

Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?

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1. Introduction

The European Commission concluded in 2020 that “The EU is still lacking a toolbox to address situations of crisis, which could result from a mass influx of third-country nationals arriving irregularly capable of rendering a Member State’s asylum or reception system non-functional, and have serious consequences on the functioning of the overall CEAS.”¹ and concluded that Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection (hereinafter *Temporary Protection Directive 2001/55/EC*)² no longer responds to the current reality of Member States and needs to be repealed. By referencing the conclusions of the Study on Temporary Protection Directive 2001/55/EC³ published in 2016 the Commission offered the following reasons for this conclusion: a) the absence of definitions of different types of mass influx set out in the Temporary Protection Directive 2001/55/EC and indicators on how

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- 1 European Commission, Commission Staff Working Document Accompanying the Document 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, SWD(2020) 207 final of 23 September 2020, 63.
- 2 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, OJ L 212/12 of 7 August 2001 (Temporary Protection Directive).
- 3 Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden, ‘Study on the temporary protection directive: Final report’ European Commission (2016) <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-europe-an-asylum-system/temporary-protection_en> accessed 19 October 2021.

to measure these; b) impossibility to attain Member State agreement on the possible activation of the Directive and c) procedural weaknesses to activate and implement the temporary protection mechanism namely, cumbersome activation mechanism foreseen in the Directive.⁴ To remedy the outlined shortcomings, the Commission presented the 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 asylum⁵ (hereinafter *Proposal for a Migration and Asylum Crisis Regulation*) as part of the new European Pact on Asylum and Migration⁶ on 23 September 2020 which sought to repeal the Temporary Protection Directive 2001/55/EC and aims at introducing immediate protection instead.⁷

A closer look at the new immediate protection status reveals that immediate protection resembles a lot to temporary protection in some respects though there are a number of differences.⁸ Motivation behind the introduction of the immediate protection status can be identified as to establish a group protection status that would be applied in situations of crisis as opposed to the Temporary Protection Directive 2001/55/EC which remains, to this date, unimplemented.⁹ To increase the protection framework's chances of implementation, the Commission has changed the name of the protection status from temporary to immediate protection, simplified its activation/triggering mechanism, narrowed down its scope and limited its duration. This chapter examines whether these changes will

4 European Commission Staff Working Document (n 1).

5 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum COM (2020) 613 final, 2020/0277(COD) of 23 September 2020.

6 European Commission, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity' (Press Release, IP/20/1706 of 23 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706> accessed 19 October 2021.

7 Galina Cornelisse and Giuseppe Campesi, 'The European Commission's New Pact on Migration and Asylum Horizontal Substitute Impact Assessment' (European Parliamentary Research Service 2021), 79 and 80.

8 This chapter builds on Meltem Ineli-Ciger, 'What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration' (*EU Immigration and Asylum Law and Policy*, 11 November 2020) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>> accessed 19 October 2021.

9 Meltem Ineli-Ciger, 'Time to activate the Temporary Protection Directive: Why the Directive can play a key role in solving the migration crisis in Europe' (2016) 18(1) EJML 1.

increase the likelihood of implementation of the immediate protection status and make a difference in practice by reviewing the newly proposed immediate protection framework and comparing it with the temporary protection status.

2. *Activation Mechanism*

The Temporary Protection Directive 2001/55/EC was adopted and entered into force in 2001 following the refugee crisis in Kosovo.¹⁰ The Directive established an emergency mechanism to provide immediate and temporary protection to displaced persons from third countries who are unable to return to their country of origin in mass influx situations.¹¹ The Directive refers to temporary protection as a measure that can be introduced in the event of a mass influx or imminent mass influx. Mass influx is defined as: “arrival in the community of a large number of displaced persons, who came from a specific country or geographical area, whether the arrival in the Community was spontaneous or aided, for example through an evacuation programme”.¹² For the Directive to be implemented, the Council, upon the proposal of the Commission, should adopt a decision by a qualified majority.¹³

In its new Proposal for a Migration and Asylum Crisis Regulation, the Commission maintains the need for a trigger mechanism, which the Commission proposes to entrust on the Commission itself.¹⁴ The Commission should adopt an implementing act triggering the granting of immediate protection status with the assistance of the committees of representatives from EU countries.¹⁵ However, if there are duly justified imperative

10 Cf Nuria Arenas, ‘The Concept of Mass Influx of Displaced Persons in the European Directive Establishing the Temporary’ (2005) 7 EJML 435, 435.

11 Cf Achilles Skordas, ‘Temporary Protection Directive 2001/55/EC’ in Kai Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law* (Nomos 2016) 1055; Karoline Kerber, ‘The Temporary Protection Directive’ (2002) 4(2) EJML 193.

12 Art. 2(d) of the Temporary Protection Directive 2001/55/EC.

13 Art. 5 of the Temporary Protection Directive 2001/55/EC.

14 Art. 10(3) of the Proposal for a Migration and Asylum Crisis Regulation.

15 Art. 11(2) of the Proposal for a Migration and Asylum Crisis Regulation; Art. 8 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers OJ L 55 of 28 February 2011.

grounds of urgency the Commission can adopt an implementing act without submitting it to the committee first.¹⁶ This means, if the situation of crisis is so dire that it makes the granting of immediate protection status absolutely urgent and necessary, then the Commission does not have to follow the examination procedure¹⁷ and can adopt a decision which will be in force immediately.

While these institutional rules might appear quite complex, the experience of the Temporary Protection Directive 2001/55/EC shows how relevant they are in practice. Under which circumstances can the Commission trigger these mechanisms? Article 1(2)(a) and (b) of the Proposal for a Migration and Asylum Crisis Regulation defines ‘a situation of crisis’ as:

*“(a) an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State’s asylum, reception or return system non-functional and can have serious consequences for the functioning the Common European Asylum System or the Common Framework as set out in Regulation (EU) XXX/XXX [Asylum and Migration Management], or
(b) an imminent risk of such a situation.”*

As I interpret this definition four conditions need to be fulfilled for a situation of crisis to exist: to begin with, an imminent or actual mass influx situation should exist. It should be noted that unlike the Temporary Protection Directive 2001/55/EC, the Proposed Regulation does not define the term ‘mass influx’. Secondly, the mass influx should consist of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations. Thirdly, the number of persons arriving irregularly to a member state or disembarked after a search and rescue operation should be disproportionate to the population and GDP of the Member State concerned. Finally, the nature and scale of the arrivals should make the Member State’s asylum, reception or return system non-functional. Mass influx may also adversely affect the Common European Asylum System or the Common Framework as set out in the Asylum and Migration Management Regulation Propos-

16 Art. 11(2) of the Proposal for a Migration and Asylum Crisis Regulation.

17 European Commission, Comitology (2021) <https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts/comitology_en> accessed 19 October 2021.

al¹⁸ though this is not cited as a condition but rather a likely result of a situation of crisis.

The novelty in immediate protection is the fact that the Commission, instead of the Council, has the authority to decide when immediate protection would be granted, who will receive the status and for how long. The proposal leaves this wide discretion, which was left to the Council in the Temporary Protection Directive 2001/55/EC mostly to the Commission.

Another difference between immediate and temporary protection lies within the indicators of a mass influx/crisis situation. While implementation of temporary protection is tied to the existence of a mass influx situation and inability of the asylum system to process this influx without adverse effects for its efficient operation, implementation of immediate protection is linked to the existence of a crisis situation and the Member State's asylum, reception or return system becoming non-functional. A situation of crisis which is key to triggering the granting of immediate protection status includes clearer and more precise indicators compared to the vague definition of 'mass influx' in the Temporary Protection Directive 2001/55/EC. For instance, the inclusion of the number of arrivals being disproportionate to the population and GDP of the Member State can, to a certain extent, make it easier to determine the existence of a crisis. Yet, it is not clear, when exactly a Member State's asylum, reception or return system becomes non-functional; what does this return system include and why a dysfunction in the return system must be accepted as a relevant factor for granting persons in need of protection a group protection status.

A stark difference between two frameworks relates to whether protection status can be given to those persons evacuated directly from their country of origin or neighbouring countries to the country of origin hosting large number of displaced persons. Whilst Article 2 (d) of the Temporary Protection Directive 2001/55/EC makes clear that temporary protection can be granted to "third-country nationals or stateless persons who have been evacuated from their country or region of origin 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", the Proposal mentions that immediate protection is to be

18 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, 2020/0279(COD) of 23 September 2020.

implemented for only “exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State”. Since coming to the Union territories through evacuation programmes cannot be categorised as ‘irregular arrivals’, the immediate protection status is not to be granted to those evacuated from the country of origin or neighbouring states to the country of origin.

The Proposal for a Migration and Asylum Crisis Regulation while defining the term ‘situation of crisis’ makes a reference to irregular arrivals and the number of persons disembarked to Member States following search and rescue operations though no such reference exists in the Temporary Protection Directive 2001/55/EC. This change reflects today’s reality that arrival of mixed flows by sea is a common concern for the EU. In view of the outlined differences, whilst the activation mechanism of the Temporary Protection Directive 2001/55/EC is complex and requires lengthy procedures. Compared to this, immediate protection can be activated arguably through a simpler process without a decision by the Council.

I previously argued¹⁹ that the absence of clear objective indicators of a mass influx, complex and lengthy activation mechanism of the Temporary Protection Directive 2001/55/EC and difficulty in securing a qualified majority vote in the Council in the face of an influx situation that only seriously affects a limited number of Member States can be accounted for the non-implementation of the Directive to this date.²⁰ Similar reasons are cited in the Study on the Temporary Protection Directive by Beirens et al.²¹ which concluded that it seems impossible to achieve Member State agreement on the possible activation of the Directive. This is cited as one of the reasons why the Temporary Protection Directive 2001/55/EC no longer responds to Member States’ current reality and needs to be repealed in the Explanatory Memorandum of the Proposal for a Migra-

19 Meltem Ineli-Ciger, ‘Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and its Lack of Implementation in view of the Recent Asylum Crisis in the Mediterranean’ in Céline Bauhoz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common Asylum System* (Brill 2015) 225, 232-236; Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill 2018), 157-162.

20 See for a 2019 MA thesis confirming some of these arguments Pia Micallef, *Six Reasons Why: Europe’s Temporary Protection Mechanism – Case studies from Malta and Italy during the 2010 Arab Spring and motivations behind an unused solution to Europe’s 2015 Migration Crisis* (MA Refugee Protection and Forced Migration Management Thesis, University of London, 2019).

21 Study on the Temporary Protection Directive Final Report (n 3).

tion and Asylum Crisis Regulation. Although it is true that the Proposal for a Migration and Asylum Crisis Regulation increased the number of indicators for determining ‘a mass influx’ or a ‘crisis situation’, some of the proposed indicators such as a large scale irregular arrival of third country nationals and stateless persons rendering Member State’s asylum, reception or return system becomes non-functional, is still vague and open to interpretation.²² Carrera and Cortinovis agree with this view and add that “the absence of precise and objective qualitative criteria and data to differentiate between situations of ‘migratory pressure’ and ‘crisis’ creates uncertainty as to which circumstances would fall under the scope of each of these two situations.”²³

The Proposal for a Migration and Asylum Crisis Regulation by adding additional indicators for activation of/triggering the protection scheme, by simplifying the activation/trigger mechanism and by leaving the decision to initiate the protection mechanism not to the Council but to the Commission seeks to overcome the reasons for the non-implementation of the Temporary Protection Directive. However, considering the Commission has not proposed activating the Temporary Protection Directive in the past two decades it is doubtful whether it will adopt a decision to implement the immediate protection status in the near future.

3. Eligibility Criteria for Receiving Protection

Who can be granted immediate protection? Article 10 of the Proposal for a Migration and Asylum Crisis Regulation provides for the granting of immediate protection status to displaced persons who, in their country of origin, are facing an exceptionally high risk of being subject to indiscriminate violence in a situation of armed conflict and who are unable to return to that third country. Indiscriminate violence means violence in situations of international or internal armed conflict which presents a serious and individual threat to a civilian’s life. Simply put, persons who face a high risk

22 See also EPRS Study on the Temporary Protection Directive Final Report (n 7) 137.

23 Sergio Carrera and Roberto Cortinovis, ‘Proposal for A Crisis And Force Majeure Regulation’ in *The European Commission’s legislative proposals in the New Pact on Migration and Asylum* (Study of the European Parliament, July 2021) <www.asilep.roject.eu/wp-content/uploads/2021/09/IPOL_STU2021697130_EN-1.pdf> accessed 19 October 2021, 137.

of being subject to bombings, attacks and armed confrontations in areas that are inhabited or frequented by civilians could be granted immediate protection. The Commission has the authority to designate a specific country of origin, or a part of a specific country of origin for persons who have fled or fleeing there to receive immediate protection. Persons representing a danger to the national security or public order of the Member State are excluded from the scope of immediate protection. The Proposal does not provide any guidance on how this exclusion determination will be made and whether an appeal against the decision to exclude a person will be possible. This is unlike the Temporary Protection Directive 2001/55/EC which clearly notes an exclusion decision should follow an individual assessment in line with the principle of proportionality.²⁴

The Commission has the authority to designate groups who are to be given the immediate protection status whereas the Council has the power to decide on persons who are to be granted temporary protection. A broad category of persons i.e. refugees, persons fleeing non-international and international armed conflict and endemic violence as well as victims of systematic or generalised human rights violations can be protected within the Temporary Protection Directive's scope.²⁵ Compared to temporary protection, groups that can be granted the immediate protection status have been defined quite narrowly.

From the outset, the term 'displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict' reminds one immediately of article 15(c) of the Qualification Directive 2011/95/EU²⁶ and CJEU's *El-gafaji* judgment.²⁷ So, it seems, immediate protection is to be granted to a group of persons who, if the international protection procedures had not been suspended, would be eligible for subsidiary protection on the basis of Article 15(c) of the Qualification Directive 2011/95/EU. This limits the potential use of immediate protection since the status can only be granted to those fleeing indiscriminate effects of an armed conflict but not

24 Art. 28 of the Temporary Protection Directive 2001/55/EC.

25 See Art. 2(c) of the Temporary Protection Directive 2001/55/EC; Skordas, 'Temporary Protection Directive 2001/55/EC' (n 11), 1066.

26 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 (recast), OJ L 337 of 20 December 2011.

27 CJEU, C-465/07 *ECLI:EU:C:2009:94*.

persons fleeing political persecution, systematic violations of their human rights, oppressive regimes etc. For example, in theory while persons fleeing Aleppo and Idlib where the degree of indiscriminate violence reaches such a high level would satisfy the eligibility criteria, a person fleeing Homs or Damascus would not qualify for the immediate protection status despite his/her genuine need for international protection.²⁸ In line with this, it is advocated by a number of authors that personal scope of immediate protection should be enlarged as to include refugees and other displaced persons such as persons fleeing violence and systematic human rights violations.²⁹

4. Rights of the Protected Persons

Persons holding immediate protection status would be eligible for the rights of subsidiary protection beneficiaries as laid down in the Qualification Regulation Proposal.³⁰ The Commission envisages the persons with immediate protection status to receive protection from *refoulement*, information on the rights and obligations relating to their status, maintaining family unity, the right to be issued a residence permit, freedom of movement within the Member State, access to employment, access to education, access to procedures for recognition of qualifications and validation of skills, social security and social assistance, healthcare, rights related to unaccompanied minors, access to accommodation, access to integration measures and repatriation assistance. On the other hand, since the right

28 Cf EASO, Country Guidance Syria (September 2020), <<https://easo.europa.eu/country-guidance-syria/3342-overview>> accessed 19 October 2021.

29 See Carrera and Cortinovis, 'Proposal For A Crisis And Force Majeure Regulation' (n 23) 178; ECRE, 'Comments on the Commission Proposal For a Regulation Addressing Situations of Crisis and force Majeure in the Field of Migration and Asylum COM (2020) 613' (March 2021) <<https://ecre.org/ecre-comments-on-the-commission-proposal-for-a-regulation-addressing-situations-of-crisis-and-force-majeure-in-the-field-of-migration-and-asylum-com-2020-613/>> accessed 19 October 2021, 23.

30 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) of 13 July 2016.

to family unification is secured under the Family Unification Directive 2003/86/EC not under the Qualification Regulation Proposal or the Qualification Directive, immediate protection status holders do not have a right to family unification.

Rights of immediate protection status holders are drafted differently compared to those of temporary protection beneficiaries. The Temporary Protection Directive obliges Member States to protect temporary protection beneficiaries from *refoulement* and provide them with residence permits. The Directive also allows such persons to engage in employed or self-employed activities though states can invoke labour market policies to give priority to EU citizens, citizens of the European Economic Area, and documented migrants from third countries. Member States are further required to provide temporary protection beneficiaries with access to suitable accommodation, necessary assistance in terms of social welfare and means of subsistence and access to medical care, if they do not have sufficient resources. Those under 18 years of age can also enjoy education under the same conditions as nationals.

Unlike immediate protection, temporary protection beneficiaries do not have a right to enjoy equal treatment with nationals of the Member State granting protection with regard to social security, working conditions, freedom of association and affiliation, education, social assistance and healthcare. Moreover, while the Temporary Protection Directive neither provides the status holders with an absolute right to family reunification nor with a right to free movement within the host Member State, immediate protection status holders are to enjoy the mentioned rights. If the Proposed Regulation is adopted, compared to temporary protection immediate protection would offer more rights and entitlements to the status holders in terms of both quality and quantity.

5. Access to International Protection Procedures and Time Limits

Both immediate and temporary protection do not prejudice the right of its beneficiaries to apply for international protection although these statuses give Member States an opportunity to postpone processing of international protection applications for a certain period of time. The duration of temporary protection is one year and can be further extended by the Council for a maximum of three years.³¹ Whereas, immediate protection

31 Art. 4 of the Temporary Protection Directive 2001/55/EC.

can be granted for a maximum of one year although the Commission has the authority to decide how long immediate protection will continue.³² This means the Commission can designate a certain period of less than a year during which processing of international protection applications can be suspended and immediate protection will be granted to persons instead.

6. Conclusion

Implementation of immediate protection introduced by the Proposal for a Migration and Asylum Crisis Regulation and temporary protection are tied to an activation or a trigger mechanism yet, the trigger mechanism in the Proposed Regulation is much simpler and mainly involves the Commission instead of the Council. Arguably, indicators for triggering immediate protection are clearer and more precise compared to those which apply to temporary protection. Simplifying the activation/trigger mechanism, introducing clearer indicators for identifying a crisis situation and making the Commission the main decision-maker, aim at ensuring that immediate protection is implemented in practice when the need arises – unlike in the case of the Temporary Protection Directive 2001/55/EC, which to date, remains obsolete.

Persons who can be granted immediate protection are defined narrower compared to persons who can be granted temporary protection. This limits the potential use of immediate protection. In a situation where persons who have arrived to a Member State irregularly or those rescued from sea do not flee from an armed conflict but systematic human rights violations, political persecution or oppressive regimes, immediate protection becomes obsolete. This is one of the shortcomings of the newly proposed protection framework. Broadening the personal scope of immediate protection can enable the proposed framework to deal more effectively with mass influx or crisis situations. The rights of immediate protection status holders are more generous compared to the rights of temporary protection beneficiaries and this is certainly a positive aspect of the proposal. Nevertheless, immediate protection can only continue for a year and there is no procedure foreseen to prolong this duration.

In sum, immediate protection with its narrow scope shifts the focus from providing effective protection to a large number of displaced persons

32 Art. 10 of the Proposal for a Migration and Asylum Crisis Regulation.

in mass influx situations to offer breathing space to Member States until their asylum, reception or return system becomes functional again. One crucial question remains: if the Proposal for a Migration and Asylum Crisis Regulation is adopted, will immediate protection be used in practice? One of the reasons for the non-implementation of the Temporary Protection Directive 2001/55/EC to date was the belief shared by many Member States that an activation of the Directive may create a pull factor for migrants seeking entry to the EU.³³ Thus, it is to be seen whether the outlined shift from temporary to immediate protection in the EU asylum *acquis* and the changes proposed in 2020 will be enough to render immediate protection a more applicable framework. Granting group protection to certain groups fleeing indiscriminate violence in an armed conflict may still create a pull factor for those who wish to flee to Europe and this is certainly not something that the EU or the Member States want. Hence, only time will tell whether the reduced scope of immediate protection would be enough to address this particular concern. In light of the fact that the Commission has not proposed activating the Temporary Protection Directive 2001/55/EC in the past two decades, similar to temporary protection, immediate protection is likely to remain as a measure of last resort to respond to future mass influx situations.

33 Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete?' (n 19) 233.