TEMPORARY PROTECTION DIRECTIVE, DEAD LETTER OR STILL OPTION FOR THE FUTURE? AN OVERVIEW ON THE REASONS BEHIND ITS LACK OF IMPLEMENTATION

1. Introduction

In the remarks following the Social Summit on 15 October 2015, the President of the Council Mr. Tusk observed: «Libya is still volatile. And the situation in Syria is deteriorating. All this may lead to a new massive exodus of refugees. […] We must ask ourselves if the decisions we are going to take are sufficient to contain a new migratory wave». In the current context of unprecedented pressure on the European borders by an influx of migrants mostly in need of international protection, it appears vital to rationalise as much as possible the legislative tools at disposal, thus granting the effective implementation of the ones that better suit nowadays' need for a coordinated response.

In the light of this preamble, it seems appropriate an attempt to identify the legal and political reasons behind the complete lack of implementation of the Temporary Protection Directive (hereinafter TPD), first – although never applied – of the five Directives composing the Common European Asylum System (CEAS). This will be achieved through a concise yet comprehensive analysis of the features, ratio and functioning of the mechanism.

Established on 21 July 2001 with Council Directive 2001/55/EC, the TPD was negotiated at the juncture of the 20th and 21st centuries in order to institutionalize in a legal framework the humanitarian assistance provided as response to the Bosnians and Kosovars displacements due to the Yugoslav wars. In those two occasions, EU Member States (MS) were able to find a political compromise, developing a policy of “temporary protection” (henceforth TP) that suspended the normal asylum procedures.

In accordance with then Article 63(2) EC Treaty as amended by 1999 Treaty of Amsterdam, the Council “shall […] adopt […] minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection, promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons”. This commitment, now transposed in Art. 78(2)(c) TFUE, had as direct outcome the adoption of Directive 2001/55/EC.

2. Overview of the characteristics and activation mechanism of the TDP through a comparison with the prima facie system
The main purpose of Directive 2001/55 is to provide an exceptional legal instrument to face mass influxes, a phenomenon that has had no legislative consideration before. In fact, the Geneva Convention on the Status of Refugees (henceforth “the 1951 Convention”) neither excludes nor specifically regulates the possibility of granting protection to entire groups of people. Nonetheless, according to UNHCR, worldwide the majority of the refugee status determinations (RSD) have in practice been conducted on a prima facie collective basis. This approach, widely used when the recipient State lacks the logistic and financial capacity of conducting individual assessment, shares with TP a fundamental element: they both offer protection without an individual RSD in case of mass influx. However, the two systems have major differences. Firstly, while the prima facie mechanism eventually confers to the asylum seeker a full refugee status, TP on the contrary recognizes just a provisional and more limited set of conditions. According to Art. 4(1)(2), its standard duration amounts to one year, extendable for other two years. Also the obligations of the hosting State towards the beneficiaries of the TPD differ from the ones granted to prima facie refugees. Pursuant to Articles 8 – 16, Directive 2001/55 confers temporary residence permits (Art. 8), documentation (Art. 9), access to the labour market (Art. 12), accommodation, social benefits and emergency health care (Art. 13), education for minors (Art. 14) and right to family reunification (Art. 15). Nevertheless, several limitations apply to these rights: no freedom of movement is granted to the beneficiaries, and their right to family reunification and access to the labour market are explicitly limited. These restrictions suggest that the ratio of this instrument is to grant a prompt and basic protection to the displaced persons in case of exceptional circumstances and, at the same time, to give MS some time in order to organize the reception resources to assess any possible asylum claim. It is clear, therefore, that the TP system is not meant as an alternative to the refugee protection regime, but rather as a “prelude to [its] normal operation” (J. Durieux, Temporary Protection: Hovering at the Edges of Refugee Law, in Netherlands Yearbook of International Law, 2014, p. 221).

A second main difference between the two mechanisms concerns their triggering: while applying the prima facie refugee determination is a discretional choice of the State responsible, the activation procedure of the TPD is on the contrary precisely articulated in the Directive itself. According to Art. 5, its implementation requires the Commission to put forward a proposal to the Council, either on its own initiative or at the motion of a Member State. The Council, after thorough evaluations and consultation with Member States, UNHCR and other relevant international organizations as required by Art. 5(2) and (4), shall adopt a Council Decision with a qualified majority voting of two-thirds, later informing the European Parliament. Pursuant to Art. 5(3)(a), rests in the Council the exclusive authority to determine in its Decision which group will be entitled to the TP, without prejudice to the fact that, according to Art. 7(1), MS are free to extend the protection also to additional groups, given that the reason for the displaced is the same.

3. The nebulous subjective element: notions of “displaced persons” and “mass influx”

As mentioned, the power to activate the mechanism lays fundamentally in the collaboration between Commission and Council. Its main aim is the identification of the fundamental requirement for the implementation, i.e. the presence of a “mass influx” of “displaced persons”.
Both these notions need some clarification. Firstly, it should be explored the scope of the category of individuals eligible for TP, which the Directive refers to as displaced persons. According to Art. 2(c), this group includes refugees as well as persons fleeing armed conflict or endemic violence and victims of systematic human rights violations. The coverage of the Directive is therefore significantly broader than the one of the 1951 Convention, which is primarily individualistic and focused on discriminatory acts of persecution based on specific grounds.

However, what really differentiates the temporary protection mechanism from the other Directives is the concept of mass influx. According to Art. 2(d), a mass influx for the purposes of the TPD is the “arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area”, irrespective of the spontaneous or aided nature of the arrivals. This last provision should be underlined, since it explicitly opens to the possibility of connecting the TP to an evacuation programme: a generic yet important reference.

Art. 5(4)(a) adds that the Council Decision on the activation of the mechanism should be founded on “an examination of the situation and of the scale of the movements of the displaced persons”, though not clarifying much.

The identification of an objective criterion (e.g. a precise minimum number of arrivals) to delineate this definition was considered both technically and politically too complicated. Nonetheless, it is possible to identify some elements that slightly circumscribe this rather vague definition. Combining the text of the Directive with the Commission’s explanatory memorandum, it can be deduced that the abovementioned notion implies four different characteristics: (i) a defined geographical origin of the inflow, i.e. a specific country or region, thus excluding cumulative migrations from different areas; (ii) an exceptional intensity of arrivals: an initially modest and gradual inflow – even if from a single country or area – cannot in itself justify the activation of the TDP; (iii) the inability of the normal reception mechanism to absorb and process properly such a sizable influx: in fact, according to Art. 2(a), the TP should be implemented “in particular if there is also a risk that the asylum system will be unable to process this inflow without adverse effects for its operation”; (iv) the impossibility to quantify in advance what constitutes a mass influx, whose evaluation rests with the Council. According to UNHCR’s interpretation, it “must be defined in relation to the resources of the receiving country”.

In sum, even in light of these clarifying elements, this notion remains mainly undetermined and commended to the institutional margin of appreciation.

4. The burden-sharing scheme

Art. 25(1) establishes that the burden deriving from the TPD activation shall be distributed according to the principle of Community solidarity, in clear reference to Art. 80 TFEU. Significantly, the importance of this principle has been stressed also in the few ECJ’s judgments that mention Directive 2001/55.

The principle of solidarity is structured in the TDP in two ways: a financial sharing and a “physical” sharing. With regard to the former, Art. 24 establishes that the costs arising from the implementation of
such a mechanism should be partially covered by the **European Refugee Fund**; the latter, on the other hand, should consist in the transfer of TP beneficiaries between Member States, given the consent of the involved beneficiaries and as a consequence of a voluntary offer of the receiving country. According to Art. 25, MS should advance the offer through a “declaration of capacity of reception” to be made before the mechanism’s activation, indicating “in figures or in general term, their capacity to receive such persons”, with no prejudice to the possibility of notifying additional reception capacity to the Council and the Commission after the adoption of the Decision.

The principle embodied in this system, harshly debated during the preparatory works, has been identified with the term “**double voluntariness**” (K. Kerber, *Temporary Protection Directive*, in European Journal Migration Law, 2002, p. 198), since the transfer request the consent of the State of destination and of the person seeking protection. Article 25(3) further provides that, in case of unmanageable influx, “the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for Member States affected”. Nevertheless, no indication is given to what “additional support” means, leaving open the possibility that this could encompass also a physical distribution of the beneficiaries. If so, the TPD would potentially provide Member States with a more fair and equitable burden-sharing mechanism than the one currently enforced by the controversial Dublin system. It should be also noted that the Directive, somehow to encourage MS to accept the burden sharing, is clearly oriented to the repatriation of those who will not apply for – or obtain – refugee status once the temporary protection regime will come to an end.

5. Some attempts of implementation

Despite the jubilant announcements that accompanied the approval of Directive 2001/55/EC, the TP framework was never being really put to the test. Before trying to identify the possible reasons for that, it is appropriate to make a brief reference to the few attempts of its activation.

A first try dates back to the mid-2000s, as the escalation of armed conflicts in Afghanistan and Iraq led thousands to seek refuge in Europe. The debate on the possibility of implementing the TPD mechanism with respect to Iraqis or Afghan migrants, nonetheless, soon ground to a halt because of to the opposition of numerous Member States, fearing the potential “pull-factor” of such a decision.

Similarly, a second attempt was made following the 2011 Arab Spring, whose consequential displacements overwhelmed the reception systems of EU’s southern-border States. Italy, with the support of Malta, officially formalized a request to start off the TP system, but the Justice and Home Affairs Council and later Commissioner Malmström turned down the call. Although reaffirming the principle of solidarity, especially towards those MS most directly concerned by migratory inflows, the Council observed the absence of the necessary preconditions in relation to the status to be attributed to the displaced persons approaching the shores of southern Italy – a substantial part of which economic migrants – as well as to the existence of an actual emergency situation, despite the fast-growing entity of the arrivals.
6. Conclusions on the possible legal and political reasons for the lack of implementation

As explained, the activation of the TPD system requires complex legal evaluations and, at the same time, a laborious political process aimed to reach an agreement between Member States – which, as the last months have shown, can be arduous task in situation of crisis. This conclusive paragraph will focus on some problematic elements that might have contributed to the lack of success of the temporary protection mechanism up until now. It should be anticipated that none of these potential reasons is exclusively “legal” or, on the contrary, strictly “political”. Their nature is always a mixture of the two.

First of all, the Achilles’ heel of the Directive: as mentioned, it rests on some rather ambiguous legal notions, notably “mass influx”. The impossibility to give a precise scope to such a fundamental definition, despite some useful elements contained in the text, is seen by many as a major flaw. The combination of this feature with the wide margin of appreciation that is left to the Council seriously undermines the effectiveness of the mechanism. These considerations are even more relevant if combined with the qualified majority of two-thirds for the Council Decision to be approved: a high threshold, especially when the migration crisis affects only – or mainly – borderland MS as Italy and Malta in 2011. This possible third weak point ought to be linked with the restriction on the power of initiative, attributed exclusively to the discretion of the Commission. Such interpretative and procedural factors determined, indeed, the failure of the most recent attempt to activate the Directive as a response to the growing influxes crossing the Mediterranean after the Arab Spring.

Furthermore, the short duration of the protection afforded by the TPD is neither sufficient nor proportionate to the articulated procedure requested to activate and extend the protection. So tight deadlines could discourage States and European Institutions to consider its activation worthwhile. In addition to this, it has been noted that the vague activation process schedule would most probably require several months, a time span hardly suitable for triggering an emergency mechanism.

Moving on to a more political field, a reason to explain the reluctance of Member States to resort to the temporary protection is related to the so-called “pull factor”. According to this theory, the activation of TP would constitute an element of attraction for other displaced persons to head towards Europe, possibly worsening an already critical scenario. Several authors, nevertheless, consider this element as overrated, for two main reasons. On one hand, it has been proven that forced migrations depends mainly on push factors as endemic violence and systematic violations of human rights: a person fleeing a conflict will seek a safe harbour whether or not temporary protection mechanisms are to be activated. On the other hand, pursuant to Art. 5(3)(a), the Council has the faculty to circumscribe the applicability of TP to specific groups of persons, thus reducing to a minimum the potential pull factor.

Moreover, due to some initial concerns, not even the main international organizations have strongly lobbied for the implementation of temporary protection. The doubts pertained principally to the scarcity of procedural provisions regarding some guarantees for the beneficiaries of the mechanism: UNHCR at first lamented the absence of a detailed procedure for the voluntary and enforced return, while the European Council on Refugees and Exiles (ECRE) objected that the
Directive has no procedural safeguards against the denial of temporary protection, i.e. the right to appeal it. Anyhow, the further directives composing the CEAS have filled most of these gaps.

A further weak spot can be identified in the feebleness of the solidarity principle set by Art. 25 as pivot of the Directive. The absence of a system of binding quotas affects seriously the effectiveness of the TP system, although at the same time this seems to possibly constitute to the eyes of MS an encouragement – and not an obstacle – to its activation.

Several flaws have been mentioned, both of legal and political nature. Yet, it appears that not even the combination of all of them would constitute a convincing ground to set this instrument aside. As underlined by many scholars and stake-holders (inter alia the European Parliament Research Service), implementing the TP as a response to the current situation would be of precious help in providing Syrian migrants with an effective protection, meanwhile giving to national systems the time to organize, cope with the mixed inflows and share the economic and logistic burden. Moreover, its possible connection with an evacuation programme pursuant Art. 2(d) could eliminate the risks of the journey across the Mediterranean, potentially saving numerous lives. The requirements set by the Directive are very likely to be met, indeed. It is difficult to deny the existence of a “mass influx of displaced persons from third countries”, as the current arrivals constitute an inflow of unprecedented proportion made almost exclusively of persons seeking international protection. Apart from the well-known reticence of Member States to commit to the solidarity principle, there is no valid reason why the TPD system should not be included in the EU Agenda on Migration and thus not remain dead letter. It is shared opinion that a crisis is not the preferable moment to elaborate new solutions, but rather to put to the test the prearranged ones.

Nonetheless, a dose of realism is due. After a thorough scrutiny of the Council’s and Commission’s documentation of the last months, it emerged that the Directive has been formally mentioned just once, in a meeting of the Commission on 8 September 2015: «Lastly, the President (Mr. Junker) confirmed that the Commission would examine the terms of application of the Temporary Protection Directive in due course. However, the Directive could not be activated in the current climate and sending out multiple messages would create confusion around the essential measures proposed here in the immediate context of the refugee crisis. That said, each Member State could decide individually to grant temporary protection to persons seeking refuge on its territory». Although apparently leaving open to the possibility of activation, this statement seems to be the swan song of Directive 2001/55/EC. Member States and European Institution, by ignoring it and elaborating different remedies, seems to be de facto bypassing – and thus pensioning – the TP system.