

8 THE PROSPECT OF TEMPORARY PROTECTION REFORM IN THE LIGHT OF THE UKRAINIAN REFUGEE CRISIS

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This chapter analyses the Temporary Protection Directive's application and its reform prospects. The process of the Directive's implementation is marked by significant legal innovations, most notably the principle of "free choice" for the temporary protection beneficiaries. The rules of the Regulation intended to replace the Directive are also analysed, and the provisions of the two instruments are compared. The chapter concludes that the reform initiated before the war needs to consider the experiences generated by the Ukrainian refugee crisis and the resulting pragmatic legal solutions should be included in an amended proposal for the Regulation.

8.1 THE TEMPORARY PROTECTION CONCEPT

The Temporary Protection Directive¹ was adopted following the Kosovo refugee crisis of 1998-1999 and entered into force in 2001. The Directive established an emergency mechanism to provide immediate and temporary admission into the EU to displaced persons from third countries who cannot return to their country of origin in mass influx situations.

The Directive (Art. 2(a)) defines temporary protection as follows:

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

¹ 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 [2001] OJ L212/12.

Whereas mass influx is defined as an “arrival in the Community of a large number of displaced persons, who came from a specific country or geographical area, whether the arrival in the Community was spontaneous or aided, for example through an evacuation programme” (Art. 2(d)).

To trigger the application of the Directive, the Council, upon the proposal of the Commission, must adopt by a qualified majority (Art. 5(1)) a Decision based on

- (a) an examination of the situation and the scale of the movements of displaced persons;
- (b) an assessment of the advisability of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such measures; and
- (c) information received from the Member States, the Commission, UNHCR and other relevant international organisations (Art. 5(4)).

The Decision, binding on all the Member States, must include at least

- (a) a description of the specific groups of persons to whom the temporary protection applies;
- (b) the date on which the temporary protection will take effect;
- (c) information received from Member States on their reception capacity; and
- (d) information from the Commission, UNHCR and other relevant international organisations (Art. 5(3)).

Unless terminated earlier by a Council Decision, the duration of temporary protection is one year, and it may be extended automatically by six months, two times maximum (Arts. 4(1), 6(1)(b)). If the reasons for temporary protection persist, the Council, by a qualified majority and on a proposal from the Commission, may extend it by one more year (Art. 4(2)).

8.2 ENTERS RUSSIA

Amazingly, the Directive has been activated for the first time for the persons fleeing the Russian invasion of Ukraine. It had not been activated even during the Syrian war. However, the number of Syrian refugees in Europe exceeded the number of Ukrainian refugees at the time of activation of the Directive and is about the same at the time of writing.² On 3 March 2022, the Interior Ministers of the EU Member States took

² See UN High Commissioner for Refugees, Operational Data Portal, ‘Situations’, <https://data2.unhcr.org/en/situations> (accessed 17 November 2023).

the “historic decision” to activate the Directive. The resulting Council Implementing Decision became valid upon the official publication the following day.³

Extraordinary times call for extraordinary measures. One more revolutionary decision the Ministers took was not to apply Article 11 of the Directive. Moreover, this was done not “based on a bilateral agreement”, as envisaged in the Article, but by agreeing on a statement in Recital 15 of the Implementing Decision. Article 11 provides for the so-called take-back mechanism (similar to that of the Dublin III Regulation⁴), according to which every Member State must “take back a person enjoying temporary protection on its territory, if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision”.

Legal innovation does not stop there. The Commission has also produced guidelines on derogations from the fulfilment of entry conditions for third country nationals under Article 6(5)(c) of the Schengen Border Code, where it invited the Member States “to ensure that the onward travel – and the future return – of these third country nationals remains possible”.⁵ The document even envisaged the possibility for the Member States to exempt carriers from paying fines for “carrying passengers who are not adequately documented due to the ongoing conflict in Ukraine”, expressly acknowledging the plans of at least “some” displaced persons from Ukraine “to travel further to other EU destinations, to reunite with family or friends in most cases”.⁶

This “unexpected renaissance of ‘free choice’” was not charity, of course: “The sheer need for pragmatic solutions in the face of more than a million entries made possible what would have been a political taboo only two weeks ago”.⁷ Under the Directive, the territorial allocation of the beneficiaries of temporary protection depends on two factors: firstly, the capacity of a Member State to receive a certain number of persons indicated at the time a mass influx is found and subsequently updated during the

3 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1.

4 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 (recast) [2013] OJ L180/31, Arts. 18(1b-d) and 20(5).

5 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders 2022/C 104 I/01, OJ C104I/1, 4.

6 Ibid.

7 Daniel Thym, “Temporary Protection for Ukrainians: the Unexpected Renaissance of “Free Choice” (EU Immigration and Asylum Law and Policy, 7 March 2022), <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/> (accessed 17 November 2023).

temporary protection period (Art. 25(1)), and secondly, the consent of individuals who are not yet in a Member State to be received into its territory (Art. 25(2)), or in the case of those who already enjoy temporary protection in a Member State, their consent to be transferred from that Member State to another (Art. 26). In the absence of quantitative indicators to establish the reception capacity of the Member States and effective mechanisms to obtain, record and communicate consent of the beneficiaries, the pragmatic solutions included doing away with the “take-back” mechanism and relying on the displaced persons’ free choice, often based on “meaningful links”. Among the latter, Professor Di Filippo mentions

- presence of family members or relatives in a Member State;
- knowledge of the official language of a Member State;
- evidence of past experiences of work, training, study or other activities deployed in the country;
- verified local sponsor (individuals, companies or other entities);
- existing legal tools facilitating the recognition of professional qualifications; and
- other social ties include the regular presence of friends from the same country of origin or diaspora and associations of exiles or nationals of the same country.⁸

Besides Eastern Europe’s geographic proximity, cultural and linguistic similarities and historical connections, the aforementioned links have already drawn many Ukrainian displaced persons to Italy, Germany, Spain and Portugal, that is, the countries where multitudinous Ukrainian diasporas exist. The Commission has demonstrated its awareness of the importance of and support for diaspora involvement and individual and community sponsorship in its proposal for a New Pact on Migration and Asylum.⁹

8.3 THE PROPOSED REFORM

The reasons for no prior activations of the Directive cited by commentators include the absence of clear and objective indicators of a mass influx in the text, a complex and lengthy activation mechanism and the difficulty of securing a qualified majority vote in the Council in case of a mass influx that seriously affects only some of the Member

8 See Marcello Di Filippo, ‘From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures’ (Policy Brief – January 2016) 11-12, <http://immigrazione.jus.unipi.it/wp-content/uploads/2016/02/IIHL-A-plea-for-the-reform-of-the-Dublin-system-policy-brief-def.pdf> (accessed 17 November 2023); Marcello Di Filippo, ‘Dublin ‘Reloaded’ or Time for Ambitious Pragmatism?’ (*EU Immigration and Asylum Law and Policy*, 12 October 2016, November 2016) 2-3, <https://doi.org/10.13140/RG.2.2.30146.17608>.

9 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final, Para. 6.6.

States.¹⁰ For those reasons, the Commission's Staff Working Document has concluded that "the Temporary Protection Directive no longer responds to Member States' current reality and needs to be repealed".¹¹ On 23 September 2020, as a part of the New Pact on Migration and Asylum, the European Commission put forward its Proposal for a Regulation¹² that would replace the Temporary Protection Directive. Compared with temporary protection, the activation mechanism of immediate protection has been significantly simplified, its scope narrowed down and its duration shortened.

What follows is a discussion of the key provisions of the proposed Regulation as compared with the corresponding rules of the Directive.

8.3.1 *The Activation Mechanism*

The proposed Regulation seeks to introduce a new concept of "immediate protection", essentially a legal status comparable to that of a refugee that would apply to groups of displaced persons in migration crises.

Just like the Directive, the proposed Regulation provides for an implementing act, but this time, it is the Commission that adopts it (Art. 10(4)):

The Commission shall, by means of an implementing decision:

- (a) establish that there is a situation of the crisis on the basis of the elements referred to in Article 3;
- (b) establish that there is a need to suspend the examination of applications for international protection;
- (c) define the specific country of origin, or a part of a specific country of origin, in respect of the persons referred to in paragraph 1; [and]
- (d) establish the date from which this Article shall be applied and set out the time period during which applications for international protection of displaced persons as referred to in point (a) may be suspended, and immediate protection status shall be granted.

10 See, e.g., Meltem Ineli-Ciger, 'Has the Temporary Protection Directive Become Obsolete?' in Celine Bauloz, Meltem Ineli-Ciger, Sarah Singer, Vladislava Stoyanova (eds.), *Seeking Asylum in the European Union* (Brill 2015); Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden, 'Study on the Temporary Protection Directive: Executive European Commission, Publications Office, January 2016), available at <https://data.europa.eu/doi/10.2837/479329> (accessed 17 November 2023).

11 Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final, 10.

12 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, 2020/0277 (COD).

Unlike the temporary protection's activation mechanism, the Council is nowhere in the picture. The Commission is to adopt the implementing decision leading to the granting of the immediate protection status assisted only by a committee composed of representatives of the Member States (Art. 11(1) referring to Art. 5 of Regulation 182/2011¹³) by means of a process known as comitology.¹⁴ However, where duly justified imperative grounds of urgency exist, the Commission can adopt an implementing act without submitting it to the committee (Art. 11(2) referring to Art. 8 of Regulation 182/2011).

Another difference between immediate and temporary protection subsists in their respective triggers: a “situation of crisis” and a “mass influx”. While under the proposed Regulation, the former includes the latter, the trigger that would set the whole temporary protection procedure in motion is a situation of crisis. It is defined in the proposed Regulation (Art. 2) as

an exceptional situation [or an imminent threat of such a situation] of a mass influx of third country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning the Common European Asylum System or the Common Framework as set out in [the simultaneously proposed Regulation on Asylum and Migration Management].

From this definition one can deduce four conditions that must be met for a situation to be formally recognised as a crisis:

1. An imminent or actual mass influx of displaced persons must exist (notably, the vague definition of “mass influx” has not migrated from the Temporary Protection Directive to the proposed Regulation).
2. The displaced persons must be third country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following a search and rescue operation.
3. The number of such persons thus arriving must be disproportionate to the population and GDP of the Member State concerned.

13 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L55/13.

14 See European Commission, 'Comitology', https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts_en (accessed 17 November 2023).

4. The nature and scale of the arrivals must make the Member State's asylum, reception or return system non-functional and be capable of adversely affecting the functioning of the Common European Asylum System or the Common Framework as set out in the proposed Asylum and Migration Management Regulation¹⁵ that forms part of the New Pact on Asylum and Migration.

It is obvious that the definition of a situation of crisis, with its references to the persons "arriving irregularly" and disembarkations "following search and rescue operations", was formulated with the illegal migration from Syria and Northern and Trans-Saharan Africa kept in mind. It is only natural that the refugees from those regions are arriving irregularly: it is impossible to obtain an entry visa there because the embassies of the EU Member States either do not exist there or the applicants are being denied visas for the lack of certainty that they will return to their country. At the same time, since Ukrainian citizens enjoy a visa-free regime when travelling to the Schengen countries or the Republic of Ireland, they are arriving irregularly only if they do not have a valid biometric passport or if they have reached the limit of the number of days that they can stay in the Schengen Area or Ireland without a visa.

While the implementation of the Temporary Protection Directive is tied to the existence of a mass influx and the inability of the asylum system to process this influx without adverse effects on its efficient operation, the implementation of the immediate protection procedure is linked to the existence of a crisis situation and a Member State's asylum, reception or return system becoming non-functional. It must be admitted that compared with the Directive's vague definition of a mass influx, the proposed definition of a situation of crisis including a set of quantitative indicators, such as the number of arrivals being disproportionate to the population and GDP of the affected Member State, can, to a certain extent, make it easier to determine the existence of a crisis. The qualitative indicators, however, remain blurred: it is not clear when exactly a Member State's asylum, reception or return system becomes non-functional and when exactly the "consequences for the functioning the Common European Asylum System or the Common Framework as set out in [the Asylum and Migration Management Regulation]" become "serious". While adding the reception system to the definition seems logical, the inclusion of the return system on the list of the systems that are becoming non-functional and, hence, a factor in establishing the situation of a crisis seems dubious and contradicts the very spirit of the proposed Regulation.

¹⁵ Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM/2020/610 final.

The duration of immediate protection is one year, after which time Member States must “resume the examination of the applications for international protection that have been suspended” (Art. 10(3)). No extensions to this one year are envisaged. Given the experience of the Russo-Ukrainian war and the fact that the temporary protection under the Directive has been extended to the fullest,¹⁶ the proposed Regulation’s maximum of one year might prove to be short-sighted.

8.3.2 *The Eligibility Criteria*

Compared with the Temporary Protection Directive, groups that can be granted immediate protection status have been defined quite narrowly in the proposed Regulation.

The proposed Regulation provides for the granting of immediate protection status to

displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin (Art. 10(1)).

“Indiscriminate violence” is a term used in EU law only in the context of an armed conflict. Thus, according to the Qualification Directive,¹⁷ indiscriminate violence is one of the factors relevant for establishing the risk of serious harm for the purposes of qualification as a “person eligible for subsidiary protection” (Art. 15(c)), that is, the protection additional to that of refugees. The CJEU has used the same term in a case involving the ongoing internal armed conflict in Iraq.¹⁸

The use of the term indiscriminate violence is a sign of a radical departure from the Directive’s approach, according to which (Art. 2(c)) temporary protection is granted to “displaced persons”, in particular

- (i) persons who have fled areas of armed conflict or endemic violence and
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.

16 See Council of the EU, ‘Ukrainian Refugees: EU Member States Agree to Extend Temporary Protection’ (Press release, 28 September 2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/09/28/ukrainian-refugees-eu-member-states-agree-to-extend-temporary-protection/> (accessed 17 November 2023).

17 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L337/9.

18 See Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921.

The proposed wording significantly narrows down the circle of persons eligible for immediate protection. Refugees (as opposed to persons eligible for subsidiary protection) from the relatively peaceful parts of Syria or from Belarus, for example, would be ineligible. This limits the potential use of immediate protection since the status can only be granted to those fleeing the indiscriminate effects of an armed conflict, not persons fleeing oppressive regimes, political persecution, systematic violations of their human rights, among others.

According to Article 10(1) of the proposed Regulation, persons representing a danger to the Member State's national security or public order where immediate protection is sought can be denied such protection. The draft does not provide a procedure to follow in such a case. This is in stark contrast with the Temporary Protection Directive, which, on the one hand, contains an exhaustive list of grounds for exclusion and, on the other, clearly provides that an exclusion decision must follow an individual assessment based on the principle of proportionality (Art. 28).

8.3.3 *The Rights of the Protected Persons*

Unlike the Directive, the draft Immediate Protection Regulation contains no provisions on the rights of the persons granted immediate protection. Instead, by reference provided in Article 10(2) of the proposed Regulation, they would enjoy the same social and economic rights as the subsidiary protection beneficiaries under the so-called Qualification Regulation¹⁹ that the Commission also proposes as part of the New Pact on Migration and Asylum. According to the provisions of that latter Regulation, the persons holding the immediate protection status would enjoy

- protection from *refoulement* (Art. 23);
- the right to obtain information on the rights and obligations relating to their status (Art. 24);
- the right to maintain family unity (Art. 25);
- the right to be issued a residence permit (Art. 26) and travel documents (Art. 27);
- freedom of movement within the Member State (Art. 28) and the Union (Art. 29);
- access to employment (Art. 30), education (Art. 31) and procedures for recognition of qualifications and validation of skills (Art. 32);
- social security (Art. 33), social assistance (Art. 34) and healthcare (Art. 35);

¹⁹ Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, COM(2016) 466 final.

- rights related to unaccompanied minors (Art. 36);
- access to accommodation (Art. 37), integration measures (Art.38); and
- the right to assistance with repatriation (Art. 39).

Compared with temporary protection, immediate protection would have more to offer to the status holders in terms of rights and freedoms: under the Directive (Arts. 8-16), temporary protection beneficiaries do not have a right to enjoy equal treatment with nationals of the host Member State when it comes to access to employment, social security and social assistance and healthcare. Thus,

[f]or reasons of labour market policies, Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third country nationals who receive unemployment benefit. (Art. 12)

Surprisingly, the Directive does not provide even for the freedom of movement within the receiving Member State. As a result, while the proposed Regulation does not fully equate the status of an immediate protection beneficiary with that of an EU citizen, it obviously envisages more rights and entitlements than the Directive does.

Both immediate protection (Art. 17 of the Directive) and temporary protection (Art. 22 of the proposed Regulation) do not prejudice the right of their beneficiaries to apply for international protection. However, both statuses allow Member States to suspend the processing of international protection applications for a certain period. In the case of temporary protection, that period is the duration of temporary protection, which lasts for one year and can be further extended for a maximum of two years (Art. 4 of the Directive), while immediate protection can be granted for a maximum of one year, with the Commission having the authority to decide for exactly how long applications for international protection may be suspended. Immediate protection will be granted (Art. 10(3) and (4)(d) of the proposed Regulation).

8.4 CONCLUSIONS AND RECOMMENDATIONS

The receiving capacities of the EU Member States are put to the test. Under these circumstances, temporary protection offers a pragmatic compromise between what is needed and what is possible. The Directive provides temporary relief to the Member States' overwhelmed migration and asylum systems in times of crisis and to the displaced persons who get a legal status comparable to that of a refugee. However, the reform of the temporary protection mechanism, with its complicated activation mechanism, the

“take-back” principle and other shortcomings discussed in this chapter, has been long overdue.

The proposed immediate protection would considerably improve the system. Thus, the activation mechanism in the proposed Regulation is simpler and makes the Commission rather than the Council the decision-maker. The indicators for triggering immediate protection are clearer and more precise than those for temporary protection. The rights of immediate protection status holders are more generous than those of temporary protection beneficiaries. On the other hand, the persons who can be granted immediate protection are defined narrower than those who can be granted temporary protection. This limits the potential use of immediate protection by those who flee not from an armed conflict but from systematic human rights violations, political persecution or oppressive regimes.

Being a pre-war proposal, the Regulation would become a major facelift to the temporary protection system, but not a radical reform that is needed, as the Ukrainian refugee crisis has vividly demonstrated. The pragmatic ad hoc solutions described – now seen as an exception – should, we submit, become standard procedures. Most importantly, the placement decisions should, at least partially, depend on the free will of the beneficiaries of temporary protection and their “meaningful links” with the country of their choice.

From the very beginning of the war, private actors have demonstrated motivation, determination to provide relief and the ability to mobilise resources, create synergies and generate ideas instrumental for central and local authorities. This is an indispensable resource that should be tapped. The EU’s efforts to provide relief to Ukrainians can provide a testing ground for “catalysing a whole of society response”²⁰ based on sharing responsibility among governments, civil society, NGOs and diasporas, the approach that should be written into an amended proposal for the Regulation.

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20 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, European solidarity with refugees and those fleeing war in Ukraine, COM/2022/107 final 8.

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