumbersome especially in situations of mass arrivals.

On the other hand, to understand how far solidarity towards refugees reaches, it is useful to recall that temporary protection status is not the only way of dealing with high numbers of refugee arrivals. Group-based recognition on a *prima facie* basis was the norm under the League of Nations regime before host states distanced themselves from the regime and gradually turned to individual processing of asylum applications.<sup>48</sup> The EU Member States could have decided to offer a stronger status to Ukrainian nationals from the outset. One would think that, when assessing the added value of temporary protection and the rights it affords, the correct reference point should be the 1951 Refugee Convention. It is difficult to overlook the fact that Ukrainian nationals would be entitled to (at least) subsidiary protection if their applications were processed through asylum procedures under the Qualification Directive.<sup>49</sup> Seen this way, the Temporary Protection Directive acts as a catalyst for the denial of refugee status.<sup>50</sup>

47 UNHCR, The Implementation of Temporary Protection Directive, Six Months On, <https://data.unhcr.org/en/documents/details/96266>, p. 11, accessed 17 November 2022.

48 Jean-François Durieux, 'The Many Faces of "Prima Facie": Group-Based Evidence in Refugee Status Determination' (2008) 25 *Refugee* 153.

49 According to Article 15 of the Qualification Directive, subsidiary protection is granted to persons who do not qualify for refugee status but run a real risk of serious harm on account of (a) death penalty, (b) torture, inhuman or degrading treatment, or (c) a serious and individual threat to life or person stemming from indiscriminate violence in armed conflict.

50 See on this point, Gilbert (n 14) 982.

### 3 Solidarity between the Member States

#### 3.1 Policy Harmonisation

One of the two main objectives of the Directive is to promote a balance of efforts between the Member States. The Directive seeks to promote solidarity through a scheme, which will be discussed in the next section, and policy harmonisation,<sup>51</sup> also known as ‘indirect solidarity’.<sup>52</sup> The premise is that if all Member States provided the same level of protection, asylum seekers would not be attracted to certain countries only.

There are, however, at least two factors that undermine the importance of harmonisation as a solidarity instrument. The first, and more obvious, is that the Directive sets minimum standards of humane treatment owed to protection seekers, allowing the Member States to offer stronger rights. The fact that Member States can offer more generous rights is commendable from the perspective of refugee protection. However, it casts doubt on the effectiveness of harmonisation as an instrument of solidarity. For purposes of solidarity, the differential attractiveness of Member States could be addressed more effectively if harmonisation ensured uniformity in protection standards, rather than setting minimum standards. Even then, major structural challenges that weaken the efficacy of harmonisation remain. Research into pull factors demonstrates that the generosity of a national system is not always the main reason motivating protection seekers to go to a specific country.<sup>53</sup> For some, the economic prosperity of the host country is a pull factor, while for others cultural and historical ties determine the choice of destination country.<sup>54</sup> Existing family and other social networks, geographical location, and language ties have also been identified as structural factors that influence the choice of asylum state.<sup>55</sup> No matter how harmonised the asylum approaches of the Member

51 Liza Schuster, ‘A Comparative Analysis of the Asylum Policy of Seven European Governments’ (2000) 13 *Journal of Refugee Studies* 118, 129; Reinhard Marx, ‘Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications’ (2001) 3 *European Journal of Migration and Law* 7, 14.

52 Maarten Vink and Frits Meijerink, ‘Asylum Applications and Recognition Rates in EU Member States 1982–2001: A Quantitative Analysis’ (2003) 16 *Journal of Refugee Studies* 297, 298.

53 Eiko Thielemann, ‘Why Asylum Policy Harmonisation Undermines Refugee Burden Sharing’ (2004) 6 *European Journal of Migration and Law*, 60–64.

54 Anita Böcker and Tetty Havinga, ‘Asylum Applications in the European Union: Patterns and Trends and the Effects of Policy Measures’ (1998) 11 *Journal of Refugee Studies* 245, 249–265; Eric Neumayer, ‘Asylum Destination Choice: What Makes some European Countries more Attractive than Others?’ (2004) 5 *European Union Politics* 155–180.

55 Eiko Thielemann, ‘Why Refugee Burden-Sharing Initiatives Fail: Public goods, Free-riding and Symbolic Solidarity in the EU’ (2018) 56 *Journal of Common Market Studies* 63.

States are, such structural differences play a role in the decisions of refugees on their destination states.<sup>56</sup> Thus, one needs to be cautious not to overstate the distributive effects of policy harmonisation.

Current data indeed show that structural factors have more weight in the choice of a protection state than protection standards. According to interviews conducted with Ukrainian nationals between May and mid-August 2022, the decision to move to another country was determined mostly by family ties (30%), safety considerations (24%), employment opportunities (18%), and community ties (9%). Similarly, those who wished to stay in their host country mentioned safety (51%), family ties (15%), and employment (8%) as reasons.<sup>57</sup>

### 3.2 *Financial Solidarity and Relocation*

The solidarity scheme provided under the Temporary Protection Directive facilitates the relocation of protection seekers,<sup>58</sup> as well as allowing for financial assistance.<sup>59</sup> In practice, however, these mechanisms have significant limitations. First, the financial solidarity facility under the Directive is endowed with limited resources.<sup>60</sup> Second, financial solidarity has inherent limitations in evening out inequalities in responsibility sharing. The indirect costs of refugee protection, such as challenges to social cohesion or an increased strain on public health and education systems, can be better addressed by relocation, which is the second prong of the Directive's solidarity scheme.

The Directive envisages a relocation system that is based on double-voluntarism, meaning that relocations are subject to a voluntary offer from the recipient state and the consent of the transferee.<sup>61</sup> The activation of the Directive does not automatically bring about solidarity obligations. The solidarity instruments mainly operate within an inter-governmental framework

56 Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 271.

57 UNHCR, Regional Protection Profiling & Monitoring Factsheet, <https://data.unhcr.org/en/documents/details/95010>, accessed 17 November 2022, p. 4.

58 Temporary Protection Directive, Article 25.

59 Ibid, Articles 24 and 26.

60 Temporary Protection is mainly expected to be supported by the Asylum, Migration and Integration Funds, which amount to €9.9 billion for 2021–2027. Commission, The Asylum, Migration and Integration Funds, [https://home-affairs.ec.europa.eu/funding\\_en](https://home-affairs.ec.europa.eu/funding_en), accessed 27 July 2022. The cost of hosting displaced Ukrainians for the EU Member States is expected to total €40 billion for 2022. Zsolt Darvas, Bold European Union action is needed to support Ukrainian refugees, <https://www.bruegel.org/blog-post/bold-european-union-action-needed-support-ukrainian-refugees>, accessed 27 July 2022.

61 Temporary Protection Directive, Article 26.

and in an *ad hoc* manner, leaving considerable autonomy to Member States, which are free to decide on their level of contribution.

First, Member States are expected to indicate their absorptive capacity, which is to be set out in the Council decision that introduces temporary protection.<sup>62</sup> However, the Implementing Decision that activated the Directive does not include information on the reception capacities of Member States, although this is clearly stipulated in the Directive.

Furthermore, during the temporary protection period, Member States shall inform the Commission and UNHCR of transfer requests, and the other Member States are expected to respond to these requests by informing the requesting state of their capacity.<sup>63</sup> Member States assess their reception capacity autonomously, and displaced persons are relocated according to this assessment. It would not be far-fetched to anticipate that Member States will take diverse approaches to determining their absorptive capacities. Member States are not bound by common criteria in their assessment or required to substantiate the figures they submit. This means that the scope and content of assistance are determined according to the political climate and economic conditions of the day. Although the relocation mechanism provided under the Temporary Protection Directive may contribute to supporting states that are under pressure, it promises little prospect of responding successfully to an emergency resulting from a large number of arrivals.

The jurisprudence of the Court provides a good insight into the role of the Directive as a solidarity instrument. At the height of the 2015 crisis, the EU introduced Decision 2015/1601, which required the relocation of a total of 120,000 asylum seekers based on mandatory quotas.<sup>64</sup> The legality of the Decision was challenged on various grounds, including a failure to comply with the principle of proportionality.<sup>65</sup> The essence of the argument was that the Temporary Protection Directive was an alternative scheme that served the same end as the contested mandatory scheme. It was argued that the Directive provided for a mechanism that encroached less on the 'sovereign rights of each Member State'. This was because the Temporary Protection Directive allowed the Member States to determine their absorptive capacities and, accordingly, decide how many people to allow into their territory. However, Advocate General Bot rejected the idea that the Temporary Protection Directive was an

62 Ibid, Articles 25(1) and 5(3)(c).

63 Ibid, Article 26(2).

64 Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2015] OJ L 248/80.

65 Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* ECLI:EU:C:2017:631, para. 226.

alternative to the contested scheme, pointing out that ‘it was impossible to obtain commitments’ under the Directive, and the Council was not wrong in choosing a ‘rapid and binding response’ to deal with the crisis.<sup>66</sup> The Advocate General also argued that the objection of some Member States to the contested decision indicated that the same level of commitment could not be achieved by a voluntary scheme.<sup>67</sup>

The Court’s holding focussed on the suitability of the Temporary Protection Directive and specifically the Council’s argument that the Directive could not offer an effective solution, since it allowed access to protection in the states where protection seekers were located, in this case Greece and Italy, which were already beyond their capacity.<sup>68</sup> From the perspective of the Court, the activation of the Directive, if anything, would increase the pressure on these two countries. The Court did not explicitly comment on the ineffectiveness of the Directive’s solidarity mechanism, but the Court’s conclusion that the Directive would create more pressure on border states implies that it had little faith in the voluntary relocation scheme offered by the Temporary Protection Directive.

Finally, it is worth mentioning that the Commission did not seem to have much confidence in the Directive as an emergency response, which is evidenced by its efforts to repeal the Directive and introduce a new crisis management scheme.<sup>69</sup> The Proposal for a Crisis Regulation acknowledged that it is necessary for the current system to be supplemented by an emergency instrument to deal with exceptional situations of crisis in an effective manner.<sup>70</sup> The proposed emergency scheme involves compulsory relocations based on quotas determined by a distribution key, although questions of morality and effectiveness can be raised in relation to the market-like mechanism which the Commission envisages to create a more ‘flexible’ instrument.<sup>71</sup> Despite these concerns, the fact that the Commission seeks to introduce compulsory contributions to responsibility sharing is testament to the limited value of the Temporary Protection Directive as a solidarity instrument.

66 Opinion of Advocate General Bot, Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council*, ECLI:EU:C:2017:618, para. 258.

67 Ibid, para. 259.

68 Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* (n 66), para. 256.

69 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, COM(2020) 613 final, Article 10 (hereinafter ‘Proposal for a Crisis Regulation’).

70 Explanatory Memorandum of a Proposal for a Crisis Regulation.

71 Commission, A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity, Press Release, 23 September 2020.

#### 4 Political Expediency or an Act of Solidarity?

The above analysis demonstrates that the activation of the Directive, on its own, does not meaningfully contribute to the enhancement of solidarity, which, ironically, is one of the defined objectives of the Directive.<sup>72</sup> On the contrary, the activation of the Directive is likely to have adverse implications for refugee protection in the EU. If not solidarity, what made the Directive in the eyes of the Council ‘the most appropriate instrument in the current situation’?<sup>73</sup>

First, the activation of the Directive was considered appropriate, arguably, because it was the only certain way to deflect criticism of a lack of action at the EU level. The Directive fitted the current situation well without creating political divisions between the Member States. The EU institutions have so far not been successful in substantially reforming the asylum solidarity framework, despite recognising its central role in the asylum system at a constitutional level. It is necessary to recall that the Commission unsuccessfully attempted to introduce a more robust solidarity scheme as part of a comprehensive reform proposal of asylum and migration management in the wake of the 2015 refugee crisis.<sup>74</sup> The solidarity scheme was the main reason for a deadlock in negotiations over the reform proposal. This was followed by a complex but less ambitious solidarity scheme under the New Asylum and Migration Pact in 2020,<sup>75</sup> which, however, was not less contentious.<sup>76</sup>

It is worth underlining that the Directive was activated in a particularly fragile political climate characterised by divisions driven by nationalist agendas and exacerbated by Brexit and rule of law backsliding. In the field of asylum, divisions between the Member States manifested themselves in the refusal of the *Visegrád* countries to implement the relocation schemes introduced by the EU to mitigate the 2015 refugee emergency: Decision 2015/1523 (introducing a voluntary relocation scheme),<sup>77</sup> and a week later, Decision 2015/1601 (imposing

72 Temporary Protection Directive, Article 1.

73 Implementing Decision, Preamble 16.

74 Commission, Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) COM/2016/0270 final, 4 May 2016.

75 Commission, New Pact on Migration and Asylum, COM(2020) 609, 23 September 2020.

76 For example, see Olivia Sundberg Diez, Florian Trauner and Marie De Somer, ‘Return Sponsorships in the EU’s New Pact on Migration and Asylum: High Stakes, Low Gains’, (2021) 23 *European Journal of Migration and Law* 226–244.

77 Council Decision 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, [2015] OJ L 239/146.

mandatory quotas).<sup>78</sup> When Poland, Hungary, and Czech Republic refused to fulfil their obligations under the Decisions, the Commission brought infringement proceedings before the Court, which concluded that all three countries had failed to fulfil their obligations under the Decisions.<sup>79</sup> The ruling of the Court did not make much difference in practice, since the defendant Member States refused to implement the Decisions. Seen from this perspective, the unanimous activation of the Directive may be considered an achievement. It prevented further division between the Member States in the short term and may serve to create a sense of togetherness and common identity that has the potential to generate solidarity in the long term.

Another reason to activate the Directive was the desire to support those (mostly women, children, and the elderly)<sup>80</sup> fleeing a warzone by recognising their need for international protection and immediately providing for their basic needs, albeit without committing too much. The Temporary Protection Directive is perceived as a way to undertake fewer protection responsibilities while complying with international obligations. This was vividly illustrated in *Slovak Republic and Hungary v Council*.<sup>81</sup> In order to justify the necessity of a mandatory relocation scheme, the Council argued that the Temporary Protection Directive was not suitable as an emergency response.<sup>82</sup> On the other hand, the Slovak Republic, one of the applicants, argued that the Directive was more suitable in the situation at hand, since temporary protection granted ‘fewer rights’ than the contested decision, especially in relation to the period of protection, which meant that it imposed ‘fewer burdens on the Member State of relocation’.<sup>83</sup> It is thus not fanciful to suggest that the less demanding protection obligations under the Temporary Protection Directive had an appeal for some Member States.

It can be argued that the emphasis on the ‘temporary’ nature of protection also played a role in the decision to activate the Directive. The temporary nature of protection is used as a way to mitigate political risks arising from concerns about immigration control.<sup>84</sup> Even if, in practice, temporary protection

78 Council Decision 2015/1601 (n 64).

79 Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic*, ECLI:EU:C:2020:257, para. 189.

80 Eurostat, Ukrainians granted temporary protection in July, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220907-2>, accessed July 2022.

81 Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* (n 66).

82 *Ibid*, para. 256.

83 *Ibid*, para. 227.

84 Joan Fitzpatrick, ‘Temporary Protection of Refugees: Elements of a Formalized Regime’ (2000) 94 *American Journal of International Law* 280. See also Gluns and Wessels (n 16) 71.



does not typically end with repatriation and host states may be reluctant to pursue removal for various reasons, the nominally temporary nature of protection is believed to generate broader public support at a time when political and economic incentives to maintain low levels of refugees may be strong.<sup>85</sup> The activation of the Directive illustrates this uneasy balancing act attempted by the Member States.

Finally, the activation of the Directive was driven by a spontaneously created system of free choice of asylum state. Free choice of asylum was made possible through a Schengen visa waiver that exempts Ukrainian nationals from visa requirements for entry into the EU and provides them with the right to travel in the EU for 90 days within a 180-day period.<sup>86</sup> This allowed displaced Ukrainian nationals to decide in which Member State to exercise their rights as beneficiaries of temporary protection. The main implications of an asylum system based on the free choice of asylum state are discussed in the next section. Suffice it to say here that the right of visa-free travel has contributed to a balance of efforts by allowing protection seekers to spread across the EU and easing some of the pressures on the Member States neighbouring Ukraine. Based on preliminary data on secondary movements of displaced Ukrainians, there are indications that this free choice model has far greater distributive capacity to support neighbouring states than a relocation scheme.<sup>87</sup> On the other hand, it raises concerns for states that are traditionally more appealing to protection seekers. From the perspective of traditional asylum states in the west and north of the EU, temporary protection status and immediate access to basic rights in neighbouring states is desirable because it can serve to limit secondary movements. However, as discussed above, it is questionable to what extent a harmonised temporary protection regime actually prevents secondary movements, given that the decision to move is influenced also, and often primarily, by structural factors, such as social and cultural factors as well as economic conditions.<sup>88</sup>

The above considerations suggest that the decision to activate the Directive was largely based on political expediency. It gives the false impression that it is an appropriate tool in the management of a crisis, while, in fact, solidarity has been advanced more effectively through the free choice of asylum system that came into being incidentally. Moreover, the use of temporary protection in the

---

85 Khalid Koser and Richard Black, 'Limits to Harmonization: The "Temporary Protection" of Refugees in the European Union' (1999) 37 *International Migration* 527.

86 Regulation on Schengen Visa Exemptions, Article 4, Annex II.

87 UNHCR, Ukraine Refugee Situation, <https://data.unhcr.org/en/situations/ukraine>, accessed 20 November 2022.

88 See above Section 3.1.

EU gives credence to the view that temporary protection is an integral part of refugee protection across the globe and a legitimate way of managing emergencies, while its long-term implications for refugee protection are likely to be detrimental. It is, therefore, important to consider how the adverse effects of the Directive can be mitigated.

## 5 A Way Forward in Crisis Management

### 5.1 *Short Term: Transition to Durable Protection Status*

Should the war in Ukraine not have come to an end, or Ukraine not being a safe country, at the end of the maximum temporary protection period of three years, the Member States can take two possible routes: i) asylum determination through individual processing; and ii) asylum determination through group recognition. According to Article 20 of the Temporary Protection Directive, Member States have the power to use national laws on asylum and the entry and residence of foreign nationals after the temporary protection period.<sup>89</sup> To expand the scope of international protection, some Member States provide for complementary protection status and grant a residence permit based on humanitarian grounds. In practice, regrettably, national complementary protection is also used in cases where persons are eligible for refugee and subsidiary protection.<sup>90</sup> The use of complementary forms of protection under national laws should be an option only when Ukrainian nationals are not eligible for refugee and subsidiary protection.

The plain reading of the Directive suggests that the transition from temporary protection to a more durable status should happen through a determination of individual asylum applications.<sup>91</sup> It is too early to say how this asylum determination procedure will unfold in different Member States. What can be said with certainty, however, is that the individual processing of asylum applications is problematic for several reasons. As explained above, the Directive sets up a system that allows Member States to delay the transition to refugee status.<sup>92</sup> Member States can render an asylum application less desirable by providing that beneficiaries of temporary protection do not retain their status

89 Temporary Protection Directive, Article 20.

90 Liv Feijen, 'Filling the Gaps – Subsidiary Protection and Non-EU Harmonized Protection Status(es) in the Nordic Countries' (2014) 26 *International Journal of Refugee Law* 196.

91 This follows from Articles 17–19 of the Temporary Protection Directive that set out the rules that regulate access to the asylum regime during and after the temporary protection period is over.

92 See above Section 2.2.

while their application is pending. In fact, it is clear from the Commission proposal for the Temporary Protection Directive that a non-combination of statuses is allowed to make temporary protection more attractive and thereby reduce the 'burden of asylum applications'.<sup>93</sup> Disappointingly, the Commission's guidelines regarding the Council Implementing Decision are largely limited to stipulating that Member States should fully inform the beneficiaries of temporary protection if access to the asylum procedure would entail a withdrawal of temporary protection status.<sup>94</sup> Some Member States, such as Slovakia, Romania and Spain, do not allow applicants to maintain their status of temporary protection holder while their asylum application is pending (although most states allow a retention of status).<sup>95</sup>

Allowing temporary protection holders to retain their status while their asylum application is pending may not make any difference in practice if a host state decides to suspend the asylum determination procedure. Sweden has done so for those fleeing the war in Ukraine, meaning that applications for asylum of those who are *not* entailed to temporary protection will be considered.<sup>96</sup> Finland, similarly, has suspended the determination of asylum applications for those who benefit from temporary protection.<sup>97</sup> Italy and Belgium have done the same until the end of the temporary protection period.<sup>98</sup> Arguably the use of suspensions is intended only for situations when a national asylum system is under pressure.<sup>99</sup> However, the Directive does not require the Member

93 Explanatory Memorandum to the Proposal for a Temporary Protection Directive, Section 5.7.

94 Commission, Communication on Operational guidelines for the implementation of Council Implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 1/01 [2022] OJ C 1261, Section 7.

95 On this point, see Gregor Noll and Marcus Gunneflo, *Directive 2001/55 Temporary Protection Synthesis Report*, 2007, 51–52. European Union Agency for Asylum, Information on Temporary Protection in Spain, [https://euaa.europa.eu/sites/default/files/2022-06/Booklet\\_Spain\\_EN.pdf](https://euaa.europa.eu/sites/default/files/2022-06/Booklet_Spain_EN.pdf), p. 13, accessed 1 December 2022.

96 Swedish Migration Agency, Continued Uncertainty in Ukraine, <https://www.migrationsverket.se/English/Private-individuals/Protection-under-the-Temporary-Protection-Directive.html>, accessed 20 November 2022.

97 Finish Immigration Service, Temporary Protection for those fleeing Ukraine, <https://migri.fi/en/temporary-protection#asylum>, accessed 20 November 2022.

98 European Union Agency for Asylum, Information on Temporary Protection in Italy, [https://euaa.europa.eu/sites/default/files/2022-06/Booklet\\_Italy\\_EN\\_v1.pdf](https://euaa.europa.eu/sites/default/files/2022-06/Booklet_Italy_EN_v1.pdf), p. 14, accessed 1 December 2022; Belgian Immigration Office, Temporary Protection, <https://dofi.ibz.be/en/themes/ukraine/temporary-protection>, accessed 1 December 2022.

99 Explanatory Memorandum to the Proposal for a Temporary Protection Directive, Section 5.7.

States to justify why they suspend the processing of asylum applications. As explained above,<sup>100</sup> delaying the transition to refugee status while not allowing protection seekers to exercise their rights as refugees despite their eligibility for protection amounts to creating an alternative international protection status via the back door.

This strategy of delay is also problematic from a practical standpoint, because the transition of status through individual applications prescribed under the Directive creates greater complexity and uncertainty for those who are under temporary protection and the authorities who process their applications. Even if the Member States choose to process asylum applications as they are submitted, it is questionable whether beneficiaries of temporary protection would submit an asylum claim if that meant reverting to the position of asylum seeker. If a Member State delays status transitions during the temporary protection period universally, as the Directive permits, it is not clear how individual status determination will operate at the end of the protection period, given the likely scale of applications.

The delay-oriented system is structured around the end goal of return, which is based on the false presumption that a return to the country of origin is the most probable outcome in refugee protection. However, the fact that Turkey has hosted over 3.7 million Syrians under temporary protection for almost a decade shows that, contrary to what the term ‘temporary protection’ suggests, return is not always feasible.<sup>101</sup> When return is not an option, temporary protection holders should be transferred to a secure and more durable status. When the armed conflict in Bosnia came to an end, most Member States did not return temporary protection holders and eventually moved towards a solution that involved the granting of permanent residence.<sup>102</sup> Unfortunately, temporary protection also leaves the door open to a more precarious outcome. Germany, for instance, returned 70% of temporary protection holders from Bosnia, albeit prematurely, going against the advice of UNHCR that the situation Bosnia did not permit forced returns.<sup>103</sup>

<sup>100</sup> See above Section 2.2.

<sup>101</sup> Law on Foreigners and International Protection, Law No: 6458; Official Gazette No. 28615 (published 11/4/2013). For the number of temporary protection holders in Turkey, see Turkish Ministry of the Interior, Precedency of Migration Management, Distribution of Syrians under temporary protection by year, <https://en.goc.gov.tr/temporary-protection27>, accessed 8 April 2022.

<sup>102</sup> Khalid Koser, Martha Walsh, Richard Black, ‘Temporary Protection and the assisted Return of Refugees from the European Union’ (1998) *International Journal of Refugee Law*, 450–452.

<sup>103</sup> Amnesty International, Bosnia-Herzegovina, ‘Who is living in my house?’ Obstacles to the Safe Return of Refugees and Displaced People, 9 March 1997, <https://www.refworld.org/docid/45b5067e2.html>, accessed 5 April 2022, pp. 16–17.

The course of events signals that the war in Ukraine may not come to an end soon, and operating on the assumption that the protection of displaced Ukrainians will be ‘temporary’ is imprudent. Figures show that Ukrainians have so far overwhelmingly applied for temporary protection, rather than asylum.<sup>104</sup> According to large-scale interviews conducted by UNHCR, only 13% of Ukrainian nationals who participated in the survey expressed their intention to return to Ukraine in the near future.<sup>105</sup> It seems likely that the Member States will ultimately face difficult questions surrounding the stay and residence status of Ukrainian nationals.

Complexities surrounding individual processing could also be avoided if the Member States were willing to provide for a group recognition procedure of Ukrainian nationals. While group recognition is usually considered part of temporary protection, it has been used in the recognition of refugees. In fact, most of the world’s refugee population has been granted refugee status through group recognition rather than individual processing.<sup>106</sup> While it has been argued that the refugee definition provided under the 1951 Refugee Convention is individualistic, there are no good reasons to hold that the Convention does not apply to influx situations.<sup>107</sup> The Qualification Directive does not provide for a formal process for recognising refugees *en masse*. However, Article 14(2)(a) of the Asylum Procedures Directive allows the granting of refugee status on the basis of the application without an interview.<sup>108</sup> From a legal perspective, there is therefore nothing that would stop the Member States from using group recognition as a process of status determination. In fact, group recognition has been used by some of the EU States not long ago, namely in the management

104 By 8 November 2022, while 4.5 million Ukrainian nationals were registered for temporary protection, only 27,400 had lodged an asylum application in the EU and Schengen-associated States. European Commission, Migration Management: Welcoming Refugees from Ukraine, [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/migration-management-welcoming-refugees-ukraine\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/migration-management-welcoming-refugees-ukraine_en), accessed 17 November 2022.

105 UNHCR, Regional Protection Profiling & Monitoring Factsheet (n 57) p. 4.

106 David Weissbrodt, *The Human rights of Non-citizens* (OUP 2009), 172; Bruce Burson, ‘Refugee Status Determination’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *Oxford Handbook of International Refugee Law* (OUP 2021) 573.

107 Jean-François Durieux and Jane McAdam, ‘Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16 *International Journal of Refugee Law* 9–10.

108 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, [2013] OJ L 180/60.

of the 2015 refugee emergency.<sup>109</sup> The obstacles to group recognition, consequently, are political in nature.

If return is not an option at the end of the protection period, which is possible in the case of Ukraine, delayed asylum processing may result in Member States facing the question of whether to proceed with the individual processing of asylum applications or group recognition. While individual processing risks putting national asylum systems under pressure, group recognition may have political repercussions. This dilemma, like many other issues of asylum and immigration, calls for joint action by the EU on an intergovernmental basis. However, the outcome of any such initiative will depend on the political, social, and economic climate prevailing at the time.

The Proposal for a Crisis Regulation, which would replace temporary protection, is progressive in at least two ways. Under the proposed Regulation, the beneficiaries of immediate protection would be entitled to access rights equivalent to those enjoyed by beneficiaries of subsidiary protection.<sup>110</sup> Moreover, the envisaged system would require Member States to process asylum applications after a maximum of one year.<sup>111</sup> If accepted, this will address concerns about creating an alternative, lower level of protection status through the back door. On the other hand, the Proposal, which rebrands temporary protection as ‘immediate’ protection, unhelpfully defines immediate protection holders as asylum seekers.<sup>112</sup> It is useful to highlight that granting temporary protection under the Directive is, in fact, a form of group recognition of the protection status on a *prima facie* basis. In other words, the activation of the Directive is an explicit acknowledgement of the protection needs of individuals based on objective circumstances. It is incoherent, on the one hand, to acknowledge the protection needs of individuals and, on the other, to categorise them as protection seekers. This system creates a ‘privileged’ asylum seeker status and leads to the differential treatment of different categories of asylum seeker.<sup>113</sup> The categorisation of immediate protection holders as asylum seekers is problematic

109 For different forms of group recognition that have been used in different contexts and jurisdictions, see Cathryn Costello, Caroline Nalule and Derya Ozkul, ‘Recognising refugees: understanding the real routes to recognition’ (2020) 65 *Forced Migration Review* 5.

110 Proposal for a Crisis Regulation, Article 10(2).

111 Ibid, Article 10(3).

112 Explanatory Memorandum to Proposal for a Crisis Regulation, 5.4 provides that ‘Persons granted immediate protection remain applicants for international protection at the same time but should enjoy the set of economic and social rights that are applicable to subsidiary protection beneficiaries as laid down in Regulation’.

113 For a critique of the ‘immediate protection’ status, see Minos Mouzourakis, ‘More laws, less law: The European Union’s New Pact on Migration and Asylum and the fragmentation of “asylum seeker” status’ (2020) 26 *European Law Journal* 171, 173–179.

also because of what it signals for the construction of international protection. It represents a poor effort to balance the demands of a coherent, open and accessible system of international protection and political demands.

### 5.2 *Long Term: Free Choice of Asylum State*

The legal design of asylum and its implementation in the EU is flawed. It has become increasingly clear that solidarity between the Member States is a functional necessity of any proper common asylum regime, and a lack of solidarity is at the heart of the problems that afflict the current system. In Advocate General Sharpston's words, solidarity is 'the lifeblood of the European project' that 'require[d] one to shoulder collective responsibilities and (yes) burdens to further the common good'.<sup>114</sup>

The instrumental role of interstate solidarity in the functioning of the EU is undisputable and has, in fact, found explicit expression in various Treaty provisions, such as Article 80 TFEU. Beyond making solidarity more central to the management of asylum, this provision imposes fairness in responsibility sharing as a governing principle of the EU asylum system. On the other hand, confining solidarity to inter-state relationships fails to recognise the complex nature of asylum management.<sup>115</sup> Asylum solidarity is a multi-actor and multidimensional problem, concerning not only the relationship between the Member States, but also between the EU and third countries as well as asylum seekers and refugees.<sup>116</sup> Any system that is developed without a full appreciation of the multidimensional nature of asylum solidarity is unlikely to be just or sustainable.

The failures of the current asylum regime under the Dublin Regulation result largely from the refusal of some Member States and asylum seekers to comply with a system that does not take account of their respective positions. The current system pre-assigns asylum processing and protection responsibilities to a single state, which is often the country of first entry.<sup>117</sup> Avoiding

114 Opinion of AG Sharpston in Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic*, ECLI:EU:C:2019:917, para. 253.

115 Valsamis Mitsilegas, 'Solidarity and Trust in the Common European Asylum System' (2014) 2 *Comparative Migration Studies* 181, 186–87 (defining asylum solidarity as 'state-centered, securitised and exclusionary').

116 Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (external) Asylum Policy' (2017) 24 *Maastricht Journal of European and Comparative Law* 757–758 (arguing for the existence of an overarching principle of solidarity, which is expressed in Article 80 TFEU and governs both 'internal' and 'external' aspects of asylum solidarity).

117 Dublin Regulation, Article 7.

secondary movements and returns is central to this system.<sup>118</sup> Its workability hinges to a great extent on the willingness of the border states to prevent secondary movements, although this means shouldering more responsibilities. The system also demands the cooperation of asylum seekers in limiting secondary movements, even though this may require them to remain within an overstretched asylum system in a country where they have no ties. This shows that solidarity between the Member States cannot be advanced in isolation through solutions that disregard the needs of other relevant actors but requires a more inclusive approach.

The Ukrainian refugee incidence reveals the potential of a free choice model for meeting the complex demands of asylum management in the EU. The overarching principle underpinning this model is to permit asylum seekers to determine their protection state, based on the assumption that protection seekers themselves are best placed to know their ideal protection location.<sup>119</sup> Instead of forcing individuals who seek protection to remain in the country of first entry, where they may have no ties, a free choice model would allow them to join social networks that support their integration. Further practical advantages of such a model are that it does not require a return mechanism and prevents people smuggling and irregular movements.<sup>120</sup>

An earlier study proposed a reconfiguration of the Dublin system to prevent coercion and make room for the preferences of asylum seekers, although without endorsing the idea of free choice of asylum state in all instances.<sup>121</sup> Since then, various models have been put forward by scholars and professional organisations to accommodate the preferences of asylum seekers and refugees, especially in the wake of the 2015 refugee incidence. A consortium of NGOs together with the German Bar Association has issued a memorandum that suggests replacing the country-of-first-entry rule with the criterion

118 Under the Dublin Regulation, secondary movements of asylum seekers are, in principle, prohibited, and returns are facilitated pursuant to the take-back mechanism provided under Article 23. Preventing secondary movements was defined as a goal of the Dublin system. Case C-695/15 PPU *Mirza*, EU:C:2016:188, para. 52.

119 Elspeth Guild and Sergio Carrera, *Rethinking asylum distribution in the EU Shall we start with the facts?* (2016) Centre for European Policy Studies 9.

120 European Council on Refugees and Exiles, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008, <https://www.refworld.org/docid/47f1edc92.html>, accessed 30 June 2022, pp. 29–30.

121 Elspeth Guild and others, *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection* (European Parliament 2014) 84.



of ‘free choice of member state’.<sup>122</sup> *Maiani* has proposed free choice as an asylum management model, supplemented by scaled-up solidarity instruments to offset the implications of such a model for preferred states, rather than a centrally managed asylum regime.<sup>123</sup> *Mitsilegas* has called for the mutual recognition of positive asylum decisions, which will enhance the free movement of refugees and ultimately lead to a central system of asylum.<sup>124</sup> *Bast* has suggested that refugees and other persons with international protection status are granted free movement rights within the EU under the same conditions as Union citizens.<sup>125</sup> As these proposals demonstrate, a free choice of protection state model can be designed, optimised, and supported in diverse ways.

Free choice of asylum has been considered by the Commission on several occasions, but not given adequate attention. In 2000, the Commission questioned the suitability of free choice because of the far-reaching implications it may have for the balance of responsibility sharing.<sup>126</sup> The idea of allowing asylum seekers to choose their country of protection was picked up by the Commission again in 2016 during debates about the reform of the Dublin regime. Once again, it was not supported because of the concern that it would be in conflict with solidarity and a fair sharing of responsibility.<sup>127</sup> The new Pact on Migration and Asylum retains the backbone of the current responsibility system based on holding the country of first entry responsible for protection.<sup>128</sup> A uniform asylum status is not endorsed, which means that a

122 German Bar Association and others, ‘Allocation of Refugees in the European Union: For an Equitable, Solidarity Based System of Sharing Responsibility’, 2013, <https://www.proasyl.de/en/material/memorandum-allocation-of-refugees-in-the-european-union-for-an-equitable-solidaritybased-system-of-sharing-responsibility/>, accessed 28 July 2022.

123 Francesco Maiani, ‘The Reform of the Dublin 111 Regulation’ (European Parliament 2016) 48–52.

124 Valsamis Mitsilegas, ‘Humanizing solidarity in European refugee law: The promise of mutual recognition’ (2017) 24 *Maastricht Journal of European and Comparative Law* 721, 732.

125 Jürgen Bast, ‘Deepening supranational integration: interstate solidarity in EU migration law’ in Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar 2018), 114, 128.

126 Commission Staff Working Paper, Revisiting the Dublin Convention, SEC(2000)522, 21 March 2000, Conclusion No. 55, para. 56.

127 Commission, Communication to the Parliament and the Council towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final, p. 7.

128 Commission, Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) xxx/xxx [Asylum and Migration Fund], COM/2020/610 final, Article 21.

transfer of refugee status is not possible. Similarly, the Proposal does not allow asylum seekers to choose the Member State where they wish to lodge an application, but time limitations on returns may allow some room for choice in some cases.<sup>129</sup>

The current experience with Ukrainian protection seekers suggests that the free choice of protection state offers an effective and flexible framework for managing emergencies through which both asylum solidarity towards refugees and between Member States can be realised and balanced. Monthly data on temporary protection granted by each Member State indicates that protection seekers move across the EU to all Member states, including those that have not traditionally been asylum states, such as the Czech Republic, Latvia, and Portugal.<sup>130</sup> Although Poland is still shouldering most protection responsibilities and arguably will remain one of the main host states, as most neighbouring states do, predicted numbers signal that the free choice of protection state will ameliorate the situation significantly. By the end of 2022, the projected refugee population having entered Poland is expected to be 4.3 million, while the number of refugees expected to stay is 2.6 million.<sup>131</sup> Free choice can thus alleviate pressures that build up in neighbouring states, which may have limited capacity to host large numbers of asylum seekers and process applications. It does so without the logistics of a large relocation scheme that would require substantial financing. Further practical reasons militate against limitations on secondary movements. Prior episodes of mass movements demonstrate that it is unrealistic to expect that secondary movements can be prevented.<sup>132</sup> All these factors support the development of a framework that respects the choices of protection seekers as regards their protection location in emergencies and integrates a model of free choice into immediate protection.

129 See on that point, Daniel Thym, 'Secondary Movements: Improving Compliance and Building Trust among the Member States?' in Daniel Thym (ed.) *Reforming the Common European Asylum System* (Nomos 2022) 146.

130 Eurostat, Decisions granting temporary protection by citizenship, age and sex – monthly data, [https://ec.europa.eu/eurostat/databrowser/view/MIGR\\_ASYTPFM/default/table?lang=en&category=migr.migr\\_asy.migr\\_asytp](https://ec.europa.eu/eurostat/databrowser/view/MIGR_ASYTPFM/default/table?lang=en&category=migr.migr_asy.migr_asytp), accessed 20 Nov 2022.

131 UNHCR, Regional Refugee Response Plan for the Ukraine Situation: Poland 2022, <https://data.unhcr.org/en/dataviz/225?sv=54&geo=10781#>, p. 1, accessed 17 November 2022.

132 In 2016, out of 1,018,074 asylum seekers, about 30% (307,421) had previously applied for international protection in another Member State, 2016 Eurodoc Statistics, April 2017, p. 6, <https://www.eulisa.europa.eu/Publications/Reports/2016%20Eurodac%20annual%20statistics.pdf>, accessed 28 July 2022. It is safe to argue that the actual percentage of secondary movements is higher, as not all protection seekers register with national authorities in the country of first entry.

The distributive effect of a free choice model can be enhanced by allowing the beneficiaries of immediate protection to move and request protection in another Member State as long as the absorptive capacity of a Member State permits this. Granting Member States full control over whether to allow secondary movements leaves a free choice system and, accordingly, the solidarity that comes with it, exposed to sudden changes in political preferences. On the other hand, allowing unlimited secondary moves may put the asylum systems of the more desirable asylum states under particular strain. A balance can be achieved by conditioning the refusal of transfer requests on the asylum capacities of Member States, which could be calculated according to objective criteria. Such flexible design of secondary movements would respond to the interests of all stakeholders, without requiring a return mechanism and the administrative and humanitarian complexities that come with it.<sup>133</sup> It is true that free choice is not a panacea and, like any model, requires adjustments and calibration. A free choice model, like other solidarity schemes, may also require supporting instruments of an administrative and a financial kind.<sup>134</sup>

Beyond what the visa waiver has incidentally facilitated, can we speak of a conscious shift towards free choice? In parallel to the Dublin Regime,<sup>135</sup> the default approach under Article 8(1) of the Temporary Protection Directive is that beneficiaries of protection can exercise their rights only in the Member State that has issued a residence permit. In line with this principle, the Directive is designed to prevent secondary movements.<sup>136</sup> Accordingly, Article 11 of the

133 The humanitarian complexities surrounding the Dublin return procedure are well documented. Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* ECLI:EU:C:2011:865; C-578/16 *PPU – C. K. and Others* ECLI:EU:C:2017:127; Case C-163/17 *Jawo* ECLI:EU:C:2019:218. For the rulings of the European Court of Human Rights on the Dublin returns, see *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011); *Tarakhel v Switzerland*, App no 29217/12 (ECtHR, 4 November 2014).

134 To support the EU Member States in managing the current refugee emergency, the EU recently adopted two regulations to release additional funds in total amounting to €20 billion. See Regulation (EU) 2022/562 of 6 April 2022 amending Regulations (EU) No 1303/2013 and (EU) No 223/2014 as regards Cohesion's Action for Refugees in Europe [2022] OJ L 109/1; Regulation (EU) 2022/585 of 6 April 2022 amending Regulations (EU) No 514/2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management, (EU) No 516/2014 establishing the Asylum, Migration and Integration Fund and (EU) 2021/1147 establishing the Asylum, Migration and Integration Fund, [2022] OJ L 112/1. Additionally, upon the request of the European Council, the Commission set up a Solidarity Platform with a view to coordinating the efforts of Member States in managing the current refugee incidence.

135 See above text to fn. 117.

136 Temporary Protection Directive, Preamble 9.

Directive requires Member States to take back a person enjoying temporary protection in their territory in the case of a secondary movement. Article 11 also allows Member States to decide on the basis of a bilateral agreement not to make use of take-back requests. The Member States have decided to make use of this option and disapply the return mechanism in the case of Ukrainian protection seekers.<sup>137</sup>

However, the abolishment of returns does not mean that beneficiaries of temporary protection are now *entitled* to relocate. Once a Member State issues a residence permit, it is within the discretion of the Member States to accept a transfer request in the case of a secondary move.<sup>138</sup> In addition, the decision of Member States not to apply Article 11 is a 'gentlemen's agreement' that lacks a legally binding nature.<sup>139</sup> There is thus, in principle, nothing to prevent Member States from reactivating the return mechanism. Arguably, the Member States' approach is, at least partially, driven by practical reasons. It would be extremely difficult, if not impossible, to implement a return mechanism, given that Ukrainian nationals exercise visa free travel rights. Therefore, the decision not to apply Article 11 of the Directive can be read, to some extent, as an acknowledgement of the complexities of a return procedure.<sup>140</sup>

Unquestionably, the merging of a system of free choice of asylum state as a consequence of the Ukrainian visa waiver and temporary protection has created complexities, not only because it happened spontaneously, but also because Schengen visa waivers and temporary protection are built on different principles and have different rationales. On the positive side, this episode provides valuable insights into a novel way of managing asylum and shows that limiting secondary movements is not the only feasible way of addressing mass arrivals. When free choice became a reality with the activation of the Temporary Protection Directive, the Council presented a free choice system in a more positive light, describing it as a way of facilitating a balance of efforts

137 Statement of the Member States, <https://data.consilium.europa.eu/doc/document/ST-6826-2022-ADD-1/en/pdf>, accessed 19 July 2022.

138 Preamble 16 of the Declaration attached to the final text of the Implementing Decision.

139 On this point, see Steve Peers, Temporary Protection for Ukrainians in the EU? Q and A, EU law Analysis, 27 February 2022, <http://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html>, accessed 19 July 2022.

140 The abolishment of take-back requests under Article 11 only applies to those who are under temporary protection and not to Ukrainian nationals who are in the regular asylum system. The country responsible for processing asylum claims and the permissibility of returns will be subject to the Dublin Regulation. In most cases, the country of first entry rule will determine the responsible state, and other Member States can request the return of protection seekers. The basis for this is arguably Article 17 Dublin Regulation, rather than the decision not to apply Article 11 of the Directive.

between the Member States.<sup>141</sup> The EU could cultivate this newfound momentum and draw on the experience and knowledge that has been acquired to give new impetus to a reform of the asylum regime. It is hoped that the current practice can serve as a blueprint for what future crisis management in the EU will look like.

## 6 Conclusion

It is tempting to describe the activation of the Temporary Protection Directive as a bold step forward in protecting refugees and advancing inter-state solidarity. While solidarity towards refugees is the foremost goal of refugee protection, inter-state solidarity is indispensable for providing high standards of protection. The EU is to be commended for seeking to improve asylum management in emergencies. Undoubtedly, granting basic rights on a temporary basis demonstrates that the Member States recognise the powerful humanitarian needs of displaced Ukrainians.

However, the Directive provides for a precarious protection framework without guaranteeing a swift access to the asylum procedure. It sets out a legal framework that allows the Member States to replace international protection obligations as prescribed under EU law (and serves as a justification for replacing these obligations) by establishing loosely defined rights and leaving ample room for flexibility on the part of host states. It thereby facilitates an erosion of protection standards in the EU and adds yet another layer to the already fragmented and complex landscape of the EU protection framework.

As far as inter-state solidarity is concerned, the Directive offers an inadequate scheme that is not fit to address emergencies. Thus, one needs to be careful not to make sweeping claims about increased solidarity between the Member States based on the activation of the Temporary Protection Directive alone. The uncomfortable truth is that the Implementing Decision presents itself as an act of political expediency. The pressures created by the current refugee incidence are primarily dealt with by a system of *de facto* free choice of asylum state rather than the mechanisms enshrined in the Directive.

Looking ahead, this article has explored whether and how some of the deficiencies of the Temporary Protection Directive can be mitigated in the short and the long term. The Directive leaves room for the Member States to decide how to manage the current refugee incidence, which ultimately renders the protection landscape in the EU exposed to the political dynamics of the day.

---

<sup>141</sup> Preamble 16 of the Declaration attached to the final text of the Implementing Decision.

The article has argued that the Member States can alleviate some of the limitations of the Directive by ensuring that beneficiaries of temporary protection can transition to a more durable status without delays. Finally, the article has advocated a free choice model for emergency asylum management. While the EU has struggled to reform the current flawed asylum regime, it has found itself testing new frontiers of solidarity through the free choice of asylum state in the context of temporary protection. The current situation presents a unique opportunity to radically rethink asylum management from a more inclusive and rights-based perspective of asylum solidarity. The EU can learn from its experience dealing with Ukraine refugee situation and develop its future policies with a view to operationalising and widening free choice. Or it can focus its efforts on reviving the old system based on limiting secondary movements, while seeking to remedy imbalances through financial assistance and relocation, which has failed time and again. The question is which path the EU will choose at this important juncture.

### Acknowledgements

An earlier draft of this article was presented at a workshop organised by Essex Law School and the University of Lund in May 2022. I would like to thank the workshop participants for discussions and useful comments. I am also grateful to Steve Peers, Geoff Gilbert, Nikos Vogiatzis, and the anonymous reviewers for helpful suggestions and support. All errors are mine alone.