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EDITORIAL

A Rarity in Action: Temporary Protection in the EU – Here to Stay?

Goran Sandic, LL.M.

Junior Research Assistant, University of Belgrade – Faculty of Political Science

Janja Simentic Popovic, PhD

Assistant Professor, University of Belgrade – Faculty of Political Science

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Abstract

The Temporary Protection Directive (TPD) within the European Union (EU) was activated for the first time in 2022, responding to the mass displacement caused by the Russian invasion of Ukraine. This activation marked a significant moment for the EU's migration management framework, bringing a long-dormant mechanism into action. The TPD was designed to provide immediate, temporary protection to those fleeing crisis situations, offering displaced Ukrainians a broad array of rights, including movement, employment, and access to essential services. However, as the temporary protection period nears its end, the EU must explore exit strategies that transition beneficiaries to stable legal statuses if return is not possible, whether through extending protection, integrating them into existing asylum frameworks, or developing new legal pathways.

1. Introduction

The concept of temporary protection within the European Union (EU) gained significant attention in 2022. A once-overlooked mechanism now had to prove its worth in a newly emerged crisis. The armed conflict between Russia and Ukraine has [displaced nearly 10 million people](#), forcing over 6 million of them to seek refuge across various regions, notably within the EU. Even though some [other crisis perhaps demanded its activation earlier](#), for the first time in its history the EU activated the temporary protection mechanism in 2022. This move underscores the necessity and complexity of migration management amidst humanitarian crises.

Temporary protection is not a well-established part of international law but rather a [political instrument](#) developed to cope with specific situations of mass influx. It offers a practical framework designed to handle large-scale movements of people, typically in response to sudden crises that would overwhelm standard refugee determination procedures.

This blog post explores the activation and implications of the [EU's Temporary Protection Directive \(TPD\)](#) for Ukrainian persons fleeing Ukraine. We delve into the first ever activation of TPD with the nuances of its implementation, highlighting its role as both a humanitarian aid tool and a migration management strategy, and explore the possible exit strategies once the current temporary protection scheme elapses.

2. A Rarity in Action: TPD Activated

The Russian invasion of Ukraine marked the first activation of the TPD in its 21-year existence. On March 4, 2022, the EU introduced temporary protection for persons displaced from Ukraine due to the Russian invasion. This [decision](#), adopted unanimously by the Council, highlighted the extraordinary and exceptional nature of the situation, with migratory pressures on EU borders escalating rapidly. Nevertheless, this 'historic agreement' had a cost, particularly when considering how key obligations outlined in the Commission's proposal were watered down (see [D. VITIELLO](#)).

The TPD defines temporary protection as a procedure of exceptional character, providing immediate and temporary protection in the event of mass influx. The broad definition of mass influx grants the Commission and the Council significant discretionary powers, with no minimum number or speed of arrival required for activation.

In practice, the temporary protection mechanism has provided a range of rights to displaced persons, including residence permits, the right to work, access to suitable accommodation,

social welfare, medical assistance, and education for children. Member States have implemented these measures through various means, ensuring that the needs of displaced persons are met promptly and effectively.

The implementation of the TPD by Member States has involved several key actions: information provision, registration procedures, documentation, and access to rights. These measures have [varied across countries](#), reflecting the diverse approaches to managing the influx of displaced persons.

[Information provision](#) has been facilitated through dedicated leaflets, websites, email, and phone lines, with some countries using social media platforms like Telegram and Facebook. [Registration procedures](#) have differed, with some Member States using a single authority and others involving multiple authorities. [Documentation](#) has ranged from paper-based documents to biometric cards and digital certificates, with significant variation in issuance times.

[Access to rights](#) has depended on presenting relevant documents, with several Member States offering counseling services, online tools, and dedicated platforms for job opportunities. Member States also retain the right to exclude certain persons from temporary protection based on serious reasons, such as committing crimes against peace or posing a danger to the security or community of the host country.

3. Pioneering the TPD Exit Strategy

As the temporary protection period nears its end, the question of the future legal status of TP beneficiaries looms large. By March 2025, the [maximum extended period](#) for temporary protection, individuals under this status will face legal uncertainty unless a sustainable solution is found.

The TPD outlines transitional arrangements for TP beneficiaries, including voluntary return, enforced return, or transfer into the asylum determination procedure. However, these options are hardly achievable. Streaming all TP beneficiaries into the asylum system would overburden national systems, while enforced return might be politically controversial or legally hindered if the situation in Ukraine remains unstable. Voluntary return depends on the post-conflict scenario in Ukraine, with many displaced persons likely wishing to remain in the EU for personal or safety reasons.

Given these complexities, there is a pressing need for a novel, durable solution for the legal status of TP beneficiaries. There is a possibility to establish a nationally rooted [approach](#). However, a more desired approach is the EU based one. The options include extending

temporary protection, transitioning persons into other legal statuses based on the current normative framework, or introducing new normative solutions.

Extending Temporary Protection

One option is extending temporary protection, as mentioned in a [report by EU's Special Adviser on Ukraine](#), Lodewijk Asscher. While this extension would preserve the same rights and benefits for TP beneficiaries, it is highly unlikely to happen in practice. In order to extend temporary protection, the EU would need to change the TPD in the prescribed (complex) legislative procedure. What is even more important is that such a legislative change would actually abandon the logic of TPD: the main characteristic of temporary protection is its temporary nature and further extension of temporary protection would make it – not temporary. *Travaux préparatoires* testify to that, as [certain MS advocated](#) for even shorter temporary protection duration.

Using the Current Normative Framework

Another approach involves using the current normative framework, particularly the Common European Asylum System (CEAS). TP beneficiaries could be streamed into the asylum procedure, which could be a logical move given that TP beneficiaries were considered to be *prima facie* refugees. Nevertheless, this would not be easy today for several reasons.

Firstly, if a person who is a TP beneficiary decides to lodge an asylum application, that would require a decision which MS is responsible for the examination of the asylum application (art. 18 TPD) with the accompanying Dublin criteria. There are still uncertainties in practice about the determination of the responsible MS, which can possibly deter a TP beneficiary from entering the asylum system.

Secondly, if a TP beneficiary lodges the asylum application, they might lose the TP status and be encompassed under the asylum applicant regime (art. 19(1) TPD). This would be unappealing since TP beneficiaries have a higher level of rights than asylum seekers. At the date of writing this blog, that would happen in Slovakia, Romania and Spain.

Finally, in certain MS it is not even possible for TP beneficiaries to apply for asylum while the current TP scheme is in force. Sweden, Finland, Italy and Belgium have suspended asylum determination for TP beneficiaries until the end of their TP.

Third Country Nationals' Status in the Immigration Normative Framework

Even though the TPD was adopted outside the immigration framework, TP beneficiaries come close to or even surpass the treatment afforded to third country nationals (TCN). For instance, unlike asylum seekers, TP beneficiaries are granted immediate access to the labor market (art. 12 TPD). Additionally, unlike asylum seekers and other third-country nationals, they have the right to free movement since the MS decided not to apply art. 11 TPD. Therefore, due to the fact that art. 11 TPD is not being applied and the visa waiver for Ukrainians, TP beneficiaries are the only third-country nationals who enjoy secondary movement rights within the EU. Nevertheless, aligning the TP with TCN status would require significant legislative amendments.

Introducing New Normative Solutions

A novel solution, such as a Reconstruction Permit valid for up to ten years, has been proposed (see [Asscher](#)). This solution is presented very briefly, making it difficult to evaluate. It appears to be somewhat connected with the proposal for the TPD extension. It would also require substantial political consensus and adjustments to the normative framework, but it could provide a sustainable and durable status for TP beneficiaries. Other options include a specifically designed permit for subgroups meeting certain criteria, special transitional permits, or even a modified status of free movement akin to that enjoyed by EU citizens.

4. Here to Stay?

It seems easy to forget that the European Commission wanted to ‘cancel’ the TPD not too long ago. The EC presented its [Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum](#) in September 2020. It was supposed to be a part of the new [European Pact on Asylum and Migration](#) repealing the TPD by introducing the immediate protection.

In the September 2020 Proposal the EC highlighted that it is «hardly possible to attain Member State agreement on the possible activation of the TPD» and that the TPD «no longer responds to Member States’ current reality and needs». The TP was to be replaced with the immediate protection, [which was narrower in scope and entailed simpler activation](#). However, the immediate protection was more clearly linked to the asylum procedure—it should have involved suspending the examination of applications for international protection to provide immediate protection with access to the rights available to beneficiaries of subsidiary protection (see [Article 10 of the 2020 EC Proposal](#)). Conversely, while temporary protection (TP) is part of the Common European Asylum System (CEAS), it adheres to the logic of migration management slightly more than the logic of international protection.

After the successful activation of TPD in 2022 the Commission abandoned the idea of TPD repeal and the immediate protection never materialized. Currently, the TPD and new Crisis and Force Majeure Regulation are both complementary parts of the CEAS. It is important to note that both instruments are to be applied in the situations of crisis understood in terms of mass influx of third countries nationals that renders the national asylum system of a MS dysfunctional.

5. Conclusion

The activation of the Temporary Protection Directive for Ukrainian refugees has highlighted both the strengths and limitations of this mechanism. While it has provided immediate and necessary protection for displaced persons, it has also exposed the challenges of transitioning from temporary protection to a more permanent legal status. As the end of the temporary

protection period approaches, it is crucial for the EU to find a sustainable solution that ensures legal stability and predictability for TP beneficiaries. This decision must be made promptly, given the time-consuming nature of achieving political consensus and adjusting the normative framework.

The future of temporary protection in the EU may well depend on the lessons learned from this unprecedented activation. Whether through extending temporary protection, utilizing the current normative framework, or introducing new solutions, the EU must navigate these challenges with a focus on both humanitarian protection and migration management. For now, it seems that the TPD will remain part of the toolbox for the EU and its Member States for handling such similar crises if they are to happen in the future. It is here to stay.

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