BlogDUE

Temporary Protection: Which Future in The EU Migration Policy?

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1. Since the 2015 "migration crisis", European Union (EU) institutions are attempting, though with little success, to reform EU migration policy, perceived as outdated and inefficient in dealing with sudden influxes of people at EU external borders. After the Russian invasion of Ukraine however, it took only eight days for the EU to adopt and implement an EU-wide temporary protection scheme. Such a scheme granted Ukrainian refugees access to the whole EU territory, giving them immediate and collective protection. The prompt and common EU action was built upon the already existing temporary protection framework introduced in the EU migration policy back in 2001 with the Temporary Protection Directive.

Until the activation of the Directive in 2022, the concept of temporary protection was unfamiliar to many in Europe. If the EU had the tools to efficiently manage the arrival of people in crisis situations, why was it not activated before? The Ukraine crisis showed that the EU was equipped to react to migration crises in a coordinated manner, provided that the EU institutions had the political will and legal creativity to do so.

While the current situation is unprecedented, it provides the *momentum* to reconsider the role of temporary protection in the EU legal framework. How can EU temporary protection be improved to make it more efficient and more easily activable? Two interlinked issues are the most urgent: the provision of alternatives to return upon the end of the protection period, and the introduction of additional instruments to allow EU institutions to better tailor the response to migration crises.

2. The temporary protection regime is not an exclusive tool of the Common European Asylum System (CEAS). While the 1951 Geneva Convention provides for the definition of the status of refugees, it does not address large-scale movements of people fleeing conflicts.

Individuals escaping violence are nonetheless protected by the *non-refoulment* principle, stemming from Article 3 of the European Convention on Human Rights, which obliges States not to return people to a country where they would face irreparable harm. To give effect to such obligation, States increasingly introduced in their national legislation "temporary refuge provisions" ensuring protection of people escaping from generalised violence in their country of origin. Contrary to international protection, temporary protection is not an individualised status but rather a group-based protection intended to provide immediate assistance to people in need, at the same time avoiding overloading States' asylum systems with applications. For a long time addressed exclusively in national legislation, temporary protection was recognised by the United Nations High Commissioner for Refugees (UNHCR) as a valid tool to "offer sanctuary to those fleeing humanitarian crises" during the 1990s Balkan wars.

The mass exodus from former Yugoslavia during its dissolution targeted mostly its neighbouring European countries, part of the EU. During the first Balkan war in 1992-1995, many Member States introduced national practices concerning temporary protection, without a proper common approach (M. KJAERUM, *Temporary Protection in Europe in the 1990's Opinion*, in *International Journal of Refugee Law*, 1994, p. 544). During the 1999 Kosovar crisis, the need for a coordinated EU effort to harmonise national temporary protection schemes became evident. The diverging national practices on temporary protection were indeed detrimental to the well-functioning of the internal market: without any coordination nor responsibility sharing among Member States, displaced persons from the Balkans entered, settled, and circulated in the EU with different legal statuses, entitled to different sets of rights and guarantees.

With the entry into force of the Amsterdam Treaty, the EU gained the competence to set up flanking measures targeting migration to enable the efficient functioning of the internal market (K. HAILBRONNER, *European Immigration and Asylum Law under the Amsterdam Treaty*, in *Common Market Law Review*, in vol. 35, n. 5, 1998). In 2001, Directive 2001/55/EC (Temporary Protection Directive, hereafter TPD) was adopted. It was the first legislative instrument in the field of asylum to ever be approved at EU level.

The TPD, after having defined what constitutes a mass influx of displaced persons (Chapter I), introduced an activation mechanism and a set of minimum protection standards. The Directive's content is five-folded: first, an activation mechanism under the control of the Council of the EU is set up (Chapter II); second, minimum standards concerning the legal status, rights and guarantees of temporary protection beneficiaries are listed (Chapter III); third, the procedures to follow for beneficiaries of temporary protection to request and obtain international protection is regulated (Chapter IV); fourth, return to the country of origin is normed as the only option to follow the end of temporary protection (Chapter V); finally, a solidarity scheme among Member States is set up, under the form of burden-sharing (Chapter VI) and administrative cooperation (Chapter VII). Many commentators analysed in detail the content of the directive here briefly outlined (see: M. INELI-CIGER, *EU temporary protection directive*,

in ID. (ed.), *Temporary Protection in Law and Practice*, Leiden, 2017, pp. 149-167; A. SKORDAS, *Temporary Protection Directive 2001/55/EC*, in K. HAILBRONNER, D. THYM (eds.) *EU Immigration and Asylum Law*, Munchen, 2016, pp. 1055-1108; K. KERBER, *The Temporary Protection Directive*, in *European Journal of Migration and Law*, n. 4, 2002, p. 193.

The Directive pursues two complementary objectives (Art. 1 TPD): one, "to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin"; two, "to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons".

The first objective consists of a standard application of the soft harmonisation approach adopted under the Amsterdam regime in the asylum field. Member States are given a much-needed set of guidelines on how to implement temporary protection, though allowing for more favourable provisions.

The second objective is more ambitious. Well before the Lisbon Treaty put solidarity among the guiding principles of the EU migration policy (Art. 80 of the Treaty on the Functioning of the European Union), the TPD strives to establish a burden-sharing mechanism between Member States as a solidarity measure. Member States are indeed required to "receive persons who are eligible for temporary protection in a spirit of Community solidarity" (Art. 25 TPD). Such a solidarity provision remains a *unicum* in the CEAS, where burden-sharing is implemented exclusively via a hierarchy of criteria with no place for equitable distribution among Member States (see the Dublin System, for more information: V. MITSILEGAS, *Solidarity and trust in the common European asylum system* in *Comparative Migration Studies*, n. 2, 2014, p. 181 ss).

What made it politically possible for the TPD to feature such an innovative solidarity scheme is the key condition of the status granted: the return of temporary beneficiaries as soon as the situation in their country of origin is stabilised. Return is presented as the only possible outcome at the end of the temporary protection period: the TPD often stresses the temporary nature of the protection granted, which cannot be converted into any permanent residence permit, nor it involves any form of integration measure.

3. The temporary protection scheme designed by EU law has no comparison at international level, as it creates a system effectively managing the temporary stay of refugees in the EU while avoiding national asylum systems to be paralysed when facing a crisis situation. However, until 2022 the TPD was never activated, despite many migratory crises at the EU external borders could be defined as mass influxes. According to many commentators, the TPD was doomed to remain wishful thinking, due to a variety of factors: in particular, the too broad and vague definition of "mass influx" and the lengthy and complex activation procedure under the sole control of the Council (see H. DENIZ GENÇ, N. ASLI ŞIRIN ÖNER, *Why Not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union*, in *International Journal of Political Science and Urban Studies*, 2019; M. INELI-CIGER, *Time to Activate the Temporary Protection Directive*, in *European*

Journal of Migration and Law, 2016; ID., *Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean*, in C. BAULOZ et al, *Seeking Asylum in the European Union*, Leiden, 2015, p. 223)

Looking beyond the practical issues weakening the TPD, the underlying reason for the reluctance of the Commission to propose and the Member States to back its activation is the lack of trust in the pragmatic realisation of the return precondition. Looking at the aftermaths of the Yugoslavian wars, such scepticism appears justified: once the war ended, many displaced persons from Bosnia did not leave their host countries, eventually forcing States to grant them permanent residence status (J. KOO, *Mass Influxes and Protection in Europe: A Reflection on a Temporary Episode of an Enduring* Problem, in *European Journal of Migration and Law*, 2018, p. 157). Without enforceable returns at the end of the temporary protection period, the solidarity scheme of the TPD would no longer be a temporary burden-sharing mechanism but a permanent resettlement scheme, unacceptable for most non-frontline Member States.

In the 2020 New Pact on Asylum and Migration, the Commission proposed to repeal the TPD, as it "no longer responds to Member States' current reality". In place of temporary protection, the Commission proposed the institution of a new - yet similar- type of protection: immediate protection (Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, Art. 10, hereafter Crisis and Force Majeure Regulation).

Contrary to temporary protection, immediate protection is not a self-standing legal instrument. Its functioning is inserted in a Regulation with a broader scope and content, where immediate protection is included as one of the tools at disposal of Member States facing crisis situations: it is described as a derogation allowing Member States to suspend "the examination of applications for international protection […] in exceptional situations of armed conflict" (Recital 23). Content-wise, the measure fulfils the first of the two objectives of the TPD: it equips its beneficiaries with an even broader set of rights and guarantees, comparable to the ones given by subsidiary protection. Furthermore, the activation mechanism is simplified, being entrusted solely in the hands of the Commission, with the oversight of the committees of representatives from the Member States (for more information on immediate protection, see E. PISTOIA, *Dalla Protezione Internazionale alla Protezione Immediata: L'accoglienza degli Sfollati dall'Ucraina come Cartina di Tornasole della Proposta di Trasformazione*, in *Freedom, Security & Justice: European Legal Studies*, n. 2, 2022, p. 101; R. PALLADINO, *The "Immediate Protection" Status under the New Pact on Migration and Asylum: Some Remarks* in *Journal of Mediterranean Knowledge*, 2021, p. 361).

As for the second objective of the TPD, i.e. the promotion of a balance of efforts between Member States, immediate protection remains silent. The broadening of the protection standards and easing of its procedural requirements came at the cost of depriving immediate protection of any connection with the solidarity provisions which made EU temporary protection so innovative: no burden-sharing mechanism between Member States is prescribed. Within the proposed Crisis and Force Majeure Regulation, there are other provisions

outlining a set of solidarity measures to be adopted in crisis situations, which however are disconnected from the immediate protection regime.

Despite the lack of solidarity provisions, immediate protection appeared to be a viable alternative to finally make temporary protection a functional tool of the EU migration policy.

4. The widespread agreement on the necessity to replace the pioneering yet unpractical TPD with a pragmatic but un-solidaristic immediate protection was proven wrong at the beginning of 2022, when the TPD was finally activated in response to the Russian invasion of Ukraine. After the beginning of the war on 24 February 2022, a massive influx of Ukrainians crossed the EU external borders, especially in Poland. Facing this delicate situation, the EU surprisingly took action in a swift and cohesive manner: upon a proposal from the Commission tabled on 2 March, on 4 March the Council unanimously adopted an implementing decision activating the TPD.

The Council decision defined the incoming inflow from Ukraine as a mass influx of displaced persons according to the TPD and decided to grant automatic temporary protection to three categories of beneficiaries: (1) Ukrainian nationals residing in Ukraine before 24 February 2022 and their family members; (2) beneficiaries of international protection in Ukraine before 24 February 2022 and their family members; (3) third-country nationals with a valid permanent residence permit in Ukraine who cannot safely return in their country of origin. The protection was granted until 4 March 2023, and was recently prolonged automatically for one year until 4 March 2024. It could be additionally prolonged for one year until 4 March 2025, when the TPD activation must cease having reached its maximum duration (for a detailed analysis of the Council Decision, see S. PEERS, *EU Law Analysis: Temporary Protection for Ukrainians in the EU? Q and A*, in *EU Law Analysis*, 27 February 2022; S. CARRERA et al, *The EU Grants Temporary Protection for People Fleeing War in Ukraine*, in *CEPS*, 14 March 2022).

The activation of the TPD proved that the practical obstacles and the unrealistic prospects of return could be overcome by two factors: political will and legal creativity. Differently from previous crisis situations, the Ukrainian one had peculiar features that convinced Member States to back the activation of the TPD: the scale and speed of arrivals (over 3.6 million people fled Ukraine in the first month of the war); the geographical proximity of Ukraine, directly neighbouring the EU; the cultural similarities between Ukrainians and European citizens; and the EU's foreign policy objective of opposing Russia's invasion (M. INELI-CIGER, *5 Reasons Why: Understanding the Reasons behind the Activation of the Temporary Protection Directive in 2022*, in *EU Immigration and Asylum Law and Policy*, 7 March 2022).

Member States and EU institutions were, and still are, committed to giving Ukraine all the support necessary to stand against Russian aggression, setting up measures spanning from sanctions targeting Russia to military support to the Ukrainian army. Such general commitment translated also into ensuring the smoothest management possible of the influx of people escaping Ukraine.

Political will alone cannot however explain the speediness of the activation of the TPD, especially considering its solidarity features. Knowing the harsh opposition caused by past EU relocation schemes in 2016-2017, Member States' agreement to use a tool which includes compulsory burden-sharing provisions is surprising (B. DE WITTE, E. L. TSOURDI, *Confrontation on relocation–The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: Slovak Republic and Hungary v the Council*, in *Common Market Law Review*, vol. 55, n. 5, 2018). The activation of the TPD was ultimately made possible by the legal creativity of the Commission. In its activation proposal, it introduced an "implicit" burden-sharing mechanism, avoiding the lengthy negotiations that a quota system would have caused. Taking advantage of the pre-existing ties between the EU and Ukraine, the Implementing Decision establishes a *laissez-faire* system leaving to the Ukrainian refugees the choice of where to relocate.

The free-choice system consists of three main elements. First, the acknowledgement of the existence of already-settled Ukrainian communities across the EU: before the beginning of the war, over 1.5 million Ukrainians were regularly staying in the EU, the third biggest group of non-EU citizens. The presence of Ukrainian communities in the EU is of great importance, as they provide support networks for people escaping Ukraine, helping them to settle in the host country of their choice. Second, Ukrainians are exempted from visa requirements to enter the EU for short periods of time (90 days) and have the right to move freely within the EU for 90 days within a 180-day period. The Schengen visa waiver, therefore, provided the legal foundation for letting Ukrainians decide in which Member State to obtain temporary protection. Third, Member States agreed to abolish the return system provided by the TPD (article 11), which would oblige them to take back temporary protection beneficiaries if found in the territory of another Member State (preamble 15 of the Implementing Decision). Such a decision *de facto* prolongs the free movement regime for Ukrainian refugees beyond the visa-exemption period and the 90 days granted by the temporary protection status. The free-choice system is designed to allow temporary protection beneficiaries to freely move around the EU and to change Member State of residence and ask there (but not automatically obtain) for a new residence permit (S. PEERS, *The Odd Couple: Free Choice of Asylum and Temporary Protection*, in *EU Law Analysis*, 16 May 2022).

The free-choice model adopted in the Implementing Decision is firstly a concession to temporary protection beneficiaries, allowing them to "join their family and friends across the significant diaspora networks that currently exist across the Union". Secondly and more importantly, it is a solidarity measure supporting Member States, as it "will in practice facilitate a balance of efforts between Member States, thereby reducing the pressure on national reception systems" (Recital 16 of the Implementing Decision). While it is debatable whether such a system fulfils the burden-sharing procedural obligations listed in article 25 of the TPD, there is no doubt the model is designed having in mind a "spirit of Community solidarity".

The conjunction between political will and legal creativity enabled the activation of the TPD, allowing the EU to effectively manage a humanitarian

crisis without letting it become a migration crisis: in the first year of the activation of the TPD, nearly 4 million registrations for temporary protection were recorded in the EU.

5. The EU response to the Ukrainian crisis is intrinsically linked to the situation at stake and it would be difficult to replicate it in another context. However, the temporary protection scheme adopted showed the possibility for existing EU tools to be tailored to address a crisis without renouncing solidarity provision. Therefore, the Ukrainian crisis brings the question: which future lies ahead for temporary protection in Europe?

Currently, the Commission has not withdrawn the proposal to repeal the TPD and replace it with the immediate protection. However, in its 2022 State of the Union Address, Commission's President Von der Leyen defined the EU actions towards Ukrainian displaced personsas a display of "determination and solidarity", stressing that they should be the "blueprint for going forward". In a recent Communication, the Commission further elaborated on this point stating that "the Temporary Protection Directive has proven to be an essential instrument to provide immediate protection", and that "it should remain part of the toolbox available to the European Union in the future".

It appears unlikely for the TPD to be repealed any time soon. While this is surely good news, it cannot be ignored that the activation of the TPD has never been taken into consideration before, despite the numerous "migration crises" at the EU external borders in the past decade. The political willingness and legal creativity shown in the activation of the TPD should therefore be deployed to improve the EU temporary protection scheme to better respond first to the ongoing Ukraine crisis, and second to possible future similar situations. Two interlinked issues appear the most urgently needing intervention: first, the "return dogma" surrounding temporary protection should be questioned. Subsequently, the EU migration policy must be equipped with the appropriate tools to better respond to sudden mass influxes.

The "return dogma" of temporary protection has been identified above as one of the main reasons behind the non-activation of the TPD in the past. On one side, temporary protection must have a precise end point to be considered "temporary", and return is the most logical outcome to end such protection. On the other side, return cannot always be enforced, especially in cases of mass influxes of people fleeing violence: in their country of origin, the restoration of safety and stability does not automatically follow the end of active violence. In these situations, Member States cannot return former temporary protection beneficiaries to comply with the *non-refoulement* obligation. *Rebus sic stantibus*, return in the context of temporary protection cannot be the only option to manage the end of the protection period. At the state of the art, while the TPD specifies that returns can be enforced only if they can be performed in a safe and durable manner (Art. 6(2) TPD), there is no provision providing alternatives to return compliant with the *non-refoulement* principle.

The issue of return is quite pressing in the context of the Ukrainian crisis, with the maximum period for temporary protection ending on 4 March 2025. While there is still some time ahead, there is great scepticism that the situation

in Ukraine will be stable and peaceful by then. Therefore, the definition of the status of former temporary protection beneficiaries whose return cannot be enforced will be the next issue EU institutions will face. Among the options identified by commentators, the most common ones are the prolongation of the duration of temporal protection; the change of EU legal migration law to allow the issuance of other residence permits, such as the long-term residence permit; or the issuance of other forms of protection, such as subsidiary protection (see: M. INELI CIGER, *What Happens Next? Scenarios Following the End of the Temporary Protection in the EU*, in *MPC Blog*, 9 March 2023; E. KÜÇÜK, T*emporary Protection Directive: Testing New Frontiers*, in *European Journal of Migration and Law*, n. 1, 2023).

Having in mind the Ukrainian situation and the necessity to find a sustainable solution which could be replicated in the future, the most suitable option would be to grant former temporary protection beneficiaries a new form of protection. This way, beneficiaries could continue the integration process that began with temporary protection, while not radically changing their status and at the same time being on a clear and durable regularisation path. Unfortunately, EU rules governing all forms of protection other than temporary protection are unfeasible to manage mass influxes situations like the Ukrainian case: they all provide for an individual assessment of every claim. Given the 4 million temporary protection beneficiaries present in the EU and the already existing backlog in many national asylum systems, the process of individual asylum applications would lead to the collapse of the asylum systems of the most affected countries, such as Poland.

The assignment of a new form of protection to temporary protection beneficiaries would therefore require EU institutions to display a new political willingness and legal creativity. A new procedure for the recognition of international protection should be introduced, namely the recognition on a *prima facie* basis. *Prima facie* recognition of refugee status is a tool recognised by the UNHCR to grant refugee status "on the basis of readily apparent, objective circumstances in the country of origin", particularly useful "in situations of large-scale displacement in which individual status determination impractical and unnecessary".

Such a new type of protection would require the amendment of the current EU directives governing international protection. Unfortunately, the change of migration laws at EU level has always been problematic. However, the current situation provides for an unprecedented *momentum*, mixing urgency and availability of reform venues: on one side the Ukrainian case requires urgent solutions; on the other side, the New Pact on Migration and Asylum introduced a set of proposals which could be the starting point for a speedy introduction of *prima facie* recognition of asylum claims in situations of crisis. In particular, the proposed Crisis and Force Majeure Regulation seems quite fitting for the job: the proposed immediate protection could be amended to no longer be a substitute for the temporary protection but instead to work as a *prima facie* protection.

This is exactly what the European Parliament proposed to do on 28 March 2023, when it adopted its negotiating position on the main reform proposals of the New Pact. In their amended proposal of the Crisis and force majeure

Regulation, immediate protection is rebranded as "*prima facie* international protection". As for immediate protection, it would apply in crisis situations, when Member States can suspend the individual examination of applications handled by "displaced persons unable to return to their country of origin". The Parliament envisaged a streamlined activation procedure entrusted to the Commission, which would indicate in a delegated act establishing the situation of crisis, whether there is a need to apply for *prima facie* international protection and to who it should apply. In a situation of *prima facie* recognition, applicants should receive a form of international protection in accordance with the Qualification Regulation Proposal within a month since lodging the application and with no analysis of merit.

The European Parliament proposal, albeit not much detailed, is commendable for its novelty and effort to fill in the gaps left by the TPD in cases of unenforceable returns. There is only one major problem: according to Recital 23 of the proposal, the *prima facie* recognition will consist of a temporary suspension of the analysis of international protection applications. Within one year at the latest since its suspension, Member States should resume the examination on the merits of all applications. Such a mechanism would only delay the inevitable collapse of national asylum systems. In cases of mass influxes however, what is necessary is the suspension altogether of the analysis of the merit of beneficiaries of *prima facie* international protection, given their belonging to a category whose refugee status is undoubted. Nonetheless, the European Parliament's proposal is taking over the legal creativity shown by Commission and Council to equip the EU migration policy with more instruments to adequately respond to future migration crises.

It is too early to know if the Parliament proposal on international protection *prima facie* recognition is going to become reality. The road ahead is surely going to be uphill: so far, the Council has yet to adopt a negotiating position on the Crisis and Force Majeure Regulation and the negotiation process is falling behind the objective of agreeing on most of the New Pact reforms by the end of the Parliament legislature (spring 2024). Notwithstanding the difficult way ahead, the Parliament's proposal has the potential of making temporary protection in the EU more accessible and reliable.

6. After the Balkan wars, a common scheme of temporary protection in Europe was deemed urgent and necessary. However, after the adoption of the TPD, temporary protection disappeared from the EU migration debate for over 20 years. The Russian invasion of Ukraine on February 2022 prompted EU institutions to act swiftly and in unity: thanks to a mix of political will and legal creativity, the TPD was activated for the first time in its history.

After one year since its activation, the success of the temporary protection scheme is evident: around 4 million persons enjoy the status of temporary protection across the EU, and their arrival and stay in the Member States did not encounter legal or practical obstacles. This is in great part possible thanks to the innovative free-choice model implemented by the Implementing Decision, allowing Ukrainians to choose the state where to relocate and obtain temporary protection.

While acknowledging the success of the Ukrainian case, it cannot be ignored that the TPD remained inactive for over 20 years despite the 2010s being the decade of the "migration crisis". Two are the main challenges to overcome to strengthen the future role of the TPD in the CEAS: the defeat of the "return dogma" surrounding temporary protection, and the introduction of additional tools to better respond to sudden mass influxes in the future and ensure its smooth functioning in its current activation. One possible solution would be the creation of a new type of protection, *prima facie* international protection, which would require EU institutions to display new political will and legal creativity. The European Parliament's proposal in the context of the negotiations of the New Pact goes in the right direction. The negotiating process is still at the beginning. Nonetheless, the clock is ticking on the TPD activated in wake of the Russian invasion of Ukraine, requiring urgent action. The Ukrainian solidarity system must be preserved from an unorganised and incohesive management of its de-activation. At the same time, it is up to EU institutions to rise to the challenge and improve EU migration policy's readiness to respond to future migration crises.