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TEMPORARY PROTECTION OF PERSONS DISPLACED FROM UKRAINE: BETWEEN INTERNATIONAL PROTECTION AND MIGRATION MANAGEMENT IN THE EU¹

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ABSTRACT

The armed conflict between the Russian Federation and Ukraine has profoundly impacted the lives of people in these countries, particularly in Ukraine. Due to the conflict, nearly 8 million individuals have been displaced from Ukraine, a statistic reported by the United Nations High Commissioner for Refugees (UNHCR) in 2023. These displaced persons have sought refuge in various regions, notably within EU and Western Balkan countries. In response to the massive influx of people from Ukraine, the EU activated the temporary protection mechanism for the first time. The aim of this paper is to examine whether the temporary protection provided to displaced persons from Ukraine represents an appropriate form of international protection or is rather an instrument by which states tried to manage the large migratory flow that followed as a result

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of the conflict. While acknowledging the critical role of temporary protection in safeguarding individuals affected by armed conflict, we propose that its activation was primarily driven by interests related to managing migration flows. To support this claim, we will examine the following aspects: the political nature and influence in the activation of temporary protection; the potential for temporary protection to obscure the diverse needs of those fleeing Ukraine thereby impacting their legal status determination; and the impending expiration of temporary protection, along with the lack of a publicly discussed adequate exit strategy by EU, and subsequently Serbia, which risks leaving those under temporary protection in a state of legal uncertainty.

KEYWORDS: Temporary Protection Directive, Ukrainian Refugee Crisis, EU Migration Management, Temporary Protection Exit Strategy, Common European Asylum System

I INTRODUCTION

The armed conflict between the Russian Federation and Ukraine has had a profound impact on the lives of people in these two countries, especially Ukraine. As a result of the conflict, nearly 8 million people (UNHCR, 2023) have left Ukraine and sought refuge in other countries, including EU member states. In response to the massive influx of individuals from Ukraine, the EU activated the temporary protection mechanism for the first time in history.

The Temporary Protection Directive (TPD) was adopted in 2001, as part of the Common European Asylum System (CEAS). The temporary protection (TP) is provided as a form of protection to displaced third country nationals in the event of mass influx to EU Member States. The aims of the directive are twofold – to provide international protection for persons in need and to safeguard the asylum administrations of Member States from overburdening. Therefore, the policy goals and logic of the TPD are also twofold – on one hand humanitarian and asylum-oriented to provide protection; on the other hand, practical and immigration control-oriented to manage the mass influx of third country nationals.

While it is hard to draw a hard line between the granting of asylum and migration management as two opposing policies, it is possible to establish a certain dichotomy between the two. Treaty on the functioning of the EU (TFEU) points to the dichotomy in the following way. In terms of Article 79 TFEU “common immigration policy of the EU is aimed at ensuring, at all stages, *the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States*, and the prevention of, and enhanced measures to combat, *illegal immigration* and trafficking in human beings.” (emphasis added) In migration management the focus is placed on the right of the state to exercise control, including its

rights to determine who is admitted and who is not. On the other hand, refugee protection, implemented through CEAS is, according to Article 78 TFEU aimed at offering appropriate status to any non-EU national *requiring international protection and ensuring compliance with the principle of non-refoulement*.² (emphasis added) The focus is placed on an individual's requirement for protection, their personal entitlement to be safeguarded, and the international obligations of the state.

Temporary protection was adopted as part of the asylum policy in the EU, therefore providing the relevant protection to the persons in need. Its current application is moreover praised as the epitome of the much-needed solidarity in the EU. In practice, however, there are arguments for the claim that the TP is also used as the migration management tool. This claim does not undermine the significance of the TP for the persons in need but puts into limelight the less debated side effects of its application which become particularly relevant as the temporary protection scheme nears its conclusion.

The Article is structured as follows: In the second part we will explain the notion of TP tracing its evolution within the EU. Moving into the third part, we will shift the focus to the activation of TP in case of armed conflict in Ukraine, detailing the nature and the content of the protection. Advancing into the fourth part, we will present the overview of exit strategies – different solutions for legal statuses that could be available for current beneficiaries of TP. Finally, in the fifth part we offer closing reflections and conclude the present discussion.

II HISTORICAL JOURNEY OF TEMPORARY PROTECTION IN THE EU

Temporary protection is not, or at least it was not, an established part of international law.³ It is a 'political instrument developed to cope with specific situations of mass-influx' (Kalin 2001, 202). It denotes a practical framework developed to handle situations of large-scale influx of people. It is described as „typically European response of according time-bound, emergency protection to a sudden mass influx of asylum seekers, the size

2 *Non-refoulement* is a core principle of international refugee and human rights law that prohibits states from returning individuals to a country where there is a real risk of being subjected to persecution, torture, inhuman or degrading treatment or any other human rights violation.

3 It is important to note that temporary protection discussed in this paper is different from temporary refuge and similar concepts of time-bound protection not covered by the Refugee Convention. See, i.e., United Nations High Commissioner for Refugees, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx* (Geneva 21-24 April 1981), EC/SCP/16/Add.1.

of which would overwhelm standard refugee determination procedures. As such, it should only last for as long as it remains impossible to process the asylum seekers through the normal channels and accord protection on an individual basis” (McAdam 2007, 3). The gist of temporary protection can be summarized as offering a certain minimum of protection to whole categories of people in a case of mass influx, while postponing the individual determination of refugee status to preserve the functionality of asylum system.

The *ratio legis* behind the temporary protection is threefold. First, it address a situation left unaddressed by the 1951 Convention Relating to the Status of Refugees (Refugee Convention): the problem of *non-refoulement* principle in large scale movement of persons, usually fleeing armed conflict (Ineli-Ciger 2018, 15). Second, the size of the influx makes it inefficient, or even impossible to process individual asylum claims in the normal way (McAdam 2007, 74). Third, even though the determination of the refugee status postpones the enjoyment of the Refugee Convention rights, temporary protection bridges that problem by offering a catalogue of rights which are approximately similar to the Refugee Convention rights.

This „typically European response” came with the armed conflicts in the former Yugoslavia when tens of thousands of people fled to countries of the then European Community. The European Community wanted to react to the flows of refugees while keeping a flexible and pragmatic mechanism. Therefore, the European Community adopted a *Conclusion on People Displaced by the Conflict in the Former Yugoslavia* at the meeting of Immigration Ministers in London in 1992.⁴ The ministers expressed their „readiness to offer protection on a temporary basis to those nationals of the former Yugoslavia coming directly from combat zones who are within their borders, and who are unable to return to their homes as a direct result of the conflict and human rights abuses” (Kalin 2001, 204). The next year EU Member States adopted the *Resolution on Certain Common Guidelines as Regards the Admission of Particularly Vulnerable Persons from the former Yugoslavia*.⁵

The United Nations High Commissioner for Refugees (UNHCR) diligently observed how the European Community and its Member States reacted to the crisis in Yugoslavia and formulated a report detailing its insights on the evolution of a protection framework in Europe. The UNHCR

4 Council of the European Communities General Secretariat (Conclusions of the Meeting of the Ministers Responsible for Immigration), Council Press Release, London, 30 November 1992, 10518/92 (Presse 230).

5 Council of the European Communities General Secretariat (Conclusions of the Meeting of the Ministers Responsible for Immigration), Council Press Release, Copenhagen, 12 June 1993, 6712/93 (Presse 90).

identified that, during the Yugoslav crisis, the European Community adopted five principal positions regarding the implementation of temporary protection which are relevant for the temporary protection in other situations:

- a) it was used as a tool to meet protection needs in mass outflows;
- b) basic elements of temporary protection standards are provided;
- c) beneficiaries are defined on the basis of their need for international protection;
- d) the focus is on return as the most appropriate solution; and
- e) it involves the provision of international protection as part of an integrated program of coordinated international action, which encompasses prevention, response, and solutions. (Note on Temporary Protection in a Broader Context 1994).

In 1995 something resembling the present-day temporary protection was formalized by way of the *Resolution of the Council of the European Union on Burden-Sharing with regard to the Admission and Residence of Displaced Persons on a Temporary Basis*. Unlike the previously mentioned specific instruments, this was now a generalized instrument which offered a possibility of EU response to any future situation with the mass influx of people. Almost sharing the fate of its successor,⁶ this Resolution was never implemented. (Kalin 2001, 204)

The Commission submitted proposal for a joint action on the question of temporary protection on March 5, 1997 and then again on June 24, 1998. Since the Member States had diverging opinions and opposing stances on questions such as burden-sharing, the proposal was never adopted by the Council. (Kerber 1999, 42–44) Finally, on 20 July 2021, the Council adopted Commission's proposal and thus the Temporary Protection Directive (TPD). TPD was not intended to „displace or renegotiate the 1951 Convention's rules and standards". (Guy S and Jane 2021)

Due to implementation of different protection and migration management regimes among EU Member States, a need to develop a uniform solution at the EU level was finally fulfilled at a normative level with the adoption of the Temporary Protection Directive.⁷ Both general and specific objectives of the TPD can be discerned. General objectives can be found in defining the minimum standards for giving temporary protection in cases of mass influx of displaced people and supporting the establishment of balance in

6 As it will be seen, the Temporary Protection Directive (TPD) was implemented only once in its more than two decades of existence.

7 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, *OJ L 212, 7.8.2001*, pp. 12–23.

reception of those persons among Member States. Specific objectives can be identified as preventing bottlenecks in national asylum systems, while at the same time ensuring immediate access to protection of rights.

What is peculiar is that, despite the Arab Spring and similar mass movements of people to Europe, mass influx for the purposes of the TPD has been established only once. For the first time in 21 years since the TPD was adopted, on March 4, 2022, the Council adopted the implementing decision establishing the existence of a mass influx, in this case of displaced persons from Ukraine.⁸

III A RARITY IN ACTION: TPD ACTIVATED

The Decision introduced temporary protection for persons residing in Ukraine who have been displaced on or after 24 February 2022 because of the international armed conflict between the Russian Federation and Ukraine. The Decision was adopted following the proposal from the European Commission on 2 March 2022, pursuant to Article 5 of TPD.⁹ The Council not only had the required qualified majority to adopt the Decision,¹⁰ but in this case it did so unanimously.

We will now delve into the Commission's proposal, which will serve both to explain the rest of the TPD normative framework, the application of the Implementing Decision in practice, as well as showcase its political underpinnings. First and foremost, Art. 2(1)(a) TPD defines temporary protection as 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” and „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 addition, Article 2(1)(d) TPD states that „mass influx means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme”. This is a very broad definition of mass influx, and it gives the Commission

8 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 Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, *OJ L 71*, 4.3.2022, pp. 1–6.

9 It is worth noting that the proposal can only come from the European Commission. Member States can submit a request to the Commission, and the Commission must examine any request, but it is the Commission itself that decides whether to submit the proposal to the Council.

10 Qualified majority means at least 55% of Member States which cover at least 65% of EU population.

and the Council (or rather Member States) big discretionary powers since it does not define the criteria, nor does it offer indicators of what is to be considered a large number of people. There is neither a minimum number, nor speed of arrival, for a ‘mass influx’ to exist. (Edwards 2012, 9)

As requested by Art. 5(1) TPD, the Commission considered that reasons warranting activation of the temporary protection are: extraordinary and exceptional nature of the military invasion of Ukraine by Russia,¹¹ increase of migratory pressure on EU’s external borders,¹² the fact that already 650.000 people arrived in the EU within a few days when the invasion started and that number was expected to increase,¹³ the fact that Ukraine is a visa-free country for entry into the EU, estimate that between 2.5 and 6.5 million persons will arrive to the EU out of which between 1.2 and 3.2 million are expected to seek international protection.¹⁴

In accordance with Art. 5(2), the Commission a) described three specific categories of people to whom the temporary protection will apply as: Ukrainian nationals residing in Ukraine who are displaced as of 24 February 2022; third-country nationals or stateless persons legally residing in Ukraine who are displaced as of 24 February 2022; and family members of the first two categories if the family already existed in Ukraine at the time of the circumstances surrounding the mass influx.¹⁵ The Decision nevertheless provides that Member States may extend temporary protection to additional categories of displaced persons provided they are displaced for the same reasons and from Ukraine.¹⁶

As already noted, temporary protection is time-bound. Art. 4 TPD stipulates the duration as one year. Unless it’s terminated, temporary protection may be extended automatically by two six monthly periods, which the Commission suggested in its proposal. Where reasons for temporary protection persist, the Council may decide by qualified majority to extend it by up to one year. The Council decided on 19 October 2023 to adopt the extension of temporary protection until 4 March 2025.¹⁷ That brings us to

11 European Commission, Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 10 July 2001, and having the effect of introducing temporary protection, Brussels, 2 March 2022, 2022/0069 (NLE), p. 3.

12 *Ibidem*, p. 1.

13 *Ibidem*.

14 *Ibidem*, pp. 1–2.

15 *Ibidem*, pp. 2–3.

16 Council Implementing Decision, para. 14.

17 Council Implementing Decision (EU) 2023/2409 of 19 October 2023 extending temporary protection as introduced by Implementing Decision (EU) 2022/382, *O J L* 2023/2409, 24.10.2023, date of effect: 13 November 2023.

the maximum of three year of temporary protection: initial year, two times six months automatic extension, and Council's extension by up to one year. Importantly, Art. 6 TPD stipulates that temporary protection shall come to an end when this maximum duration has been reached the latest.

TPD provides for a number of rights to be guaranteed to persons enjoying temporary protection. Among them are residence permits and corresponding documents (Art. 8(1)), provision of details on temporary protection in an understandable language (Art. 9), right to engage in employed or self-employed activities (Art. 12), access to suitable accommodation (Art. 13(1)), necessary assistance in terms of social welfare and means of subsistence (Art. 13(2)), necessary medical or other assistance (Art. 13(3)), access to the education system for children under the same conditions as nationals (Art. 14(1)), special rights for unaccompanied children (Art. 16(1)), access to asylum at any time (Art. 17). In order to fulfil their obligations, Member States need to implement the TPD and Council Implementing Decision in practice, so now we turn to that aspect.

PRACTICAL IMPLEMENTATION BY MEMBER STATES

In this part of our paper, we will first outline the measures that Member States are not required to implement, followed by a discussion on what they are required and the methods for their execution.

First is an example of what was called an unclear relationship of temporary protection to the 1951 Convention which leads to difficulties and „not least in ... standards of treatment to be accorded to beneficiaries”.¹⁸ Namely, Member States have agreed in a statement that they will not apply Article 11 TPD,¹⁹ which basically prohibits a person enjoying temporary protection from remaining on or seeking to enter (without authorization) the territory of another Member State. There seems to be a discrepancy between Member States' will in this case not to avert the risk of secondary movements with temporary protection, but not to allow asylum seekers and any other third country national to move freely.²⁰ Additionally, TPD does not apply to Denmark, but it has introduced similar provisions in its national legislation.²¹

18 UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, 19 February 2001, EC/GC/01/4.

19 Council Implementing Decision, para. 15.

20 See: *Third Country Nationals' Status in the Immigration Normative Framework*.

21 TPD does not apply to Denmark due to its four opt-outs from EU policies, but Denmark has introduced a new law for this specific situation. See, i.e., European Commission. 2022. "New Danish law for those fleeing Ukraine mirrors EU Temporary Protection Directive."

Even though the Council activated TPD on 4 March 2022, there are two categories of Member States that have had temporary protection in place before that date. First is Hungary which has activated the national temporary protection the same day of the Russian invasion.²² Second are Portugal²³ and Latvia²⁴ which have activated temporary protection on 2 and 3 March 2022, respectively. However, there are authors who consider that article 7(1) TPD seems to „deny a State the right to independently determine that a mass influx exists for the purposes of offering temporary protection within its own territory, since that provision links the extension of temporary protection to ‘additional categories of displaced persons’ to a pre-existing Council decision under article 5”. (McAdam 2007, 78) Last Member State to activate temporary protection was Italy on 28 March 2022.²⁵

To implement the TPD and the Decision, Member States needed to undertake a set of actions such as: information provision, registration procedure, documenting, and access to rights.

- **Information provision:** Pursuant to Art. 9 TPD, Member States must provide a document in a language likely to be understood, to people who are enjoying temporary protection. All Member States have created dedicated leaflets, websites, email, and dedicated phone lines to provide information, while some Member States have created Telegram channels or Facebook pages. (Providing temporary protection to displaced persons from Ukraine 2023, 17–18)
- **Registration procedure:** Art. 10 TPD requires Member States to register personal data (name, nationality, date of birth, place of birth, marital status, and family relationship). This procedure varied across Member States, where in some it was a single authority responsible for registration and issuing relevant documents (such as residence permits), while in others it was multiple authorities involved. Some had online registration available, while others had

European Commission. https://ec.europa.eu/info/news/new-danish-law-those-fleeing-ukraine-mirrors-eu-temporary-protection-directive-2022-mar-15_en. Accessed November 9, 2023.

22 The Hungarian government adopted on 24 February a decree granting national temporary protection to citizens from Ukraine and persons legally residing in Ukraine, who arrive directly from the territory of the country, Decree 56/2022 (II.24.) *Official Gazette of Hungary* (Magyar Közlöny).

23 Council of Ministers Resolution (RCM) 29-A/2022 of 1 March 2022/Resolução do Conselho de Ministros n.º 29-A/2022, de 1 de março.

24 Law on Assistance to Ukrainian Civilians | Ukrainas civiliedzīvotāju atbalsta likums adopted on 3 March 2022, Latvijas Vēstnesis, 45A, 04.03.2022. OP number: 2022/45A.1.

25 The Presidential Decree on temporary protection provision for individuals fleeing Ukraine | Decreto del Presidente del Consiglio dei Ministri del 28 marzo 2022 recante misure di protezione temporanea per le persone provenienti dall'Ucraina.

pre-registration of bookings of appointments. (Providing temporary protection to displaced persons from Ukraine 2023, 19–20)

- **Documenting:** Some Member States issued paper-based documents with safety features, others issued cards with biometric data, while Poland and Lithuania introduced digital certificates. Time of issuance varied significantly, so in Belgium a person would get the document issued upon registration, while in Austria a person would wait for the card to arrive by mail. (Analysis of Measures to Provide Protection to Displaced Persons from Ukraine 2022, 15) In most Member States a valid Ukrainian passport or identity card were required. In many Member States one-stop service centers were created where multiple authorities work under the same roof and provide information, registration, counselling, basic care, as well as documenting biometric data. (Analysis of Measures to Provide Protection to Displaced Persons from Ukraine 2022, 12)
- **Access to rights:** access to rights is dependent on presenting the relevant documents (temporary protection cards, residence permit, and similar) in all Member States. When it comes to access to the labor market, several Member States have offered counselling services, online tools, and dedicated platforms on job opportunities. (Providing temporary protection to displaced persons from Ukraine 2023, 24)

Member States retain the right to exclude certain persons from temporary protection where there are serious reasons for considering they have committed a crime against peace, a war crime, or a crime against humanity, serious non-political crime prior to admission to EU, or has been found guilty of acts contrary to the purposes and principles of the United Nations. Member States can also exclude persons where there are reasonable grounds for regarding them as a danger to the security or community of the host Member State (Art. 28 TPD).

IV A NOVELTY IN ACTION: PIONEERING THE TPD EXIT STRATEGY

On 28th September 2023 the Council reached political agreement that it will expand temporary protection until 4 March 2025 – the maximum period for this protection according to the current TPD.²⁶ This decision also became legally binding when the Council adopted the pertinent Imple-

26 Council of the European Union. 2023. "Ukrainian Refugees: EU Member States Agree to Extend Temporary Protection." <https://www.consilium.europa.eu/en/press/press-releases/2023/09/28/ukrainian-refugees-eu-member-states-agree-to-extend-temporary-protection/>. Accessed November 9, 2023.

menting Decision. Hence, for the upcoming year and a half, individuals under temporary protection will possess a legitimate legal status within the EU. Nevertheless, the question of the legal status these individuals will hold after the expiration of the temporary protection remains unresolved.

By the letter of TPD, after the end of the temporary protection TP beneficiaries are either encouraged to voluntary return (Article 21), subjected to enforced return (Article 22), or are transferred into the asylum determination procedure of the Member State (articles 17–19 TPD).²⁷

However, based on the current state of affairs, these transitional arrangements provided by the TP are hardly achievable. Streaming all the TP beneficiaries into the asylum procedure only after the TP has ended will inevitably overburden the asylum systems of MS, which is exactly what temporary protection sought to prevent. The enforced return would be politically controversial or even legally hindered if the situation in Ukraine would present the risk of harm for the persons. Strong arguments in that regard are presented by the Meijers Committee. (Meijers Committee Comment on legal status of refugees from the War in Ukraine after the end of the current Temporary Protection Scheme 2023, para. 7) The voluntary return is dependent on the situation in Ukraine after March 2025; however, it is unimaginable that the number of displaced persons will want to stay in EU MS even if the armed conflict is over, either because of the unstable post-conflict situation in Ukraine or because of personal reasons. TPD hints at the possibility to stay stating in Article 20 that “[w]hen the temporary protection ends, the general laws on protection and on aliens in the Member States shall apply.” However, that status would be contingent upon national law of Member States and not on the EU-wide approach.

Having in mind that the current transitional arrangements provided in TPD are hard to unravel in practice, there is the need to offer a novel, durable and sustainable solution for the legal status of TP beneficiaries after March 2025. At present there is no political and legal decision regarding the fate of temporary protection beneficiaries once the temporary protection period concludes. Nonetheless, there exist unofficial recommendations and academic discussions on this matter, which will be outlined here. The premise for the successful transition from TP to some other legal status is that the EU takes the common approach embodied in one of the following:

- extending the temporary protection;
- streaming persons into other legal status based on the current normative framework (asylum, immigration);
- introducing a new normative solution.

27 It is possible that the transfer to the asylum procedure is done while the temporary protection scheme is still in place, however it will be explained in the following part why that is currently not happening.

These options are categorized taking into account the necessary adjustments of the EU normative framework. Each option will be elaborated shortly, especially pointing out to the change in rights and benefits that would happen in comparison to current state of affairs, the requirements for its implementation and the likelihood of the implementation.

EXTENDING TEMPORARY PROTECTION

The possibility to extend temporary protection is mentioned in passing in the May 2023 Report to the European Commission of EU's Special Adviser on Ukraine, Lodewijk Asscher. (Lodewijk 2023, 12) The benefits of this solution are that the extension would have collective effect, would be automatic and should preserve the same rights and benefits for TP beneficiaries. This last assumption is rebuttable because the Council can now at any time end the TP (Article 5 (6) b) TPD). Moreover, the important right of secondary movement is ensured by the disapplication of Article 11 TPD, which is done in the form of gentleman agreement between MS and can be modified at any moment.

The extension of TP is highly unlikely to happen in practice. The extension would require the change of TPD in the prescribed legislative procedure. This is challenging, not least for the complexity of the legislative process but because such change would actually entail the switch in the logic of the TPD. The intrinsic characteristic of TP is its temporary nature. *Travaux préparatoires* testify to that, as certain MS during the negotiations on the Directive advocated that the protection lasts even shorter than what was finally agreed to.²⁸

USING THE CURRENT NORMATIVE FRAMEWORK

1. International Protection in the CEAS Framework

TPD is adopted as the first instrument in the Common European Asylum System framework which is the indicator that temporary protection should act as the bridge, transitional legal status towards the international protection status. As noted by Guild and Groenendijk: "The assumption of the directive is that TP beneficiaries will be *prima facie* refugees and their access to protection should be based on a collective measure..." (Guild and Groenendijk 2023b, 2) Hence, it is only natural that TP beneficiaries are streamlined in the asylum procedure. Chapter IV TPD deals with the possibility to lodge an asylum application while enjoying TP.

²⁸ The proposals put in place were that the protection lasts for a half year up to two years. See Kerber 2002, 200.

Nevertheless, at present, this legal option is not an appealing prospect for TP beneficiaries for at least four reasons.

First of all, if a TP beneficiary lodges the application for asylum there is the need to establish the MS responsible for the examination of that asylum application (Art. 18 TPD). This activates the application of the Dublin Regulation and the criteria set therein. In the Commission's Communication the Member States in which the application would be lodged are "strongly encouraged to take responsibility for examining the application pursuant to the discretionary clause set out in Art. 17(1), when a Member State experiencing mass arrivals would be responsible pursuant to the responsibility criteria set out in the Dublin III Regulation, with a view to alleviating pressure on that Member State."²⁹ While this suggestion points to the most logical solution, in practice the uncertainties about the responsible MS will remain thereby possibly deterring the TP beneficiary from entering the asylum procedure.

Secondly, when the application for asylum is lodged, TP beneficiaries might lose temporary protection and be encompassed under the regime for the asylum applicants (Article 19 (1) TPD). The problem is that the asylum applicant has a lower level of rights than the TP beneficiary. At present, only some MS provide the loss of TP in case of lodging the asylum application (Slovakia, Romania and Spain). (Küçük 2023, 19)

Thirdly, MS has the right to delay the processing of asylum application examinations through the duration of the TP scheme (Article 17 (2) TPD). Certain states (Sweden, Finland, Italy, Belgium) suspended asylum determination until the end of TP.³⁰ While this enables the applicants to continue to enjoy the more beneficial status of TP for longer, it prolongs the situation of uncertainty. (Küçük 2023, 19)

Fourthly, there is a possibility that at the end of the asylum procedure the person in question is denied international protection. If that happens while the TP scheme is still in force, they can re-benefit from the TP protection (Article 19 (2) TPD). However, if such a decision is taken after the end of the TP scheme, either because the asylum system is slow, or because of the delay in the examination of the asylum procedure based on the Article 19 (2) TPD, the persons will be left without the valid legal status. As a result, the TP beneficiaries might feel reluctant to enter the asylum procedure with the uncertain outcome to the detriment of timely-constrained but existing rights and benefits based on the TP status.

29 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01, C/2022/1806.

30 Ibidem.

After the TP is ended there would be more incentive for the displaced persons to obtain international protection (refugee status or subsidiary protection). The problem then becomes exactly the problem that the activation of TPD was trying to mitigate – MS asylum systems would be unprepared to process a large number of asylum applications. Therefore, in order for TP beneficiaries to be smoothly streamed into the asylum systems of MS after the TP scheme ends certain legislative adjustments would need to be taken. The adjustments might be that the asylum applications are not assessed in the individual procedure, as the requirement is now, or that all the TP beneficiaries are automatically given international protection. However, the question then becomes what type of international protection they should be given, keeping in mind that the content of refugee status and subsidiary protection status is not the same. Moreover, it is questionable whether such collective and/or automatic solution is in line with the spirit of the refugee protection in general and whether the persons in the same circumstances will be treated in the same manner. More openly, would such a decision undermine the foundations of international refugee protection, and would it make an unjust division between the persons displaced from Ukraine and other parts of the world?

2. Third Country Nationals' Status in the Immigration Normative Framework

At present, there are seven relevant migration directives in force, all of whom exclude TP beneficiaries from their legal scope.³¹ This again indicates that the temporary protection is adopted outside of the immigration framework. However, in practice, TP beneficiaries came close, or even surpassed the treatment of third country nationals (TCN). For example, in contrast to the asylum seekers, they are given instant access to the labour market (Article 12 TPD). In contrast to the asylum seekers and any other TCN they enjoy the right of free movement: “Because of the combined effect of the disapplication of Article 11 TPD and visa waiver for Ukrainians, TP beneficiaries are the only group of third country nationals that enjoy the secondary movement rights.” (Guild and Groenendijk 2023b, 4)

In April 2022, the European Commission proposed revisions to the Long-term Residents Directive (LTRD) and Single Permit Directive (SPD), which focus on codifying the rights of third-country nationals employed in Member States. Notably, there was no suggestion to include TP beneficiaries in the scope of these directives as these proposals were drafted before

31 Family Reunification Directive (FRD), Long-term Residents Directive (LTRD), Blue Card Directive (BCD), Single Permit Directive (SPD), Intra-Corporate Transfer directive, Students and Researchers Directive and the Seasonal Workers Directive.

the sudden activation of the TPD in March 2022. However, the pending recasts now provide a chance to align both directives with the new situation.³²

Even if the current revision of the part of the immigration normative framework would result in widening their scope in order to absorb TP beneficiaries, this transition would not be automatic. It would also require individual decision making. (Meijers Committee Comment on legal status of refugees from the War in Ukraine after the end of the current Temporary Protection Scheme 2023, para. 10.2) Additionally, the enjoyment of TCN status rests on the economic capacities of TCNs, established in the requirement for the income, health insurance and lawful residence. In such a setting a large number of TP beneficiaries would not be able to fulfil such requirements. Hence, to incorporate TP beneficiaries into the TCN schemes would necessitate substantial legislative amendments. However, this would likely result in the practical exclusion of some TP beneficiaries, and in any event, it would entail the removal of their current right to secondary movement.

INTRODUCING THE NEW NORMATIVE SOLUTION(S)

EU's Special Adviser on Ukraine, Lodewijk Asscher, in his May 2023 report to the Commission advocated that there must be an EU-wide and single approach to the residence and rights of TP beneficiaries after the end of the scheme. He has recommended the adoption of a Reconstruction Permit valid for up to ten years which could be launched by a joint statement between the EU and Ukraine. This is a very tersely presented solution and therefore hard to assess. It seems that it is somehow coupled with the proposal for the TPD extension. Many important information are not presented – what would be the legal basis and legal nature of such a Permit, actors involved in its adoption and its exact content. Scholars did delve upon the possible legal nature, presenting the following: the form of an international agreement; the agreement with third country based on 79 (3) TFEU; the inclusion under the EU-Ukraine Association Agreement; or a proposal by the Commission for a directive or regulation under Article 79 TFEU. (Guild and Groenendijk 2023a, 114–15) Any completely new normative solution would take a long time, bring more complexities to the already complex stratification of the status of TCN in the EU and would need to take into consideration how to be incorporated into the existing normative framework.

32 See more in: Meijers Committee Comment on legal status of refugees from the War in Ukraine after the end of the current Temporary Protection Scheme, para. 12; Guild and Groenendijk 2023, pp. 11–12.

Some other options are shortly presented, but not elaborated by the International Centre for Migration Policy Development (ICMPD). These can possibly fit in the category of new normative solutions and they include the “specifically designed permit, for the entire group or subgroups that meet certain criteria; special transitional permit, regularisation-type approaches, or even a transition status connected to Ukraine’s EU accession aspirations.” (Responding to Displacement from Ukraine: Past, present, and future policies 2023, 22)

As the novel approaches we will also present the option to give displaced Ukrainians a modified status of free movement, as currently the citizens of the EU have. There are authors who advocate that it would be convenient that the TP beneficiaries are absorbed in the EU citizens schemes. The arguments are based on the Ukraine status as the candidate country and the possibility that the future pre accession agreement “include free movement of persons, including the right for Ukrainians to enter, reside in, exercise economic activities and study in the EU in the same way as EU citizens.” (Guild and Groenendijk 2023b, 14) Same authors claim that the provisions of the 2017 EU-Ukraine Association Agreement “provide a basis for further liberalization of cross-border movement, employment and self-employment of Ukrainians in host Member States including Ukrainians already exercising economic activities there.” (Guild and Groenendijk 2023b, 14–15)

Apart from the normative intricacies of these solutions it is obvious that this solution would require a strong political consensus and that it would entail spill-over effects of high scale. The presented solution possibly overcomes only the TP beneficiaries and could potentially be applied to every citizen of the Ukraine. Such overinclusive solutions might not be a proportional measure for solving the very concrete problem of TP beneficiaries. This solution might leave the actual TP beneficiaries outside this new legal status and there would still be the need to make special arrangements for certain categories of persons.³³ Finally, this could make Ukrainians “citizens in waiting” and differentiate them in regard to citizens of other candidate countries.

V CONCLUSION

This research has presented several issues regarding TPD’s legislative foresight and practical application. The inherent limitation of the TPD is its failure to anticipate the long-term outcomes for beneficiaries if the initial

33 Guild and Groenendijk mention persons who did not live for three years in MS, who did not work while staying in the EU MS, and students. Guild and Groenendijk 2023a, p. 116.

reasons for mass displacement still persist after the temporary protection time-frame comes to an end. This oversight has resulted in a paradox where TP beneficiaries may find themselves disincentivized to transition to the asylum procedure due to the comparative advantages of TP status and lower level of rights under the asylum framework, further exacerbated by the political leniency towards secondary movement for TP beneficiaries.

These issues testify to the departure of TP from the pure protection mechanism and its move towards the migration management tool. This is not a problem *per se*, but we clearly see how this move is at the core of problems pertinent to any future legal status that could be available to (former) TP beneficiaries. The current political and normative landscape suggests that a one-size-fits-all approach to the rights of displaced Ukrainians within the EU may not be the most equitable or practical solution, particularly when considering the proportionality and specificity required to address the needs of TP beneficiaries.

The dilemma is how to smoothly transition from collectively giving rights through TP into individually assessing the needs of each and every person and applying the relevant criteria for the future legal status. Another open question is whether the future status of TP beneficiaries will be protection-based or migration regulation based. While an additional extension of TPD does not seem likely, it also does not seem likely that the smooth transition to international protection will take place. Either the international protection for the persons displaced from Ukraine will be adapted, or those persons will gain a unique status. What this means for their rights and benefits is yet to be settled.

The presented viable options are not mutually exclusive. They are however urgent. However, currently there is no official stance of the EU on the matter. The decision on a tangible solution holds significant importance as it aims to prevent TP beneficiaries from encountering legal uncertainty and being caught in legal limbo. It is crucial to make this decision promptly, as any agreed-upon solution is contingent on achieving a political consensus, which is time-consuming. Furthermore, most of the currently discussed solutions would necessitate adjustments to the normative framework, which also involves a time-consuming process. The timely political and legal decision which we urge for would enable legal stability and predictability for both TP beneficiaries and national administrations of Member States.

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