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*The (new) Commission's approach
on temporary protection and migration crisis*

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Key words

Migration - Temporary protection - International protection - Crisis – Emergency

5

Abstract

Although overlooked in the academic debate around the New Pact on Migration and Asylum so far, an important element of the “package” is the European Commission’s proposal for a regulation addressing situations of crisis and force majeure in the field of migration and asylum (COM(2020)613), repealing Directive 2001/55/EC. This contribution aims at showing its main pitfalls, the enclosed risks for the safety and integrity of displaced persons in case of mass influx onto the territory of the Member States, and reflects on the use of the content of subsidiary protection as a temporary instrument of emergency as well as on the precariousness that may be misleadingly associated with such status of international protection.

1. Untangling the concept of international and temporary protection in EU law

In the EU context, in order to give the widest effect to the principle of *non-refoulement*, whose scope is broader than Art. 33 of the 1951 Geneva Convention on the Status of Refugee, Art. 2(a) of Directive 2011/95/EU (Qualification Directive) includes in the definition of international protection both the refugee and the subsidiary protection status. Temporary protection has at its core the principle of *non-refoulement*, but it does not amount to a third status of international protection. It rather represents an exceptional, temporarily limited, emergency instrument that can be triggered when a Member State cannot ensure the individual assessment of international protection applications, for instance in the event of a mass influx of third-country nationals that makes its asylum or reception system non-functional, but has still to comply with international obligations. This commitment is now transposed in Art. 78.2(c) TFEU.

The categories falling under the scope of application of Art. 2(c) of the 2001/55/EC Directive (Temporary Protection Directive, TPD) are broader than the ones under international protection, as the former covers also people displaced owing to, *in particular*, armed conflicts, endemic violence, systemic or generalized violations of human rights. The presence of the term “*in particular*” makes the list of Art. 2(c) non-exhaustive, and therefore makes it possible to further extend the causes of mass influxes, as also confirmed under Art. 7 TPD.

2. Derogating in situations of crisis and force majeure

In the context of the New Pact on Migration and Asylum, the Commission advanced a Proposal for a Migration and Asylum Crisis Regulation, which includes the repealing of the 2001/55/EC Directive. The need for such an instrument substantiates in major recent events, such as the overcrowded camps in the Greek islands and the unbearable conditions of the Moria reception centre, the mass influx of people merged into the Greek border following the increasing political crisis between Greece and Turkey, and the massive disruption occurred during the still ongoing COVID-19 pandemic. All these events confirmed the already manifest shortcomings of the Common European Asylum System.

In this perspective, the Commission sets out an instrument for exceptional emergencies that would allow Member States: i) to extend the duration of the border procedure by additional eight weeks for examination (proposed Art. 8.1(b) COM(2020)613) and by twelve weeks for registration; ii) to broaden the scope for relocation and return sponsorship as well as to adopt simplified procedures and shortened timeframes for triggering the compulsory solidarity mechanism, as provided for in the proposed Regulation on Asylum and Migration Management; and iii) to derogate from the 2016 proposed Asylum Procedures Regulation and the 2018 proposed recast Return Directive, in order to extend by additional eight weeks the maximum duration of the border procedure for carrying out return in situation of

pressure.

According to the proposal, upon the request of one or several Member States, the Commission authorises, by means of an implementing decision, the application of derogatory rules, for a period to be determined by the decision itself. However, the proposal fails to mention the criteria on which a situation of crisis or of *force majeure* can be invoked, as well as of the proportionality and effectiveness of the resulting measures.

2.1 State-centric predominant narrative

As mentioned, the Commission envisages two situations of emergency, which might impair the adequate functioning of the asylum and migration system either at national or at EU level: i) a situation of migration crisis, and ii) a situation of *force majeure*.

A first remark concerns the Commission's choice of the term "*force majeure*" in the context of migration and asylum. As pointed out by [Lombardi](#), «the principle [of *force majeure*] in EU law has been subjected to unique political and practical forces», and it is widely used in trade, agricultural, and contract law to indicate the impossibility for the party invoking the occurrence of a *force majeure* event to comply with an obligation it should have performed. The Commission has, for instance, recently released a definition of the clause of the *force majeure* in relation to [Horizon2020](#) grant agreements invokable in light of COVID-19, described as «an extraordinary and unforeseeable event or situation that is beyond the beneficiaries control and that prevents them from fulfilling their obligations under the action.»

Conversely, there are no previous communications where the Commission uses that concept in the context of migration and asylum law. With regard to the concept of *force majeure* applied to the case, the Commission only provides two examples that, in its opinion, could have amounted to *force majeure* events, i.e. the COVID-19 pandemic and the political crisis at the Greek-Turkish border in March 2020. [Carrera](#), in reflecting on this Proposal, rightly wondered what a “political crisis” could actually mean.

Moreover, the proposed Chapter 4 (time-limits in a situation of *force majeure*, Artt. 7-9 COM(2020) 613) establishes that, where a Member State is facing a situation of *force majeure*, a Member State shall simply notify to the Commission of its impossibility to comply with its commitments. Additionally, where a Member State no longer faces a situation of *force majeure*, it shall likewise notify the Commission of such termination. In the absence of both a clear definition and a scrutiny on the proportionality and effectiveness of the resulting measures, these provisions potentially leave total discretion to Member States in derogating from the ordinary rules.

In addition, at least other two main pitfalls can be identified. Firstly, the Commission (proposed Art. 10 COM(2020) 613) seems not to consider the insulation of a situation of *force*

majeure as possible consequence of a mass migration influx. This is confirmed by the fact that the granting of immediate protection to displaced persons, potentially issued in situations of crisis, is not foreseen in situations of *force majeure*. It seems, therefore, that the Commission focuses more on the causes of potential pressure on Member States' migration and asylum system rather than on their common consequences. Secondly, such *prima-facie* protection is to be granted under the exclusive scrutiny of the Commission, leaving no possibility for Member States to activate the procedure to give immediate protection. Whereas Member States are allowed to derogate ordinary measures *to the damage of* asylum seekers and migrants with minimum (if none) supervision by the Commission, they are even unable to request to the Commission the adoption of exceptional protection measures *to the benefit of* people in need.

As far as the other emergency scenario is concerned, namely a situation of crisis, the definition advanced by the Commission covers exceptional situations of mass influx of third-country nationals or stateless persons arriving by land or by *sea*, when its scale and nature may render the asylum and return system of a Member State non-functional. The starting point of the Commission's proposed management of a situation of crisis thus appears to be redundant to Directive 2001/55/EC that the Commission itself aims to repeal.

Nonetheless, while TPD's approach balances the need for assistance and protection of displaced people with States' reception capacity, the proposal largely focuses on Member States' possibility to derogate from other provisions, assuming a State-centric approach. Emphatically, the proposal dedicates only one Article out of fifteen (proposed Art. 10 COM(2020) 613) to the protection of displaced people. Unlike Art. 2(c) TPD, proposed Art. 10 no more considers the systematic or generalized violation of human rights and does not envisage a possible extension of its scope of application. The Commission suggests to considerably uphold the rights and the protection status of such categories of displaced persons by suspending the examination of asylum applications for up to a year, in the meantime issuing immediate protection, which ensures <<effective access to all the rights [...] applicable and equivalent to those enjoyed by beneficiaries of subsidiary protection>> (preambular paragraph 25 and Art. 10.2 COM(2020) 613) according to the 2016 Commission's Proposal for a [Qualification Regulation \(QR\)](#).

3. Comparative analysis of activation procedures and rights under situations of crisis

The already leading position of the Commission in proposing the activation of temporary protection, as noted in the [2016 Study on TPD](#), is further enhanced under the proposal which, as underlined by [Meltem Ineli-Ciger](#), provides the Commission with the <<authority to decide when immediate protection would be granted, who will receive the status and for how long.>>. What is more, <<on duly justified imperative grounds of emergency>> (proposed Art.11.2 COM(2020) 613), which are likely to manifest in a situation of crisis, the

Commission's implementing act shall apply immediately, without its prior submission to the assisting committee (Art. 8.2 Regulation EU No. 182/2011). In brief, the monopoly of the Commission might maintain the activation process of immediate protection highly politicized, although lightened of the wide discretion of the Council.

As regards the rights granted under temporary and immediate protection, both of them ensure protection from *refoulement*, right to be issued a residence permit, access to employment and accommodation, rights related to unaccompanied minors, social benefits and emergency health care, education for minors, right to family reunification, and assistance in repatriation. Furthermore, proposed QR broadens respectively the right to information on the rights and obligations relating to their status, the right to family unit, and to education. Additionally, it provides for freedom of movement within the Member State, access to procedures for recognition of qualifications and validation of skills, and to integration measures.

As for the duration of the status, under Art. 4, para. 1 and 2 TPD, temporary protection may be issued for one year and extended for a maximum of other two years. Conversely, proposed QR provides for a more stable residence permit of one year, renewable for periods of two years each (proposed Art. 26.1(b) QR). However, the implementing act by which the Commission authorises immediate protection shall remain into force for maximum one year (proposed Art. 11.3 COM(2020) 613). Arguably, under the Commission's proposal, people displaced onto the territory of a Member State would have access to a *wider* set of rights but for a *shorter* timeframe, namely for one year. The proposal fails in providing further information in the unfortunate case where the situation of crisis lasts longer, which is highly probable in case of armed conflicts, and does not link the duration of immediate protection with that of subsidiary protection (proposed Art. 26.1(b) QR).

Although silent on that point, the proposal affirms that after one year, Member States shall resume the assessment of the suspended applications. In this case, immediate protection beneficiaries would revert to asylum seekers. Most importantly, this regression in status risks to exacerbate displaced persons' precariousness and vulnerability, constraining their rights. Among others, whereas immediate protection beneficiaries would have the right to travel documents (proposed Art. 27 QR), asylum seekers may only receive them in case of serious humanitarian reasons (Art. 6.5 Directive 2013/33/EU). Given the condition of uncertainty of their status following the termination of immediate protection, it is also likely to presume that Member States might be reluctant to grant them access to employment, integration, and skills recognition measures from the beginning.

Another key concern regards the use of the rights and services enshrined by the subsidiary protection as temporary and emergency instrument. The ultimate goal of international protection must be that to achieve a satisfactory and durable solution for the beneficiaries, which includes not only the full respect of their human and fundamental rights, but also the promotion of a concrete integration path, where safe return is not possible. Providing rights

and services equivalent to thereof subsidiary protection [hastily](#) and without a case-by-case assessment may lead to considering it as a precarious status with feeble guarantees of stability.

4. Concluding remarks

In COM(2020) 613, the Commission affirms that «the [Working Staff Document](#) concluded that Directive 2001/55/EC no longer responds to Member States' current reality and needs to be repealed». Conversely, the 2016 Study on TPD did not come to the same conclusion. It acknowledged the continued relevance of temporary protection and highlighted the main aspects to be revised to make it stronger, more transparent, and effective. It is undeniable that activating TDP involves a lengthy and cumbersome process, that the burden-sharing scheme needs to be upheld, and that key definitions such as "mass influx" suffer from vagueness in terms and purposes. The structural character of migration flows, the ongoing conflicts in EU neighbouring countries, and the proposal of the Commission itself, show that EU Member States are, however, in a self-evident need of an instrument dealing with exceptional and sudden events. However, the balanced approach emerging from the 2001/55/EC Directive appears in deep contrast with the State-centric approach of the new proposal.

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