

# The EU response to the 2015 refugee flows: A missed opportunity to use the Temporary Protection Directive?

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## Introduction

Since 2011, Europe has had to respond to its largest and most severe asylum seeker challenge since the Second World War.<sup>1</sup> Over one million asylum seekers applied for asylum in the European Union in 2016, but many more asylum seekers lost their lives trying to reach safety by using irregular and dangerous routes to cross the Mediterranean Sea.<sup>2</sup> In 2016, over five thousand migrants lost their lives at sea and the number of missing or dead people reached five thousand as well.<sup>3</sup>

Evidently, there is a significant amount of asylum seekers trying to find refuge in Europe. As a result, some Member States, in particular those at the border of the EU found themselves unable to cope with the vast numbers of asylum seekers.<sup>4</sup> However, it seems that the Union has not done enough to assist these Member States despite having an emergency regulatory tool that deal with exactly this type of situation. The Temporary Protection Directive is the tool that could have been used to assist with the situation however, it has never been implemented.

This article aims to establish that the Temporary Protection Directive was capable of assisting with the situation in Europe but was not activated due to externalisation policies. However, its lack of activation in such severe times renders it obsolete as it is now highly unlikely that it will ever be used. This article consists of three chapters.

Chapter One, provides historical context in regard to how the Temporary Protection Directive was born by explaining the situation during the Balkan War. Chapter One also lays down the aims and objectives of the Directive and explains the procedural steps that ought to be taken if a Member States wishes to activate the Directive. Lastly this Chapter provides a small overview of the Common European Asylum System in order to demonstrate that since the Directive is part of it then all Member States are bound by the same obligation under this framework.

Chapter Two of this article examines the challenges the Temporary Protection Directive faces which prove to be obstacles in its implementation. It is argued that the lack of definition as to what constitutes mass influx is a very significant challenge for the Directive as it makes it ambiguous but supports that the current situation in Europe amounts to mass influx. Furthermore, this Chapter argues that the activation process of the Directive is so complex and lengthy which defeats its primary purpose; to respond to emergency situations. Burden sharing is also a prominent problem the Directive faces as national interests and externalisation policies are more attractive to Member States than showing solidarity and sharing responsibility. Lastly, it is argued that the Directive has not yet been implemented due to the fear of it becoming a pull factor and attracting more asylum seekers on European territory.

Chapter Three examines whether the situation that Europe has faced since 2011 proved to be a good opportunity for the Directive to finally be activated. Chapter Three demonstrates that the events that unfolded could have resulted to the activation of the Directive but the Union's stance to resist activation means that it will be very unlikely that this mechanism will ever be used thus, it is now obsolete.

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1 European Parliament, 'Briefing – EU Legislation in Progress: Reform of the Dublin System', (1 March 2019), 2.

2 Ibid.

3 Ibid.

4 UNHCR, 'Europe Situation', <<https://www.unhcr.org/europe-emergency.html>> accessed 18 February 2020.

## Methodology

Primary materials such as legislation and case law were used to analyse the current situation in the European Union. Secondary materials were also used in the analysis of this article in order to draw spherical conclusions. These secondary materials included journal articles, books, online sources such as newspapers and blogs and a podcast. These materials were used to support and enhance the view and arguments presented throughout this article.

## Chapter 1: How was the Temporary Protection Directive born?

Chapter One of this article will establish the historical background behind the creation of the Temporary Protection Directive<sup>5</sup> by providing, in Section One, an analysis of the events that occurred during the Balkan Wars which ultimately lead to the creation of the Directive. Furthermore, Section Two of this Chapter will engage with the Directive in greater detail and examine its main provisions and aims. Lastly, Section Three will provide a brief analysis of what the Common European Asylum System (CEAS) is, as the Directive forms part of this legislative framework.

### Section One: The events leading to the birth of the Temporary Protection Directive

This section will examine the events that lead to the Balkan War which was the main reason why the European Union introduced the Temporary Protection Directive, as it began receiving significant numbers of asylum seekers due to the violence and conflict in that area. As a result, the EU wanted to create a legal instrument that would allow it to respond to these flows quickly without overburdening the national asylum systems of its Member States.<sup>6</sup>

In the early 1990s, the former Socialist Republic of Yugoslavia was one of the major, developed and diverse countries in the Balkan area, consisting of six separate republics, those of Bosnia and Herzegovina, Croatia, Macedonia, Serbia, Slovenia and Montenegro.<sup>7</sup> There were also two autonomous provinces within the Republic of Serbia, other than the six republics mentions, these being Kosovo and Vojvodina.<sup>8</sup> Therefore, the former Republic of Yugoslavia consisted of numerous ethnic groups as well as religious backgrounds.

With the collapse of the former Soviet Union as well as the rise of nationalism in the Eastern European region during the early 1990s, Yugoslavia found itself in severe political and economic turmoil as its central government became very weak whilst militant nationalism was on the rise.<sup>9</sup> Political groups in the country were strongly advocating for the independence of these republics or the ability for some of the republics within the Yugoslavic federation to receive more powers.<sup>10</sup> A strong nationalist rhetoric was followed to jeopardise the common Yugoslav identity and create suspicion between the different ethnic groups that existed.<sup>11</sup>

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5 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, 7 August 2001, thereafter Temporary Protection Directive or Directive.

6 D. Gulns & J. Wessels, 'Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis"', 36 Refugee Survey Quarterly (2017), 57-83, 61.

7 United Nations International Criminal Tribunal for the Former Yugoslavia, <<http://www.icty.org/en/about/what-former-yugoslavia/conflicts>> accessed 1 August 2019.

8 Ibid.

9 Ibid.

10 Ibid.

11 Ibid.

Slovenia was the first of the other six republics to leave the former Yugoslav Republic and declaring its independence in June of 1991.<sup>12</sup> This resulted to an armed conflict between Slovenian forces and the Yugoslav People's Army with Slovenia being victorious.<sup>13</sup> Croatia followed Slovenia in declaring independence, however, there was significant conflict in Croatia due to the Serb minority wanting to create a new state which would be another independent Serb state.<sup>14</sup> Croats were violently expelled from that particular territory during an attempt to commit ethnic cleansing.<sup>15</sup>

The deadliest conflict during this war was the one in Bosnia and Herzegovina with an estimation of more than one hundred thousand people being killed and another two million were forced to flee their homes in order to escape persecution.<sup>16</sup> This happened because the population consisted of different ethnic backgrounds (43% Bosnian Muslims, 33% Bosnian Serbs, 17% Bosnian Croats) which resulted in increased tensions between the groups as both Serbia and Croatia wanted to assert power over large parts of this territory.<sup>17</sup>

Kosovo was also an area of conflict during the Balkan War as the Albanian community of Serbia wished for its independence.<sup>18</sup> As a result, the Serb forces attacked civilians and lead Kosovo Albanians to flee their homes to avoid persecution.<sup>19</sup> Moreover, the North Atlantic Treaty Organisation (NATO) got involved in the conflict and carried out air strikes which targeted both Kosovo and Serbia lasting seventy-eight days.<sup>20</sup>

The last conflict that occurred during the Balkan War was that of Macedonia<sup>21</sup> despite living in peace for a decade. In the early months of 2001 the Albanian National Liberation Army, a militant group, found itself in conflict with the Macedonian security forces as it aimed at gaining its independence for the Albanian dominated areas in the territory.<sup>22</sup>

Evidently, these conflicts and the Balkan War altogether was quite a severe event in the Eastern European area. This explains why many asylum seekers fleeing these areas entered the European Union seeking refuge, which subsequently leads to the Union's creation of the Temporary Protection Directive, as a means to accommodate these asylum seekers in cases of such emergency.

## **Section Two: What does the Temporary Protection Directive consist of?**

This section will engage with the Temporary Protection Directive's provisions in greater detail. It will establish its aims and objectives and explain how this mechanism would work should it be activated through its activation mechanism.

As explained in Section Two, the birth of the Directive originates from the 1990s and the Balkan War, as an emergency tool to deal with mass influx of people arriving to the European Union. It is crucial to establish that temporary protection is different to the protection provided in the 1951 Refugee Convention<sup>23</sup>. The Convention is implemented based on the determination of individual status, contrary to temporary protection which is group-based and is used as a tool to avoid overburdening national asylum systems but at the same time providing adequate protection to asylum seekers.<sup>24</sup>

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12 Ibid.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

21 Previously known as Former Yugoslav Republic of Macedonia (FYROM).

22 United Nations International Criminal Tribunal for the Former Yugoslavia (n 7).

23 Convention and Protocol Relating to the Status of Refugees 1951.

24 H. Beirens, S. Maas, S. Petronella. M. Velden (European Commission), 'Study on the Temporary Protection Directive' ICF January 2016, 1-13, 6.

The European Union decided to create the Temporary Protection Directive because prior to the Balkan War there was a lack of a uniform framework for all Member States. Rather instead, Member States used their own temporary protection mechanisms which were different from one another and proved unable to respond to situations of mass influx as they did not seem to distribute the burden of asylum seekers in a fair and even manner between Member States.<sup>25</sup> The aim of the Directive is two-fold, firstly, it aims to establish minimum standards of temporary protection to asylum seekers in mass influx situations and secondly it aims to promote fair sharing of responsibility between Member States when it comes to receiving and asylum seekers in mass influx situations.<sup>26</sup> It is important to note that the Directive is part of the Common European Asylum System which means that it is part of a legal framework which sets common standards in asylum law within the Union and harmonises the interpretation and application of this area among Member States to achieve a uniform system.<sup>27</sup>

The Temporary Protection Directive can only be activated in mass influx situations that need to be established by the EU Council following a proposal from the Commission which is alerted of these situations by the affected Member State.<sup>28</sup> As soon as the Directive is activated, it aims to provide consistent rights to individuals who are in need of temporary protection, as well as assist fellow Member States whose asylum systems may be suffering from the large inflows of asylum seekers.<sup>29</sup> The Directive foresees for the beneficiaries of temporary protection to receive a residence permit, the ability to obtain employment, access to housing and social welfare, access to medical treatment, access to education for minors, family reunification opportunities and guarantees for access to the national asylum procedure.<sup>30</sup> The Temporary Protection Directive also contains provisions which deal with the return of asylum seekers to their countries of origin when protection comes to an end as well as exclusion clauses for people who have committed serious crime or may be a threat to public security.<sup>31</sup> There are also specific provisions for minors who are unaccompanied and for individuals who have suffered traumatic experiences including rape, violence be it physical or psychological.<sup>32</sup>

### **Section Three: A brief background of the Common European Asylum System (CEAS)**

This section will provide a brief analysis in regard to the creation of the CEAS and explain what its role within the European Asylum Law procedures and regulations is. This analysis is important because the Temporary Protection Directive is part of this legislative framework so its implementation will occur under the CEAS rules.

The CEAS was created due to the removal of internal frontiers within the European Union, as a result, the asylum system of the Union as a whole needed to follow a uniform set of rules.<sup>33</sup> The need to develop a common asylum system was born in order to prevent secondary movement of asylum seekers, which suggests that the European Union wanted to regulate asylum seeker movement within the EU and eliminate the possibility of them moving to different Member States due to conditions being better in some States than others.<sup>34</sup>

The CEAS creates mutual obligations for all Member States to provide the same protection to asylum seekers. It ensures that all procedures regarding asylum seekers that are carried within the Union are

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25 Ibid.

26 Ibid.

27 European Asylum Support Office (EASO), 'An Introduction to the Common European Asylum System for Courts and Tribunals – A Judicial Analysis', August 2016, 3-113, 13.

28 H. Beirens, S. Maas, S. Petronella. M. Velden (n 24), 7.

29 Ibid.

30 European Commission, 'Temporary Protection', <[https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en)> accessed 6 August 2019.

31 Temporary Protection Directive, Articles 21, 22, 23 and 28.

32 Ibid, Articles 13 and 16.

33 European Asylum Support Office (EASO) (n 27), 14.

34 Ibid.

the same in every Member State and are effective.<sup>35</sup> Following the implementation of this legislative framework, a series of secondary legislation followed in order to establish minimum standards of protection to which Member States ought to follow when dealing with asylum seekers.<sup>36</sup> The CEAS established the Eurodac Regulation<sup>37</sup>, the Temporary Protection Directive, the Dublin Regulation<sup>38</sup>, the Qualification Directive<sup>39</sup> and all the key legislation that deals with the arrival of asylum seekers in Europe.

The Temporary Protection Directive is an EU-wide mechanism and falls within the scope of CEAS, this means that it aims to reduce the differences between Member States' own temporary protection policies.<sup>40</sup> However, the Directive has never been activated so far despite being introduced to assist with cases of mass influx that are considered emergency.

## Concluding remarks

Chapter One of this article aims to provide an overview to the reader in regard to the main instruments analysed in this piece. Section One analysed the events that took place prior to the birth of the Temporary Protection Directive. This was done in order to provide the reader with the necessary background information about the situation at the time of the birth of the Directive and to allow for a comparison with the current situation.

Section Two explained the Temporary Protection Directive in greater detail. It established its aims and objectives and it differentiated it from the protection that is offered under the 1951 Convention. Section Two also analysed the steps that need to be taken in order for the Directive to be activated.

Section Three of this thesis briefly explained what the CEAS is as the Directive is part of this framework. Section Three aims to demonstrate that since the Temporary Protection Directive is Part of the CEAS then all Member States are under the same obligations as it forms a uniform legislative framework.

## Chapter Two: The challenges the Temporary Protection Directive faces

This Chapter of the article will analyse the main challenges the Temporary Protection Directive faces. This article will examine whether these challenges could justify not activating the Directive when there were large flows of asylum seekers which overwhelmed numerous Member States. This chapter will be divided in three sectors in order to examine the key issues of the directive. Section One will analyse the mass influx clause<sup>41</sup> used in the mechanism to demonstrate not only the ambiguity in the legislation but also the unwillingness of the EU to activate it. Section Two will examine the activation procedure of the mechanism and argue that its complexity and lengthy requirements undermine the purpose of the

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35 European Commission, 'Common European Asylum System', < [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en)> Accessed 6 August 2019.

36 European Asylum Support Office (EASO) (n 27), 15.

37 Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.

38 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1.

39 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

40 European Asylum Support Office (EASO) (n 27), 54.

41 Temporary Protection Directive, Article 2 (A): "temporary protection' means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection".

Directive itself, as an *emergency* mechanism. Section Three will look into the solidarity clause found in the Directive and establish whether it is a good tool or simply a mere clause that is not used by the Member States. Lastly, Section Four will analyse the possibility of the Directive becoming a pull factor which causes Member States to resist its activation in fear of being overburdened with asylum seekers.

## **Section One: Mass influx under the Temporary Protection Directive**

This section will examine the mass influx clause the Directive uses as a key element for its activation. It will be argued that the ambiguity of the mass influx clause leads to the inactivation of the Directive as the definition of a mass influx situation proves to be particularly broad. In addition, this section will demonstrate that the large flows of asylum seekers arriving to the EU post-Arab Spring amounts to mass influx. In order to prove this claim, statistics of the period when the Directive was passed and other mechanisms the EU used to respond to these numbers will be examined.

There are various definitions of mass influx and since the Directive does not give a clear definition it proves to be challenging to assess whether a situation amounts to mass influx. The United Nations High Commissioner for Refugees (UNHCR) defines mass influx as the large-scale arrival of people who are seeking asylum or refuge.<sup>42</sup> UNHCR also states that a mass influx situation includes an increasing rate of arrival which can result to overwhelming the host state's reception condition and impair the ability of the national asylum system to absorb those seeking asylum.<sup>43</sup> A definition for mass influx is not available in the Directive itself however, it can be found in the proposal of the Commission for the Directive in the explanatory text.<sup>44</sup> In the proposal the Commission states that the influx of asylum seekers must come from the same country or geographical area and the gradual arrival of these people must disturb the functioning of Member States' national asylum system making it impossible for the host to absorb the numbers of people seeking refuge.<sup>45</sup> Furthermore the proposal mentions that it is impossible to quantify exactly what numbers amount to mass influx.<sup>46</sup>

The lack of clear definition in the text of the Directive itself could demonstrate motive of intentional creation of ambiguity exactly because the drafters at the time may have wanted to create this mechanism symbolically but not actually implement it in the future. This conclusion can be drawn because, it would be reasonable to assume that a definition would exist in the main text of the Directive especially when it concerns the central criterion for activation. Therefore, it is evident that these definitions are not substantial as to what amounts to mass influx. Both definitions provide some guidance as to how a host state may realise that it is experiencing a mass influx situation by being unable to absorb the asylum seekers but still, there are no numbers to serve as guidance for such situations. As a result, whether a situation amounts to mass influx is up to the Commission to ultimately decide as it plays a central role in the activation process of the Directive.<sup>47</sup>

The European Commission has argued that the broad nature of the mass influx clause in the Directive is a positive aspect of the mechanism as the authors believe that the legislature purposely chose to include such broad definition to ensure flexibility in different types of pressure without being bound by numerical limits.<sup>48</sup> It is further argued that by having this broad definition in the Directive allows for

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42 UNHCR, 'Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations: Advance Summary Findings of the Study Commissioned by UNHCR', 24 Refugee Survey Quarterly (2005), 118–123.

43 Ibid, 118.

44 Commission of the European Communities (2000), 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, Brussels: CEC, 24 May 2000, COM(2000) 303 final 2000/0127 (CNS).

45 Ibid, 14.

46 Ibid.

47 See Chapter 1.

48 H. Beirens, S. Maas, S. Petronella. M. Velden (n 24), 7.

flexibility of the mechanism to respond to various situations of mass influx for example, gradual or sudden arrivals which according to the Commission gives the legislator as large 'action radius'.<sup>49</sup>

The argument made by the Commission is not supported. Contrarily, this piece supports that the vagueness of the Directive does not result to flexibility rather it results to extreme ambiguity and inability of activation. Instead of achieving a large 'action radius' the legislature managed to limit the Directive incredibly as such broad definition means that nothing falls within the scope of mass influx. This is further supported by numbers, in 2015 and 2016 alone, more than one million asylum seekers reached European soil,<sup>50</sup> yet the Directive was not activated nor was there any discussion of the situation as mass influx. In fact, in 2011 Italy requested for the activation of the Directive because it was experiencing large flows of asylum seekers arriving at its shores due to the Arab spring conflict where the national asylum system could no longer absorb the arriving people.<sup>51</sup>

Italy's national asylum system was suffering and the country issued a warning stating that it anticipated more people to arrive demonstrating increasing influx.<sup>52</sup> This falls within the scope of Article 2(A) of the Directive however, the request could not be materialised as there was no consensus in the Council in order to activate the mechanism.<sup>53</sup>

No explanations were given by the Commission or the Council as to why the request was rejected, the only available information on the rejection is a statement made by the former EU Commissioner, Cecilia Malmstrom stating that '*at this point we cannot see a mass influx of migrants to Europe even though some of our Member States are under severe pressure*'.<sup>54</sup> Similarly when the author of this article asked the current EU Commissioner, Dimitris Avraamopoulos, why the EU did not activate the Temporary Protection Directive at any point during the large inflows of asylum seekers post-Arab spring, he stated that the Directive was not in a position to respond to the new needs of the situation from 2015.<sup>55</sup> The response received was unsatisfactory as it once again did not provide any reasoning behind the resistance in activating the Directive.

It is argued that the response of both EU Commissioners as well as the EU in general in not defining the situation especially post-Arab spring uprisings, as mass influx is erroneous. As mentioned in Chapter 1 the Directive was born in order to respond to the flows of asylum seekers from the Balkan states after the Balkan war. At that time Europe considered that the inflows constituted mass influx however, it is important to note that by 1992 the number of asylum seekers from the Balkan war reached 604,812.<sup>56</sup> In 2015, the asylum seekers that managed to reach EU territory exceeded one million<sup>57</sup> and in 2011 when Italy made a request for activation, the asylum seekers in Italy alone reached 500,000.<sup>58</sup> The numbers of asylum seekers attempting to enter the EU since the Arab spring uprisings are comparable, if not exceeding, those of the Balkan War.

Therefore, if the Directive was born to serve as an emergency tool to relieve national asylum systems at a time where asylum seekers reached around 600,000; it is only reasonable to assume that with more than one million asylum seekers in the last five years the situation falls well within the scope of the Directive and can be ultimately defined as mass influx.

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49 Ibid.

50 UNHCR, 'Europe Situation', 6 October 2017 < <https://www.unhcr.org/europe-emergency.html> >, accessed 10 July 2019.

51 M. 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' found in 'Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System' (BRILL 2015), 237.

52 B. Nascimbene & A. Di Pascale, 'The 'Arab Spring' and the Extraordinary Influx of People who Arrived in North Italy from North America', 13 EJML 2011, 341-360, 342.

53 Ibid, 347.

54 C. Malmstrom, 'Debate on Migration Flows', C. Malmstrom – My Blog, 6 Apr. 2011, <[http://ec.europa.eu/archives/commission\\_2010-2014/blogs/malmstrom/debate-on-migration-flows.html](http://ec.europa.eu/archives/commission_2010-2014/blogs/malmstrom/debate-on-migration-flows.html)> accessed 7 July 2019.

55 LSE Podcast, 'Europe's Response to the Challenge of Migration and Security', 23 January 2019, minute 56:43, <<http://www.lse.ac.uk/lse-player?id=4593>> accessed 15 July 2019.

56 M. Morokvasic, 'Yugoslav Refugees, Displaced Persons and the Civil War' 11(4) Refuge (1992), 3-8, 3.

57 UNHCR (n 50).

58 D. Gulns & J. Wessels (n 6), 63.

Technically, and according to the Proposal, gradual arrivals of asylum seekers could amount to a situation of mass influx so long as these arrivals disturb the smooth running of national asylum systems. However, there is another hurdle in the definition of the Directive. It does not mention how many national asylum systems must be disturbed and incapable of functioning to their maximum capacity in order for a situation to amount to mass influx.<sup>59</sup> Therefore, it could be argued that even if one national asylum system is overburdened due to large inflows of asylum seekers, then the Directive can be activated especially considering that the mechanism itself imposes a solidarity mechanism. Arguably, the solidarity clause exists to assist Member States that may be suffering even if there is only one Member State that is overburdened. It would not be reasonable to expect that the requirements for activation of the Directive require all national asylum systems to be overburdened, this would make the solidarity mechanism redundant as no Member State would be able to assist another.

In theory, and in accordance to the argument made above, the Directive should have already been activated as there were numerous occasions where national asylum systems have been overburdened. This became very evident when the Dublin III Regulation<sup>60</sup> became the main regulatory instrument for asylum seekers. Dublin III and its predecessors operate on a hierarchy criteria basis in order to allow for an easier process of determination and allocation of responsibility between Member States regarding asylum seekers.<sup>61</sup> During these Dublin transfers there were numerous cases against bordering Member States such as Italy and Greece for Article 3 of the ECHR violations.<sup>62</sup>

As a result, Article 3(2) of Dublin explicitly mentions the wording '*systemic flaws*' as a key element in prohibiting transfers to Member States whose asylum systems are known to be systemically flawed. However, if all Member States are fulfilling their obligations under EU Treaties regarding the protection of asylum seekers then the express use of the words '*systemic flaws*' to describe Member States asylum procedures should have never been used. However, the explicit use of these words in the Regulation itself demonstrate that the EU recognises that some of its Members are not safe hosts for asylum seekers exactly because their national asylum systems have been overburdened. Evidently, if the EU is admitting through its regulations that there is a possibility of Member States' asylum systems to be systemically flawed due to large inflows of asylum seekers, it is reasonable to claim that such situations amount to mass influx where the Directive should have been activated.

The EU has been acting on the current situation in ways that indicate mass influx despite not activating the Directive using its broad wording to avoid describing the inflows as mass. An example is the Relocation Scheme 2015<sup>63</sup>. Article 4 of the Relocation Scheme involved the relocation of 120,000 asylum seekers from Greece to other EU Member States while Article 10 establishes financial aid for Italy and Greece. Various Member States resisted this decision, in particular Hungary, Poland, Slovakia and the Czech Republic rejected the plan and amongst other things called for stricter border controls to reduce asylum seekers inflow.<sup>64</sup> Nonetheless, with the adoption of this proposal the EU has technically acknowledged and accepted that some of its Member States' asylum systems have been overburdened due to large flows of asylum seekers.<sup>65</sup> The Relocation Scheme can serve as proof that EU Member States have indeed been confronted with a mass influx situation which falls within the Temporary Protection Directive's scope. Yet again, the Directive has not been activated.

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59 M. Ineli-Ciger, 'Time to Activate the Temporary Protection Directive: Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe', 18 EJM (2016) 1-33, 16.

60 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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, [2013] OJ L180/31. (hereinafter Dublin III).

61 Ibid, Article 3.

62 J. Mink, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-Refoulement and the Prohibition of Torture and Other Forms of Ill-Treatment', (2012) 14 EJML 119-149, 121. See also cases of *MSS v Belgium and Greece* (App No 30696/09 (ECtHR, 21 January 2011) and *NS v SSHD and ME v SSHD* (Joined Cases C411/10 and C493/10, N.S. and M.E. (EU:C:2011:865), *Tarakhel v Switzerland* (App No 29217/12 (ECtHR, 4 November 2014), *C.K. and Others v Supreme Court of Republic of Slovenia* (Case C578/16).

63 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, [2015] OJ L248/80.

64 J. Mitchell, 'The Dublin Regulation and Systemic Flaws' (2017) 18 SDILJ 295. 320.

65 Ineli-Ciger (n 59), 17.

The wording of the Directive in defining mass influx has allowed the EU to avoid its activation for over a decade. Its vague nature and the terms used to define mass influx, such as '*large number*,' are not objective and do not have legal standing.<sup>66</sup> As explained throughout this section, Member States have been in situations where their national asylum systems have been overburdened but the Directive was not activated. Both of the responses of the EU Commissioners show their heavy reliance on the ambiguous wording of the Directive. The vague terms make it almost impossible to quantify what can amount to mass influx despite overwhelming evidence, including a comparing of the numbers of asylum seekers during the Balkan war, Article 3 ECHR violations due to Member States' asylum systems being systemically flawed and the Relocation Scheme, which prove that Member States have experienced mass influx of asylum seekers giving the opportunity to the Directive to be activated.

The resistance of the EU to activate this mechanism indicates that there is unwillingness for fair distribution of asylum seekers within Europe. The denial of mass influx and heavy reliance on the ambiguous wording of the Directive is a clear indication that the mechanism could be implemented post-Arab spring uprisings but it ended up being a missed opportunity.

## **Section Two: The activation procedure of the Temporary Protection Directive – Another obstacle**

This section aims to demonstrate that the complexity of the activation process of the Temporary Protection Directive, which was explained in detail in Chapter 1 of this piece, prove to be another obstacle for its implementation and use to respond to the current situation in Europe. It is argued that the activation process of the Directive undermines its very purpose, to respond to emergency situations, as it proves to be lengthy, complex and ambiguous.

Scholars argue that one of the key reasons for they inactivation of the Directive is the complexity and lengthy process that is required for the mechanism to actually be implemented.<sup>67</sup> As explained in Chapter 1, activation of the process can only be instructed by the Commission on its own accords or by receiving a formal request from a Member State. The key issue here is that the Directive does not explicitly mention the scope of the obligations of the Commission once it receives a request from a Member State.

Article 5 of the Directive simply states that the Commission should assess the request and then decide whether to propose it to the Council for consideration. As a result, the activation of the Directive can be subject to political debates every step of the activation process due to the absence of Commission obligations beyond assessing and deciding.<sup>68</sup> This means that the procedure immediately becomes longer with slim chances of achieving the qualified majority vote in the Council.<sup>69</sup>

It is also reasonable to argue that qualified majority vote will unlikely be achieved in regard to the Temporary Protection Directive because Member States who do not belong to the borders of the EU and are not particularly affected by large inflows of asylum seekers have no reason or incentive to activate this mechanism.<sup>70</sup> It is highly likely that these Member States will not vote for the activation of this mechanism and would prefer to continue using the Dublin III Regulation which distributes asylum seekers to the country of first entry should they not meet the other hierarchy criteria.<sup>71</sup> This means that asylum seekers will continue to be in bordering Member States whose asylum systems are suffering and cannot respond to the numbers of people received.

The activation procedure includes a large number of steps to be followed and debates in the Council which make the mechanism a slower tool to respond to the situation that what is currently implemented.

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66 D. Gulns & J. Wessels, (n 6), 62.

67 Ineli-Ciger (n 59), 13.

68 H. Beirens, S. Maas, S. Petronella. M. Velden (n 24), 2.

69 Ibid.

70 Ineli-Ciger (n 51), 235.

71 Ibid.

This means that the purpose of the Directive in distributing responsibility to all Member States during emergency situations is defeated as the process becomes exceptionally lengthy that the response stops being immediate.

### **Section Three: Is the Solidarity Clause a positive aspect of the Directive?**

Section three will examine the solidarity mechanism the Directive includes. It will analyse the positive aspects of this clause but will ultimately demonstrate that it offers nothing to the Directive, as solidarity has been a fundamental principle of the EU as well as the Common European Asylum System (CEAS) but has not been implemented to its full capacity by Member States.

Articles 24 and 25 of the Directive set out the solidarity mechanism of the legislation should it be activated. These provisions include both financial solidarity through the European Refugee Fund<sup>72</sup> as well as physical solidarity through allowing asylum seekers in Member States' asylum system when another Member State is overburdened.<sup>73</sup>

Upon first glance, the solidarity mechanism present in the Directive seems to be a positive aspect which demonstrates the willingness of the EU to assist its Members when they are confronted with a mass influx situation. However, these provisions are voluntary and it is up to the Member States to decide whether they wish to participate in these measures.<sup>74</sup> This allows for some Member States to choose not to participate in the fair sharing of responsibility clause within the Directive, while others who may volunteer will have to potentially sustain more asylum seekers than possible due to their fellow Member States non-participation.<sup>75</sup>

The solidarity mechanism is again ambiguous as it does not provide for any form of guidance to Member States should they decide to participate. There is lack of information on how the distribution of asylum seekers would take place and under what criteria. However, the Council retains full power to introduce measures regarding the solidarity mechanism therefore, whether these measures are successful depends entirely on the Council and thereafter the implementation by Member States.<sup>76</sup>

Arguably, Member States do not need to be bound by the Directive to exercise solidarity amongst them nor should the council take measures to enforce this mechanism. This is because solidarity is found at the core of the Union as well as CEAS therefore, Member States are already bound by solidarity. Article 80 TFEU highlights that the policies of the Union must be governed by solidarity and fair sharing of responsibility including any financial implications. Article 80 TFEU reads:

*"The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."*

Solidarity has been an ongoing problem for the Union as Article 80 itself is unclear. The provision has been described as vague because it lacks clarity for Member States therefore, it leaves questions unanswered; can Member States define solidarity differently from one another? Can Member States demonstrate their fair sharing of responsibility differently or should there be a uniform and collective approach as to what article 80 entails?<sup>77</sup>

Karageorgiou states that Article 80 is to be understood in two different dimensions. Firstly, an interstate dimension which allocates responsibility between Member States and secondly a refugee dimension

<sup>72</sup> Article 24, Temporary Protection Directive.

<sup>73</sup> Ibid, Article 25.

<sup>74</sup> H. Beirens, S. Maas, S. Petronella. M. Velden (n 24), 2.

<sup>75</sup> Ineli-Ciger (n 51), 230.

<sup>76</sup> Ibid, 231.

<sup>77</sup> E. Karageorgiou, 'Solidarity and Sharing in the Common European Asylum System: the Case of Syrian Refugees', [2016] 17(2) EPS 196-214, 199.

which provides protection to individuals in need based on the international and European asylum rules.<sup>78</sup>

However, there is a different perspective relating to the meaning of Article 80 and the extent of the provision. It can be argued that one of the European Union's fundamental objectives was to create a barrier-free market that would facilitate free movement of goods and people, which subsequently enables barrier-free movement. Therefore, if there are no internal borders between Member States, a decision for a third country national or an asylum seeker to enter European territory becomes a shared concern of all Member States.<sup>79</sup>

The CEAS is to be carried out in accordance with the fair sharing of responsibility principle however, it has constantly omitted to take into account the different situations and capacities of all Member States in the asylum process. Instead Member States are bound by the same International and European obligations.<sup>80</sup> As a result, some Member States become overwhelmed with asylum seekers and are not receiving adequate help from other Member States. This leads to aggressive policies by particular Member States in order to manage the large flows of asylum seekers.<sup>81</sup>

Evidently, solidarity and burden sharing have been at the core of the Union before the Directive was born, but it proves challenging for Member States to adhere to these obligations when their national interests are conflicted with those of the Union. As previously explained, it is reasonable to assume that Member States who are not experiencing mass influx of asylum seekers have no incentive to volunteer in allowing third country nationals in their territories other than to demonstrate good faith to fellow Member States. However, good faith is not reliable to ensure that Member States will want to participate in this mechanism. CEAS is bound by solidarity nonetheless but there are still Member States whose asylum systems are not functioning due to the large number of asylum seekers and have even been described as systemically flawed. Therefore, if all Member States were interested in upholding their obligations for solidarity they would but so far they have not, thus, implementing the Directive and invoking the solidarity clauses is unlikely to have any effect.

#### **Section Four: The fear for the Directive becoming a pull factor**

Section Four will establish that the possibility of non-implementation due to fear from Member States for the Directive to become a pull factor is legitimate. However, this section will argue that should the Directive be activated it is unlikely to become a pull factor. Nevertheless, this fear has caused the Union to resort to externalisation of asylum seekers instead of absorption through Member States' national asylum systems. Two externalisation policies will be discussed in this section; the Italy and Libya Memorandum and the EU and Turkey agreement.

These policies will be examined due to their controversial nature as they do not absolutely comply with international principles such as non-refoulement. Italy is a border Member State that has experienced overburdening of its asylum system, while Turkey is a State that has a proximate geographical location to Europe which allowed for the creation of this agreement.<sup>82</sup>

Numerous Member States believe that the activation of the Temporary Protection Directive will create a pull factor for asylum seekers that are trying to enter the EU, and this is one of the main reasons

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78 Ibid.

79 E. Kucuk, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing', [2016] 22(4) ELJ 448-469, 449.

80 L. M. Langford, 'The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unravelling of EU Solidarity' (2013) 26 HHRJ 217-264, 240.

81 Ibid 244.

82 See page 4.

behind the inactivation of the Directive.<sup>83</sup> Pull factors are elements that may attract asylum seekers to different Member States or host countries<sup>84</sup> which can then result to asylum shopping.<sup>85</sup>

However, this fear is not necessarily true nor will it materialise should the Directive be activated. This is because asylum seekers who are fleeing war or violence do not really search for a wealthier host state than their country of origin, instead they are in need of a safe place where they can protect themselves from conflict or persecution.<sup>86</sup> It is not uncommon that victims of violence and armed conflict do not wish for permanent stay in a host country, the wish to return to their country of origin and that is why they usually choose to flee to neighbouring states to their country of origin.<sup>87</sup> This argument is supported by figures as by 2013 over two million Syrian asylum seekers had fled their country but pursued refuge in neighbouring countries such as Lebanon, Iraq, Egypt, Jordan and Turkey.<sup>88</sup>

These figures demonstrate that pull factors should not be a central consideration when the asylum seekers arriving to Europe are escaping armed conflict and violence, something that proves to be an immediate threat to a person's life.<sup>89</sup> Therefore, even if the Directive is activated, figures show that it is unlikely that the numbers of asylum seekers would suddenly increase but even if they theoretically did, the Council holds the power to introduce measures that would control these pull factors.<sup>90</sup> In addition, the Union introduced other mechanisms to assist with the situation such as the Relocation Schemes, which did not prove to become a pull factor for asylum seekers, there was no significant change in numbers and in fact, the quotas were not met, as mentioned above.

Despite these arguments, it is strongly supported that the fear that asylum seekers will arrive to Europe in large numbers and be eligible to temporary protection to other Member States and not only bordering States creates the externalisation policies that the EU has been following to respond to the large inflows. A prime example of these policies is the Italy and Libya Memorandum.

The relationship between Italy and Libya is not novel, these two countries have been cooperating via various agreements and protocols from 2000 to 2009.<sup>91</sup> These agreements were the prime facilitators for various push backs of refugees that took place between Italy and Libya. Although they may not form the legal basis of the push backs, they establish the legal framework which caused the push backs of asylum seekers mainly in 2009.<sup>92</sup>

During the 2009 push backs from Italy to Libya, the Italian government stated that Libya is considered a safe haven for refugees despite not being signatory to the 1951 Refugee Convention. Not only is Libya not part of the Refugee Convention, these push backs took place during Ghaddafi's regime which was notorious for its ill-treatment of refugees, undermining their basic human rights.<sup>93</sup>

Italy could be held accountable for the push backs that took place in 2009. Italy returned asylum seekers to Libya by patrolling international waters and Libyan coasts and subsequently collecting and boarding refugees trying to illegally travel through sea to reach European soil on Italian boats and taking them back to Libya<sup>94</sup>. Evidently these practices were not compliant with the non-refoulement principle. The

83 A. Klug, 'Regional Developments: Europe' in A. Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (oup 2011) 133.

84 Ineli-Ciger (n 51), 233.

85 Asylum shopping is a term used to describe the practice of an asylum seeker applying for protection in different host countries concurrently or attempting to apply for International protection in a particular Member State following her entrance to a different Member State in search for the best reception conditions, procedural standards or recognition rates. See V. Moreno-Lax, 'Dismantling the Dublin System: M.S.S v Belgium and Greece' (2012) 14 EJML 1-2.

86 Ineli-Ciger (n 51), 234.

87 Ibid.

88 UNHCR, 2014 Syrian Regional Response Plan < <http://www.unhcr.org/syriarrp6/docs/syria-rrp6-strategic-overview.pdf#C> > 2004, accessed 3 July 2019.

89 Ineli-Ciger (n 51), 234.

90 Ibid.

91 Protocollo Aggiuntivo Tecnico-Operativo concernente l'aggiuntarsi un articolo al Protocollo firmato a Tripoli il 29/12/2007 tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione clandestina (Tripoli, 4 Feb 2009) (Executive Protocol).

92 M. Giuffrè, 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-Backs to Libya' (2012) 24 IJRL 692, 700-701, 705.

93 Ibid, 700.

94 Ibid, 704.

Italian government tried to claim that its actions at sea were 'search and rescue' operations, in which they had to disembark the refugees to a safe place. Italian authorities argued that this did not place the asylum seekers at threat of being tortured or ill-treated.<sup>95</sup> However, Libya cannot be considered as safe place, since it was proven to be inadequate to respond to large migration flows.<sup>96</sup>

Italy and Libya have signed a new Memorandum of Understanding in 2017.<sup>97</sup> The main objective of the agreement is to minimise refugee entries on Italian soil by rapidly securing Libya's borders to prevent asylum seekers from leaving.<sup>98</sup> An interesting point is that the Memorandum does not mention refugees or asylum seekers, it only mentions clandestine or illegal migrants. Palm argues that this is an attempt to create a rhetoric that connects different legal statuses to a uniform category of people that are denied the right to enter Europe.<sup>99</sup>

This agreement is a clear expression of the EU's desire to shift responsibility to third non-EU states<sup>100</sup> but this approach leads to other irregular routes appearing which could be more dangerous for asylum seekers as well as more profitable to smugglers.<sup>101</sup> This defeats the purpose of the Memorandum as one of its aims is to reduce smugglers. On the other hand, Italy has been receiving vast numbers of asylum seekers due to its geographical position driving the country in a 'desperate' situation where it could not sustain asylum seekers.<sup>102</sup> Italy made appeals for assistance from the rest of the EU as well as a request for the activation of the Directive however, it did not receive help from fellow Member States nor EU bodies, leading Italy into entering agreements of this nature.<sup>103</sup>

The EU's externalisation policy becomes evident in the EU and Turkey agreement<sup>104</sup> as well. In March 2016 the European Union and Turkey entered into an agreement, where it was agreed that all irregular migrants crossing from Turkey to Greece would be returned to Turkey, to halt human smuggling and smuggling networks.<sup>105</sup> This agreement consisted of nine points<sup>106</sup> which can be described as incentives for Turkey to hold refugees out of Europe. In particular, the EU promised visa liberalisation for Turkish citizens and an overall amount of six billion euros to take responsibility of asylum seekers who have entered European territory via Turkey.

The argument that the EU entered into an agreement with Turkey to tackle illegal crossings, is unsubstantial. The truth behind this agreement is that the EU was eager to portray an image of a highly involved and active entity in the large flows of asylum seekers post-Arab spring uprisings.<sup>107</sup>

The political nature of the agreement on Turkey's part is evident from statements the Turkish President Tayyip Erdogan has made throughout the negotiations. He openly threatened the Union stating that he

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95 Ibid, 705-706.

96 Ibid.

97 Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic (2 February 2017).

98 A. Palm, 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?' (Odysseus Blog 2 October 2017) <<http://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>> accessed 3 July 2019.

99 Ibid,2.

100 Ibid, 4.

101 Ibid.

102 L. M. Langford, 'The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unravelling of EU Solidarity' (2013) 26 HHRJ 217-264, 247.

103 Ibid.

104 European Council, 'EU-Turkey Statement', 18 March 2016 MEMO 16/963.

105 Ibid.

106 Ibid.

1. All irregular migrants crossing from Turkey to Greece to return to Turkey;

2. For every Syrian being returned to Turkey another Syrian will be resettled;

3. Turkey will take any necessary steps to prevent routes of irregular migration from Turkey to the EU;

4. Once irregular movements are minimised a voluntary humanitarian organisation admission scheme will be activated;

5. Visa liberalisation roadmap will be accelerated;

6. Speeding up the disbursement of the 3 billion euros to Turkey;

7. The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union;

8. When resources are used in full another 3 billion to be given;

9. EU and Turkey will work to improve humanitarian conditions in Syria.

107 K. M. Greenhill, 'Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis', (2016) 22 ELJ 317, 320.

would send millions of refugees to the EU if Turkey did not receive the promised funds by the Union.<sup>108</sup> Arguably Europe is attempting to create a border between itself and the asylum seekers through third countries. Therefore, in the words of Greenhill, Turkey has become a “waiting room for refugees”.<sup>109</sup> Europe is sending a message of deterrence to refugees via the EU-Turkey Agreement while ignoring fundamental principles of refugee law.

This agreement is only beneficiary to two entities, Turkey and the EU. Asylum seekers, who are projected as the centre of this agreement, are at a clear disadvantage by having their international rights infringed to satisfy international political interests. Both actors used displaced persons as bargaining chips whilst instrumentalising human beings for national State interests.<sup>110</sup> Instead of focusing on its territory and tackle the intrinsic problem of the Union’s asylum system, Europe has chosen to focus on an agreement with a third State whilst border states still receive refugees.<sup>111</sup>

Consequently, due to the fear of the Directive becoming a pull factor and ultimately more asylum seekers arriving to Europe, the EU chose to enter into agreements with unsatisfactory legal standing in order to enhance its externalising policies during the large inflows of asylum seekers. These responses are utterly inadequate as the Union could have activated the Directive and allow it to serve its purpose, assisting in emergency situations, without having to compromise its own Members’ asylum systems.

## Concluding remarks

This Chapter focused on the challenges the Temporary Protection Directive faces that could provide reasoning in its inactivation. In addition, this Chapter examined EU responses to the inflows of asylum seekers to demonstrate an externalisation policy development and resistance to activation of the Directive due to fearing it would become a pull factor. To demonstrate these, this chapter was divided in four sections.

Section One analysed Article 2(a) of the Directive which includes the mass influx clause. It was argued that the broad nature of the Article and the lack of clear definition of what amounts to mass influx has allowed the EU to ignore some of its Member’s requests for activation under the pretence of the situation not amounting to mass influx. However, section one demonstrated that the numbers of asylum seekers in 1992 and 2015 are if not higher at least comparable which amounts to an indication of mass influx. Furthermore, it was demonstrated that recognition of systemically flawed asylum systems in the wording of the Dublin III Regulation as well as the Relocation Scheme amount to an acknowledgment by the Union that there is a mass influx situation.

Section Two examined the complexity of the activation procedure of the Directive. It was argued that the length of the process undermines the purpose of the Directive, which is to provide immediate relief to Member States whose asylum systems are overburdened. This section also contended that a qualified majority vote in the Council will be unlikely achieved as Member States who are not major hosts of asylum seekers have no incentives in voting in favour of the activation of the Directive.

Section Three discussed the solidarity clause found in Article 24 and 25 of the Directive and argued that despite this mechanism appearing as a helpful tool in the Directive, in reality it has no legitimate power. This was argued in the light of solidarity as a whole within the Union. Section three examined Article 80 TFEU and established that solidarity is a key element of the CEAS however, it has not been upheld by Member States as there are a number of states with disturbed national asylum systems such as Italy and Greece, and other States who are enforcing stricter controls on asylum seekers.

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108 ‘Turkish President Threatens to Send Millions of Syrian Refugees to EU’, *The Guardian* (11 February 2016) <[www.theguardian.com/world/2016/feb/12/turkish-president-threatens-to-send-millions-of-syrian-refugees-to-eu](http://www.theguardian.com/world/2016/feb/12/turkish-president-threatens-to-send-millions-of-syrian-refugees-to-eu)> accessed 17 July 2019.

109 Greenhill (n 107), 327.

110 I. M. Borges, ‘The EU-Turkey Agreement: Refugees, Rights and Public Policy’ (2017) 18 *Rutgers Race LR* 121, 139.

111 M. H. Zoetewij, ‘The European Agenda on Migration: Let’s Talk Turkey’, (2016) *JIANL* 142-158, 158.

Section Four stated that the Directive has not been implemented yet due to the fear of it becoming a pull factor. However, it was argued that it is unlikely for this event to materialise because asylum seekers fleeing armed conflict or violence do not tend to seek for wealthier host states as they view their stay as temporary. Moreover, the Council could implement measures to control these pull factors but it became clear that the Union is not interested in activating the Directive as it has shifted its focus on externalising policies with regard to asylum seekers. This was proved through two examples of EU externalisation policies; the Italy and Libya Memorandum and the EU and Turkey Agreement.

### **Chapter 3: Were the asylum seeker flows post-Arab Spring a missed opportunity to use the Temporary Protection Directive?**

Chapter three will analyse whether the asylum seeker flows of 2011 and onwards, following the Arab Spring uprising, were a good opportunity for the European Union to finally activate the Temporary Protection Directive. This Chapter will consist of two sections. Section One will provide an overview of the events that lead to the large flows of asylum seekers due to the Arab Spring uprisings. It will demonstrate that it was appropriate to activate the Directive but instead, Member States focused on their national interests rather than respecting EU and CEAS principles of solidarity and fair sharing. Section Two will aim to establish that the Temporary Protection Directive has now become obsolete as the chances of it being activated are slim and the Union prefers to rely on other mechanisms to respond to the current situation of asylum seeker influx.

#### **Section One: The Arab Spring uprisings and the response of the European Union**

This section will provide a synopsis of the events that took place in 2011 during the Arab Spring uprisings which lead to large numbers of people seeking asylum to arrive to Europe. It is strongly supported that these arrivals were a perfect opportunity for the activation of the Temporary Protection Directive since there were Member States whose national asylum systems were overburdened but once again, it was not activated due to Member States' resistance.

The Arab Spring conflicts started to take place in 2011, which was when the border controls of Southern Member States started collapsing. In 2011 there were many arrivals from Tunisia following the conflicts in the country and the subsequent fall of former President Zine el-Abidine Ben Ali.<sup>112</sup> The numbers of asylum seekers in Europe also increased following the fall of Muammar Gaddafi and his regime in Libya along with the intervention from the North Atlantic Treaty Organisation (NATO) which drove many Libyans out of the country.<sup>113</sup> As a result the number of asylum seekers reaching Europe increased dramatically, specifically in May of 2011, twenty six thousand Tunisians arrived to the Italian island of Lampedusa.<sup>114</sup> As discussed in Chapter Two of this piece, the Italian government urged the European Commission to activate the Directive at the time, something that never happened.

Instead of activating the Temporary Protection Directive to assist Italy whose national asylum system was struggling to cope with the arrivals, the EU chose to strengthen its border controls and surveillance around the Mediterranean.<sup>115</sup> Italy was clearly struggling thus in April 2011 as it signed an agreement with Tunisia which aimed to enhance border controls and to facilitate the return of Tunisian asylum seekers who arrived to Italian territory.<sup>116</sup> The Italian Government then proceeded in issuing temporary

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<sup>112</sup> S. McMahon, 'North African Migration and Europe's Contextual Mediterranean Border in Light of Lampedusa Migrant Crisis of 2011' (European University Institute 2012) 6.

<sup>113</sup> Ibid, 6.

<sup>114</sup> S. Carrera, E. Guild, M. Merlino and J. Parkin, 'A Race against Solidarity: the Schengen Regime and the Franco-Italian Affair' (2011) *ceps Liberty and Security in Europe Working Papers*, 4.

<sup>115</sup> C. Malmström, 'Debate on Migration Flows' (n 54).

<sup>116</sup> B. Nascimbene & A. Di Pascale (n 52), 352.

residence permits for humanitarian reasons for asylum seekers who arrived to Italy before the fifth of April 2011.<sup>117</sup> Evidently, these permits gave their holders the right to move freely within the European Union<sup>118</sup>. Italy found itself being heavily criticised for issuing these permits by fellow Member States such as France, Germany and Austria.<sup>119</sup> In an act of protest, France shut its borders to Tunisian asylum seekers arriving from Italy on the seventeenth of April 2011.<sup>120</sup> Moreover, Belgium introduced additional entry requirements and even asked people who were holders of Italian residence permits to show evidence of having at least ten thousand euros in their possession, per couple, in order to enter Belgian territory.<sup>121</sup>

The Italian example demonstrates clearly that Member States were not willing to open their borders to asylum seekers, quite the contrary. This further strengthens the argument made in Chapter 2, Section Three, that there is lack of solidarity and trust between Member States. Had there been trust between Member States in regard to each other's asylum systems, France for example, would not have felt the urge to shut its borders to asylum seekers arriving from a fellow Member State who were also residence permit holders. It could also be argued that it is the lack of fair sharing of responsibility and inactivation of the Directive that lead the Italian authorities to issue such permits which allowed for free movement, perhaps to force other Member States to take part in burden sharing.<sup>122</sup> It is therefore, evident that Member States do not adhere to their obligations under fundamental Union Law as well as their obligations according to CEAS because they do not seem to be respecting the principle of solidarity. Therefore, it could be argued that as long as the activation of Temporary Protection Directive does not serve the national interests of Member States it will not be activated.<sup>123</sup>

There is absolute lack of solidarity within the Union especially when it comes to burden sharing as there is no effective mechanism in place to promote fair sharing effectively.<sup>124</sup> It is questionable why such mechanism was added in the Temporary Protection Directive in the first place, since its activation process is lengthy and complicated and no Member State adheres to its obligation of solidarity. It could be concluded that the inclusion of such mechanism is perhaps just symbolic. Therefore, the chance of activation of the Directive is particularly small.

The Arab Spring uprisings, met all the criteria for the activation of the Directive, however, it was not activated because of national interests. These events were much more severe than those of the Balkan War in the 1990s based on numbers, thus the EU had an excellent opportunity to activate this mechanism and assist its Southern Member States but it simply did not, and used other possible solutions to the asylum seeker flows. As a result, one questions is 'if the Temporary Protection Directive has not been activated during the Arab Spring uprisings will it ever be activated?' This question is answered in the negative. It is clear that the European Union wishes to use other instruments to deal with this mass influx situation thus, should there be a similar situation in the future it is highly unlikely that the Temporary Protection Directive will be used.

## **Section Two: The Temporary Protection Directive is now obsolete**

This section will establish that the Temporary Protection Directive has become obsolete because the European Union chose to deal with the large asylum seeker flows through other mechanisms, something that demonstrates clear resistance to the activation of the Directive.

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117 S. McMahon (n 112).

118 B. Nascimbene & A. Di Pascale (n 52), 353.

119 S. Carrera, E. Guild, M. Merlino and J. Parkin (n 114), 11.

120 Ibid.

121 J. Dacey, 'Tunisian Talks Held amid Growing Refugee Crisis' Swissinfo (20 April 2011)

<<http://www.swissinfo.ch/eng/tunisian-talks-held-amid-growing-refugee-crisis/30048800>> accessed 8 August 2019.

122 M. Ineli-Ciger (n 51), 241.

123 Ibid.

124 Ibid, 242.

As established in Chapter Two of this article, the European Union created other emergency responses to the asylum seeker flows instead of activating the Temporary Protection Directive. These responses included the Relocation Scheme and the EU and Turkey agreement. However, the Union responded to the asylum seeker flows through more permanent actions which included the creation of the European Asylum Support Office.<sup>125</sup> EASO was established in 2011 in order to harmonise as well as support common action while helping the asylum and reception systems of Member States which find themselves under particular pressure due to the extremely heavy and urgent demands their national asylum systems may face during emergency times.<sup>126</sup> The creation of this Office demonstrates that the European Union does not want to necessarily activate an emergency mechanism such as the Temporary Protection Directive. Arguably it seems to wish for the creation of more permanent measures which will assist in relieving the pressure off certain Member States, whilst perhaps avoiding the distribution of asylum seekers throughout its territory.

It is evident that the Union continuously dismisses the Directive and does not want to use it. When asked why the Temporary Protection Directive has never been activated, the European Council simply argued that it did not activate this mechanism because the Commission had not submitted a proposal before the Council.<sup>127</sup> The Council also cited the Relocation Scheme to answer about the non-implementation of the Directive in an attempt to demonstrate that European bodies are helping Member States which are in need.<sup>128</sup> However, this is not enough as the avoidance to answer clearly as to why the Directive has not been implemented when it was very fitting for the current situation demonstrates the exact unwillingness of the Union to promote a uniform and fair mechanism to distribute asylum seekers. The Council also noted that the current situation is being dealt under the Dublin III Regulation which demonstrated its inadequacy and is in need of reform.<sup>129</sup>

As mentioned in Chapter 2, Dublin III was not implemented to be an emergency mechanism however, it has become one and this is why the Union is now dealing with systemic flaws within its Member States' national asylum systems.

Moreover, the European Commissioner, Dimitris Avraamopoulos, explicitly stated that the Union does not believe that the Temporary Protection Directive is an appropriate measure to respond to the current situation. Instead, he stated that the only regulatory measure which would be sufficient to deal with the large asylum seeker flows would be the reformed Dublin Regulation, Dublin IV<sup>130</sup>.<sup>131</sup> Therefore, if the European Commissioner explicitly states that the Temporary Protection Mechanism will not be activated for the current situation because of the already implemented Dublin III Regulation and its anticipated reforms through Dublin IV, is a clear indication that the chances of activation are particularly slim. This further strengthens the notion that Union wishes to keep the mechanisms that it has already implemented to respond to the migrant flows whilst continuing its externalisation policies.<sup>132</sup>

It is of key importance to establish the competence of the Dublin Regulation and the reforms it will undergo to emerge as the new Dublin IV Regulation. This is to demonstrate that there are no significant differences between the Dublin IV Regulation and its predecessors therefore, it could be argued that even with the reforms this Regulation will continue to be an inadequate response to the current situation.

The Dublin III Regulation has been strongly criticised for imposing disproportionate burden on Member States that are located on the external frontiers of the European Union.<sup>133</sup> This argument is supported

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<sup>125</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11, 29 May 2010 (thereinafter EASO). <sup>[125]</sup> <sup>[126]</sup>

<sup>126</sup> Ibid.

<sup>127</sup> Council of the European Union, Reply to Parliamentary Questions, 15326/15 (15 December 2015) <<https://data.consilium.europa.eu/doc/document/ST-15326-2015-INIT/en/pdf>> Accessed 8 August 2019.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Proposal for a Regulation of the European Parliament and of the Council 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) 270 (thereinafter Dublin IV).

<sup>131</sup> LSE Podcast (n 55), minute 57:13.

<sup>132</sup> See Chapter 2.

<sup>133</sup> See Chapter 2.

by the strong adherence of the Union to Dublin and its hierarchy criteria and its constant rejection of temporary protection. It is not unreasonable to argue that non-border Member States reject the possibility of activation of the Temporary Protection Directive because it is substantially easier to use the Dublin III exceptions route under Article 3(2) to relocate an asylum seeker to non-border Member States. Due to Member States resistance of fair distribution of asylum seekers, small-scale relocations within Dublin III are more achievable.<sup>134</sup> Consequently, it proves to be more difficult to mobilise the entirety of the Union into hosting asylum seekers equally therefore, the frontline Member States continue to bear most of the responsibility.<sup>135</sup> The message sent is that the EU is unwilling to create a large-scale, fair system of distributing asylum seekers to each Member State. In the event of failure the Union will have to accept responsibility. Contrary, adhering to the Dublin III rules blindly and constantly highlight that border Member States responsible for the vast majority of asylum seekers need help, proves to be a gateway for EU institutions to shift the blame for the failure of the system on someone else.<sup>136</sup> It could not be any clearer that the Union is not willing to view Dublin III and its flaws as a genuine problem with solidarity in the entirety of the EU. The questions remain whether Dublin IV can respond to the current situation adequately or will it simply bear the same inadequacies as Dublin III.

Essentially, the Dublin IV Regulation will continue to bear the evidently problematic hierarchy criteria for the determination of the Member State responsible for the examination of the asylum application however, a corrective allocation mechanism will be introduced through this new Regulation.<sup>137</sup> The new reforms include an automated system which will monitor the number of asylum application received and the number of persons that were resettled in different Member States, a reference key in order to determine when a Member State's national asylum system is under disproportionate pressure and can no longer function to its full capacity and lastly the fairness mechanism which will work to address and distribute responsibility to relieve the pressure from certain Member States in need.<sup>138</sup> With regard to the fairness mechanism it is proposed that it will be activated when Member States are faced with a disproportionate number of asylum application, if this number exceeds one hundred fifty percent of the reference share, then this mechanism will be activated automatically.<sup>139</sup>

Following the activation of this mechanism, all asylum seekers whose applications were made after the triggering of the mechanism will be distributed and allocated across other EU Member States.<sup>140</sup> The reform also considers the possibility where a Member State does not accept the asylum seekers allocated to it after the activation of the mechanism, and it states that should this occur then that Member State will make a two hundred and fifty thousand euros '*solidarity contribution*' per applicant.<sup>141</sup>

While these reforms may seem promising, the proposal has received criticism criticisms for merely attempting to protect Member States from financial responsibility due to the absorption of refugees.<sup>142</sup> It is argued that this new system will further deepen inequality between Member States whilst continuing to undermine the fair sharing of responsibility principle.<sup>143</sup> Furthermore, the Dublin IV proposal is focused on the improvement of the Member States' capacity systems which would help improve the determination of Member State responsibility for application examination.<sup>144</sup> Therefore, the reforms are not focused on the protection of the individual nor are they particularly humanitarian in nature, instead, they focus on improving the position of the Member States.

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<sup>134</sup> N. B. Selanec, "A Critique of the EU Refugee Crisis Management: On Law, Policy and Decentralisation", [2015] 11 CYELP 73-114, 106.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> European Parliament, 'Briefing – EU Legislation in Progress: Reform of the Dublin System', (1 March 2019), 4.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid, 5.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> S. C. Young, Dublin IV and EXCOM: 'Aspirational Blunders and Illusive Solidarity' (2017) 19 EJML 370-395, 373.

<sup>143</sup> Ibid.

<sup>144</sup> M. L. Radovic and B. Cuckovic, 'Dublin IV Regulation, The Solidarity Principle and Protection of Human Rights – Step(S) Forward or Backward?', EU and Comparative Law Issues and Challenges Series Issue 2, (2018) 10-30, 14.

Despite the criticisms for the Dublin IV Regulation, it is still a supported mechanism to deal with the current situation in Europe, as affirmed by the European Commissioner. Therefore, the Temporary Protection Directive will highly unlikely be implemented, it has most likely become obsolete. This is because many of the positive elements that are contained in the Temporary Protection Directive are also reflected in the newer instruments of the Union, which makes it difficult for the Directive to be activated if there are similar mechanisms already implemented.<sup>145</sup> These mechanisms may not have proven to be successful, such as Dublin III, but nonetheless the Commission evidently, prefers using mechanisms that are already implemented and activated within the CEAS.

In addition, it would be easier for the Commission to attempt to tackle the current situation by revisiting an older mechanism which has been implemented for years and has obvious problems, and attempt to reform it.<sup>146</sup> In doing so, the Commission as well as EU Member States will not spend additional political capital in an attempt to activate or amend the Temporary Protection Directive, a mechanism which has never been activated and does not provide for certain results.<sup>147</sup>

## Concluding remarks

This Chapter analysed the reasons behind the Temporary Protection Directive becoming obsolete. However, it argued that if there was an appropriate time to activate it, the Arab Spring uprising asylum seeker flows in Europe were a particularly fitting opportunity that was missed. Furthermore, this Chapter argued that since the Directive was not activated during such events as the post-Arab Spring uprising migrant flows, the possibility of it being activated is extremely slim. This Directive will not be activated because the Union suffers from lack of solidarity between Member States, as a result, if a measure does not serve national interests of Member States then it is unlikely to be adopted even if it would help relieve the pressure from a fellow Member State.

Lastly, Section Two of this Chapter demonstrated that the Temporary Protection Directive has become obsolete and will unlikely be implemented through providing examples of the European Union wanting to continue using its current mechanisms. The Union does not want to venture into an uncertain mechanism and prefers to tackle the situation through its already implemented regulations that deal with asylum seeker flows. These being Dublin III and soon to be Dublin IV and the EASO. There also seems to be lack of acknowledgment and responsibility as to why the Directive was not activated, as the Council seems to suggest that the only reason for the non-activation was because the Commission never brought a proposal.

## Conclusion

This article aimed to establish that the Temporary Protection Directive could have been used in these times where Europe is facing a tremendous challenge with the amount of asylum seekers reaching its territory. However, there is constant resistance from non-bordering Member States when it comes to the activation of this mechanism. Instead, Europe has resorted to externalisation policies such as the EU and Turkey Agreements or assisted in the collapse of its own Member States' asylum systems as it failed to provide the necessary help under the solidarity clauses found in CEAS, TFEU and in the Directive itself.

Chapter One provided the reader with context as to how the Temporary Protection Directive was born. It discussed the Balkan War and explained that Europe created this Directive to respond to the flows

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<sup>145</sup> H. Beirens, S. Maas, S. Petronella. M. Velden (n 24), 11.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

from the Balkan States. Furthermore, it examined the scope and application of the Directive and analysed its implementation procedure along with giving a brief overview of what the CEAS is.

Chapter Two examined the challenges the Directive faces and argues that its wording is ambiguous perhaps intentionally to avoid implementation. Its implementation procedure is also quite lengthy and complex which defeats its purpose of providing emergency relief to asylum seekers and other Member States. Lastly, the argument that activation of the Directive could become a pull factor is not supported. There is evidence that demonstrates that the intention of asylum seekers is not permanent resettlement.

Chapter Three analysed the 2011 asylum seeker flows and past Arab-Spring uprisings to demonstrate that it was a situation that was exceptionally fitting for the Directive to be activated. However, it became evident throughout this article that the European Union did not want to activate this Directive and wanted to use other mechanisms to deal with the situation such as the Dublin Regulation. As a result, the Directive is now obsolete, it is highly unlikely that it will ever be activated.

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