



Study on the Temporary Protection Directive

Executive Summary

Written by Hanne Beirens, Sheila Maas,
Salvatore Petronella, Maurice van der
Velden

January, 2016



EUROPEAN COMMISSION

Directorate-General for Migration and Home Affairs

Unit C3 — Asylum

European Commission

B-1049 Brussels

Study on the Temporary Protection Directive

Executive Summary

Directorate-General for Migration and Home Affairs

January, 2016

**Europe Direct is a service to help you find answers
to your questions about the European Union.**

Freephone number (*):

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://europa.eu>).

Luxembourg: Publications Office of the European Union, **2016**

ISBN 978-92-79-61581-8

doi:10.2837/479329

© European Union, **2016**

Reproduction is authorised provided the source is acknowledged.

Table of Contents

1	Executive summary – Study on the Temporary Protection Directive.....	1
1.1	Aims of the study	1
1.2	Background and context	1
1.3	Strengths and weaknesses.....	2
1.4	Pressures on the EU in the period 2001-2014 and the reasons for non-implementation	3
1.5	Policy options and their assessment	4
1.6	Continued relevance of the TPD and an amended TPD in comparison with the new (emergency and proposed permanent crisis) relocation mechanisms ...	5

1 Executive summary – Study on the Temporary Protection Directive

1.1 Aims of the study

The objective of the study, as laid down in the Terms of Reference, was to evaluate the Temporary Protection Directive (TPD). This evaluation was to focus in particular on (1) the relevance for the challenges being faced today of the original objectives of the Directive as an instrument for helping to deal with large inflows of displaced persons, including asylum-seekers, via an EU-level temporary protection instrument; (2) a comprehensive understanding of the reasons for the Directive's non-implementation via the analysis of practical scenarios, based on actual past or possible future situations where the Directive could have been or could not be triggered. This analysis was to in turn feed into a detailed analysis of the strengths and deficiencies of the Temporary Protection Directive and thereby serve to identify possible changes to be made to the Directive to ensure its relevance and efficacy in meeting current challenges.

1.2 Background and context

The birth of the Temporary Protection Directive has its origins in the nineties. The question how to address the regulatory challenge following a mass influx of persons fleeing conflict first arose in Europe as a consequence of the Yugoslavian war in the early 1990s¹. European practice in the field of asylum following mass humanitarian crises was to provide temporary protection status². In contrast to the 1951 Convention which is implemented by means of individualised status determination, temporary protection is group-based protection which is used by states to prevent the blocking of asylum systems, whilst also providing immediate protection to those in need.

With the continuation of the crises in the 1990s, the application and evolution of the various temporary protection schemes across Member States was however inconsistent and policies highly discretionary³. In 1999, the lack of a regulatory framework for a situation of mass influx became painfully clear when the Kosovo crisis brought about the largest flow of refugees in Europe since the Second World War. The response of Member States was uncoordinated and pressure unevenly distributed. Acting independently, several Member States implemented their national form of temporary protection, which however greatly differed from one Member State to another (with regard to the status, the maximum duration, procedures gaining access to asylum procedures, and the rights and benefits). This produced imbalances with refugee flows oriented towards the most "generous" Member States and/or secondary movements. Consequently, a harmonisation process for granting temporary protection was started.

Framed by the Amsterdam Treaty⁴ and the call for a Common European Asylum System (CEAS) in the 1999 Tampere Conclusions, the Temporary Protection Directive was adopted. Its aim is two-fold: i) to establish minimum standards for giving temporary protection in the event of a mass influx, and; ii) to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons. Its specific aims, inter alia, include to avoid a blockage in national asylum systems in the event of a mass influx and to secure immediate access to protection and fair rights to the persons concerned. For the Directive to be activated, the existence of a mass

¹ Nuria Arenas, the concept of mass influx of displaced persons in the European Directive establishing the temporary protection system, *European Journal of Migration and Law* 7, 2005.

² For example, the "Duldung", or tolerated residence in Germany; Exceptional Leave to Remain in the United Kingdom; Provisional Permission to Remain in the Netherlands; or "B" or "F" temporary residence status in other parts of Europe. See Akram S. M., Rempel T., 'Temporary Protection as an instrument or Implementing the Right of Return of Return for Palestinian Refugees' (2004) 22(1) *Boston University International Law Journal* 1-161.

³ Akram S. M., Rempel T., 'Temporary Protection as an instrument or Implementing the Right of Return of Return for Palestinian Refugees' (2004) 22(1) *Boston University International Law Journal* 1-161.

⁴ The Amsterdam Treaty introduced Title IV on "visas, asylum, immigration and other policies related to the free movement of persons, see in particular also Art. 61 and 63 TEC.

influx situation needs to be established by Council Decision after a proposal from the Commission, who should also examine any request from Member States. Once activated, it foresees for harmonised rights for the beneficiaries of temporary protection as well as a solidarity mechanism. The latter consists both of financial solidarity as well as solidarity in terms of the physical reception of displaced persons based on the principle of "double volunteerism" (i.e. the will of the State to receive and the consent of the individual to be received).

Although the TPD was meant to provide for a practical and efficient framework to deal with mass influx situations, the Directive has so far never been implemented. Italy and Malta requested its activation in 2011, but such requests were not followed up on insofar as the Commission did not put forward a proposal to the Council.

1.3 Strengths and weaknesses

The study subsequently examined its – theoretical – strengths and weaknesses in responding to a case of mass influx.

Firstly, the legislator purposely opted for a broad *definition of mass influx* which would allow to cover different types of inflows and types of pressure, not confined to numerical thresholds or linked to specific indicators. TPD was considered as a flexible instrument to be invoked on a case-by-case basis: the reasons for its activation could have been different and not limited to a pre-defined set of conditions. The flexibility of the TPD to respond to a range of different types of mass influx (e.g. sudden, high influx; gradual, but persistent increase over time) was, and remains, a strength of the TPD. The legislator hereby secured a large 'action radius'.

However, in the absence of definitions of these different types of mass influx, and indicators on how to measure these, stakeholders agreed that it has been hardly possible to attain Member State agreement on the (possible) activation of the TPD. The different actors involved in the procedure may have (had) a different understanding as to: what constitutes a large number of displaced persons; the number of EU Member States that should be affected by the arrival; and whether the actual occurrence of adverse effects on the asylum system is a criterion for the activation of the TPD.

Secondly, with regard to the *procedure* to activate and implement the temporary protection mechanism, stakeholders identified several weaknesses. Concerns were raised by the fact that the activation process can only be initiated by the Commission, either *ex officio* or upon request of a Member State. The number of steps between the (potential) occurrence of a mass influx and the implementation at Member State level are also high, plus the Directive remains unclear on the content of some of these steps. As such, the Directive does not stipulate the obligations of the Commission upon receiving a request by a Member State beyond "assessing" the request and "deciding" whether or not to put forward a proposal to the Council (Art.5). Moreover, in the absence of a clear definition of the criteria for activating the mechanism and tools to measure these, the procedure to activate the TPD is subject to, and ultimately hampered by, political debates at each step of the procedure. In sum, this makes for a potentially lengthy and cumbersome procedure, with little chance of attaining a qualified majority in the Council.

Hence, should the TPD be activated in the future, this may potentially undermine its very objectives, i.e. to rapidly relieve the pressure on national asylum systems affected by a mass influx of applicants for international protection and to provide immediate access to those applicants (in clear need of international protection). This represents one of the main reasons why the TPD has never been applied to date.

Thirdly, an advantage of the TPD is that it foresees a solidarity mechanism upon its activation, i.e. financial solidarity via the AMIF and solidarity in terms of physical reception based on the rule of "double voluntarism". However, the essentially voluntary nature of the solidarity mechanism is a critical weakness of the TPD. Indeed, some of its features may hamper the TPD's scope for effective and efficient implementation of

solidarity among EU Member States. The expectation that Member States indicate capacity is problematic without common criteria to calculate or project reception capacity. Moreover, hypothetical scenarios of mass influx, developed within the scope of the project, show that the principle of 'double voluntarism' may stall the redistribution of beneficiaries across the EU and ultimately undermine the pursuit of greater solidarity.

At the outset of this Study (i.e. early 2015), the TPD was still the only Directive that foresaw an in-built form of solidarity mechanism. More recently, in response to the ensuing refugee crisis, the commitment to solidarity and burden-sharing between Member States has gained greater momentum and support, as captured in the EU Agenda on Migration (27 May 2015) and the adoption of a temporary and emergency relocation mechanism for persons in clear need of international protection.

Fourthly, a clear strength of the TPD is that it establishes minimum standards for granting temporary protection in the event of a mass influx of displaced persons. From the beneficiaries' perspective, the TPD succeeded in determining the Member States' obligations as to the conditions of reception, residence and rights. These obligations can be considered "fair" and "offering an adequate level of protection to those concerned", largely mirroring those stipulated later on in the first and second generation legislative instruments of the CEAS. From the perspective of the Member States and the EU, the establishment of minimum standards recognises that differences between Member States impact on refugee movements. Indeed, the Preamble to the TPD (9) considers these minimum standards to avert the risk of secondary movements.

However, *de facto* the harmonisation of the temporary protection across the CEAS has not been attained, in the absence of the activation of the TPD. Some Member States continue to grant forms of protection that, in terms of their nature, could be considered as functional equivalents of temporary protection regimes (e.g. DE, UK), which continue to differ significantly among Member States. This can be considered a significant weakness of the TPD.

1.4 Pressures on the EU in the period 2001-2014 and the reasons for non-implementation

In a second step, the Study also analysed the reasons for the Directive's non-implementation through practical scenario-building. Hereto, the study team identified possible cases of 'pressure' or 'mass influx' (i.e. scenarios) via a combination of research methods, investigated whether the Directive could have been triggered and, if so, what happened in the absence of the application of the TPD (i.e. the counter-factual).

Analysis of the period 2001-2014 discerned three different types of pressure occurring in some EU Member States, these being pressure due to a significant high and/or sudden increase (BG, CY, PL, MT), pressure following a gradual increase (BE, FR, DE, NL), and pressure due to strong fluctuations in the number of applicants over time (EL, IT). The assessment of these scenarios highlighted that several Member States experienced significant pressure on their national asylum systems in the period 2001-2014, threatening standards of quality and timeliness with which applicants were received and saw their claim processed. The degree to which such pressures resulted in effective lowering of standards and, in the worst case scenario, an asylum system breaking down was dependent on Member States' capacity and knowhow on how to deal with a situation of pressure. This capacity, expertise and knowhow varied, and continues to vary, significantly across Member States and following EU enlargement some of the new Member States found themselves on the external borders of the EU and were exposed to refugee movements – but also mixed migration flows – directed towards the EU.

In managing these pressures on national asylum system, measures were implemented at both Member State and/or EU level. Member States asylum systems have evolved significantly since 2001, while at EU level the legal and political context in the field of asylum has changed significantly (e.g. adoption of first and second generation legislative instruments), including the tools available at EU level for assisting Member States in

handling large influxes. Particularly relevant tools are emergency funding under ERF/AMIF, the early warning, preparedness and crisis management mechanism (Article 33 Dublin Regulation), EASO (operational) support and relocation of beneficiaries of international protection (e.g. EUREMA). Specific Member State measures taken in response to pressure include *prevention*, such as projections/risk analyses/prognoses (in DE, NL), emergency plans (FR, NL, PL) and buffer capacity (BE, DE, NL). It also takes the form of *mitigation*, such as early warning systems (NL, FR), mechanisms to speed up the decision-making process (hiring case workers or fast-tracking applications in BE, BG, CY, DE, FR, MT, NL), budget flexibility (BE, DE, FR, NL) and provision of accommodation allowance instead of accommodation in centres (CY, PL). Finally, it is also a question of *response*, including building new facilities (BE, DE, FR, NL) and/or emergency structures (BE, DE, FR, NL).

Although national measures, EU emergency funding and EASO operational support have undoubtedly assisted Member States to cope with the pressures of increased arrivals during the period 2001-2014, some tools have not been used to their full capacity (e.g. relocation) or were used at all (e.g. Art. 33 Dublin). More so, the sum of the parts in the response 'tool box' does not add up to a coordinated, coherent, and comprehensive response, precisely where the TPD could have added value.

The need for a coordinated EU response has especially become clear in the current migration/refugee crisis. Whereas there was no clear-cut case for the activation of the TPD in 2001-2014, some Member States in 2015 certainly experienced "mass influx", even in the absence of a set of agreed indicators for measuring 'mass influx' and 'pressure'.

1.5 Policy options and their assessment

The study subsequently developed and assessed policy options on the basis of the data gathered and analysed, in particular the analysis of the strengths and weaknesses of the TPD as well as the reasons for its non-implementation. The aim was to suggest possible adaptations and alternatives to the Temporary Protection Directive with a view to increasing its relevance in the current asylum context. As the main objectives of TPD derived from the 1997 Amsterdam Treaty, the main general objectives were replaced by the following in view of the adoption of the Lisbon Treaty (under which EU competence is no longer limited to minimum standards). These are: common system of temporary protection (art 78.2.c TFEU); and solidarity and fair sharing of responsibilities (art. 80 TFEU).

The character of the policy options moves on a cumulative continuum (i.e. they build progressively on the previous one). The identification and assessment of policy options was performed per thematic area and formed the basis for a hybrid preferred policy option which combines elements of the different options listed. For the assessment of the policy options, four criteria were used, i.e. their effectiveness in achieving the policy objectives; political feasibility; legal feasibility, and; operational considerations.

The "hybrid preferred policy option" includes:

Thematic area 1 (criteria): A non-exhaustive list of typologies of mass influx and indicators for measuring mass influx in conjunction with a non-exhaustive list of the type of pressures that national asylum systems may experience as a result of the mass influx and relative indicators. Such proposal would significantly enhance the clarity and function of the Directive, limit discussions among stakeholders as to whether criteria are/are not fulfilled and thus increase the TPD's scope for action vis-à-vis situations of 'mass influx' (and 'pressure').

Thematic area 2 (procedure): The obligatory factual check of the criteria for mass influx and/or national pressure by EASO, with COM assessing whether or not to put forward a proposal and the Council/EP ultimately deciding on the activation. Such proposal would represent an effective tool to respond to cases of mass influx/pressure, considering

EASO collects data to detect (imminent) situations of pressure, in particular those where Member States may not be able to cope while respecting EU asylum acquis.

Thematic area 3 (rights): The selective alignment with the rights granted to asylum seekers in the recast Reception Conditions Directive during the first six months of temporary protection and, if extended to nine months, to those benefiting from subsidiary protection in the recast Qualification Directive. This proposal contributes to the provision of harmonised temporary protection and provides for an adequate and fair level of rights, dependent on the duration of TP. The full alignment with the Return Directive is an obligation under the current asylum and migration acquis.

Thematic area 4 (solidarity): A mandatory relocation system (based on quantitative indicators), with neither voluntarism for the person relocated or for the receiving Member State, supported by an automatic allocation of funding to Member States receiving a given % of eligible persons. This proposal would contribute to effectively meeting TPD objectives and gaining political support (though not without resistances to its obligatory nature).

1.6 Continued relevance of the TPD and an amended TPD in comparison with the new (emergency and proposed permanent crisis) relocation mechanisms

The Study team has also reflected on an analysis of the continued relevance of the TPD and its proposed amended (i.e. the hybrid preferred policy option described above) in comparison with the new (emergency⁵ ⁶ and proposed permanent⁷ crisis) relocation mechanisms:

Thematic area 1 (criteria): All three instruments provide for objective, quantifiable and verifiable criteria and data to be taken into account when adopting a decision on the activation of the instruments. These help clarify concepts related to “mass/large influx” or “pressure” which in the TPD are vague and left open to interpretation. Unfortunately, the concept of capacity of the asylum system remains unclarified: it would be important to have a dynamic and relative mechanism able to determine asylum capacity (with number of relocations changing with flows).

Thematic area 2 (procedure): The provisional measures are not automatically activated, but they are conditional to both a proposal put forward by the Commission and a favourable vote within the Council, after due consultation with the European Parliament: a balance of efforts will still be conditional on the political support of Member States. On the other hand, the procedures foreseen by the crisis mechanism give more power to the Commission (under delegated acts). This may allow the EU to respond more quickly to an urgent situation and help Member States facing an emergency situation, without having to go through a lengthy adoption procedure by the Council each time (which is the case under the current TPD or provisional measures mechanisms).

Thematic area 3 (rights): The provisional measures, and, to a certain extent, the crisis mechanism, would not guarantee immediate protection to large(r) inflows of displaced persons who may be considered eligible for international protection as foreseen in the Qualification Directive (numbers are relatively low as compared to the overall scale of arrivals and people in need of protection), though it would guarantee access to international protection – and not temporary as foreseen by the TPD.

⁵ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece

⁶ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

⁷ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/proposal_for_regulation_of_ep_and_council_establishing_a_crisis_relocation_mechanism_en.pdf

Thematic area 4 (solidarity): An agreement was reached on the relocation of 160,000 persons, though not without political frictions, lengthy discussions and questions raised on how the total number of eligible persons was calculated and whether it can be considered sufficiently high. This process has suggested that agreement among Member States regarding the establishment of a permanent crisis relocation mechanism within the Dublin III Regulation may be even more difficult to attain as Member States may be reluctant to delegate too much power to the Commission, while automatically accepting quotas (or financial compensation) once a decision is taken. The use of a distribution key is an important step forward to ensure a fair distribution of persons in need of international protection among Member States.

Many of the elements which are suggested to make the TPD a stronger, more transparent and effective instrument are reflected, to a large extent, in the new instruments proposed by the Commission (and mostly by the permanent crisis mechanism). The main differences between a proposal for the revision of the TPD and the new instruments would be related to i) the scope of the instrument in terms of the persons eligible to be relocated, ii) the status of and the rights accorded to the persons eligible, and iii) the circumstances in which the relocation can be triggered. While these three elements could indicate a continued relevance for the TPD (i.e. a revised TPD may affect a larger number of third-country nationals, though covered by a different status), the new crisis mechanism guarantees for a higher (yet not necessarily harmonised) level of rights and quicker activation procedures.

As such, it seems more likely that the Commission will pursue the adoption of the provisional measures to tackle the current crisis and, at the same time, attempt to revise the current Dublin III Regulation with the possibility to include a permanent crisis relocation mechanism. Consideration could be given to incorporating some of the residual advantages of the TPD in such a mechanism, including in particular a broader personal scope (not just applying to persons from countries of origin with a 75%+ recognition rate) and a broader definition of the circumstances in which emergency relocation could be triggered. This would prevent the Commission and Member States from spending political capital trying to amend the TPD, with uncertain results, and if the residual advantages just mentioned were to be incorporated in a Commission proposal, consideration could be given to proposing the repeal of the TPD. The new instruments will be the result of complex and politically sensitive negotiations between Member States and represent a compromise aiming to accommodate their different positions, while safeguarding the obligation to protect persons in need of international protection. It is, however, pertinent that a crisis mechanism is made operational, if the clogging up of national asylum systems and a variety of national temporary protection regimes are not to persist in a time of crisis, with potential secondary movements as a result.

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
via EU Bookshop (<http://bookshop.europa.eu>);
- more than one copy or posters/maps:
from the European Union's representations (http://ec.europa.eu/represent_en.htm);
from the delegations in non-EU countries (http://eeas.europa.eu/delegations/index_en.htm);
by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm) or
calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

(* The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (<http://bookshop.europa.eu>).

